

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 534 OF 1998**

PRIME CAPTIAL & CREDIT LIMITEDPLAINTIFF

VERSUS

NATIONALWIDE ELECTRICAL

INDUSTRIES LTD. DEFENDANT

R U L I N G

Notice of Motion dated 7th May 2001 is seeking a stay of execution of the judgment, order and decree of this court delivered on 27th day of April 2001 pending the hearing and determination of the Applicants appeal to the Court of Appeal of Kenya against the Judgment, Order and Decree in their entirety. It is brought to court under Order 41 Rule 4(1) and (2) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act. The grounds for the application are three and these are that the Applicant intends to appeal against the Judgment, Order and Decree, that the intended appeal would be rendered nugatory and the Defendant would suffer irreparable harm were the Plaintiff to proceed in execution. The last ground is that the Defendants business assets stand to be attached and its Business operations severely disrupted and or crippled by the Plaintiffs execution. The Affidavit in support of the application states in brief that the Applicant intends to appeal; that the Applicant has an arguable appeal which would be rendered nugatory were the Plaintiff to proceed in execution against the Defendant and or property, and attach its property, business assets and machinery. That as the amount in Judgment is colossal, execution based on the amount would totally cripple the Applicants operations and business and hence render the intended appeal of no consequence; that as the Applicant is a manufacturer, any attachment would of necessity involve attachment of machinery vital to its operations and thereby erode its operational basis and would harm it irreparable and lastly that it is in the interest of justice that the execution be stayed. One exhibit namely copy of Notice of Appeal was annexed to the Affidavit in support of the application.

The Respondent opposed the application and filed Replying affidavit sworn by A. Ranganathan, its Senior Credit Manager. It maintains in that Affidavit that whether the intended appeal is arguable or not is not a relevant consideration to the present application; that there is nothing to show that the intended appeal is arguable; that the Applicant has not shown how its appeal would be rendered nugatory if execution proceeds. That the Respondent is entitled to reap the fruits of its judgment; that the Applicant has not indicated its willingness to give security for the due performance of the decree.

Order 41 Rule 4(1) makes it clear that no appeal or second Appeal shall operate as a stay of execution except in so far as the court appealed from may for sufficient cause order stay of such decree or order. However Order 41 rule 4(2) gives direct guidelines and states:

“(2) No order for stay of execution shall be made under subrule (1) unless

(a) The court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay and

(b) such security as the court order for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant”.

I do agree that the application has been made without unreasonable delay. The Applicant states that it is a manufacturer and if its machinery were attached in execution of the decree, it would suffer irreparably. It does not state in what manner it would suffer but I understand it to be saying that it would suffer in that

the machineries are its means of production or for manufacturing its products and if they are attached, it would not have any means of continuing in business. It does not state why its execution can only proceed by way of attaching its machineries. It does not state why it would be unable on its own to meet the decretal amount. Further it does not state why it has not given any security for the due performance of the decree. It says however, through its counsel at the bar that it is prepared to abide by any courts orders as to security.

I cannot see how the appeal if successful would be rendered nugatory as the decree is a money decree and thus if the Applicant is successful on appeal, the Respondent which is a bank and is not shown to be a man of straw will be able to refund the same money even with interest. As to whether the appeal to be preferred is arguable or not, that is not for me to consider. That is a matter for the Court of Appeal to consider should a similar application be made before it.

I do feel that much as the Applicant may suffer loss as a result of the execution of the decree (and such suffering of loss is the natural result of having a judgment against a party) I also must accept that the Respondent is also in law entitled to the fruits of its judgment and should not be denied the same save for very good reasons.

Doing the best I can in the circumstances, I will grant stay upon conditions that the Applicant pays into an interest earning account to be opened and operated in the names of both Advocates (for the Plaintiff and for the Defendant) an amount of K.shs 10,000,000 (Ten million) within thirty (30) days from the date hereof. Subject to the compliance with this order there shall be stay of execution till the intended appeal is heard and determined. There shall be stay for same 30 days from the date hereof to enable the parties to comply with this order. The Applicant is to pay the costs of this application in any event. Orders accordingly.

Dated at Nairobi this 5th day of June 2001.

ONYANGO OTIENO

JUDGE