



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 589 OF 1999**

UHURU HIGHWAY DEVELOPMENT LIMITED 1ST PLAINTIFF

KAMLESH MANSUKHALAL PATTNI 2ND PLAINTIFF

PANSAL INVESTMENTS LIMITED 3RD PLAINTIFF

GRAND HOTELS MANAGEMENT LIMITED 4TH PLAINTIFF

VERSUS

CENTRAL BANK OF KENYA 1ST DEFENDANT

DEPOSIT PROTECTION FUND BOARD 2ND DEFENDANT

JOSEPH KITTONY 3RD DEFENDANT

RULING

The applicant herein Ponangipalli Venkata Ramana Rao, described as “a court appointed Receiver”, moved the court by Chamber Summons seeking an order for a stay of the orders made by Oguk, J on 4th October, 2000, specifically orders 2,3 and 4, “pending the determination of the Appeal”. The applicant also prayed for the costs of the application which was supported by his own affidavit dated 22nd November, 2000. The orders of Oguk, J Nos.2,3 and 4 read as follows:- “2. That the order of the court dated 4 th August, 1999 be and is hereby set aside.

3. That Mr. Rao do forthwith re pay to the Grand Regency Hotel to sum of Kshs.17,952,929/=,

4. That in default of repayment of the sum of Kshs.17,952,929/= within 10 days of this order, all the property of Mr. Rao be attached to make good the amount of Kshs.17,952,929/= due from him to the Grad Regency Hotel”.

The affidavit in reply to the application was sworn by Rohit Damji Pattni. Its dated 4th December, 2000. The lengthy affidavit in support of the application was also sworn on 4th December, 2000 by Mr. Rao.

These two affidavits are quite comprehensive as they give the reasons for and against the order for stay of execution.

At para 15(b) of the affidavit, the applicant does not deny that a payment of Kshs.17,952,929/= was made to Tact Consultancy Ltd by the hotel for his services, but avers further in para 15(g) that the money “represents over-payments made in fees over and above my remuneration of Kshs.400,000/=.

The plaintiff/respondent asserts at para 17 of the replying affidavit that the applicant ***“siphoned away the funds of Grand Regency by fraudulently charging VAT and Corporate Tax and yet he was appointed personally and not as Tact Consultants Services a scheme which he used to defraud the hotel*”**

In court during the hearing of the application, Mr. Oyatta for the applicant gave the history of how his client was appointed by the court and his remuneration fixed. He submitted that his appeal against Oguk, J's orders has good chances of success because what the Judge ordered the applicant to pay back to the hotel was lawfully given to him by the court. That on the allegation of fraud the advocate submitted that this calls for a separate suit to be filed where the issue can be litigated but not in this suit.

The applicant therefore asked for a stay to enable him to appeal against the orders of Oguk, J.

The applicant's Counsel told the court that the applicant would have a problem in paying the money back because this money was paid as salary and he utilized it. For this reason he urged court not to order him to deposit the money in court or as security. That though the applicant was given a stay of execution order for 10 days by the Hon. the Chief Justice, and further stay was also given by Hon. Justice Aganyanya, then the Duty Judge, a Notice of Appeal had been filed, but not the appeal because proceedings are yet to be supplied by the Deputy Registrar though requests have been made.

On the issue of the replying affidavit having been filed only 2 days before the hearing and not 3 days, I exercised a discretion and allowed the respondent to rely on it during the arguments in court as I was satisfied that the applicant would not be prejudiced in anyway. Besides, the applicant had accepted service of the replying affidavit on him with no protest, though the same was done only 2 days before the hearing of the application. Mr. Waweru Gatonye for the 1st and 2nd respondents in the suit, i.e The Central Bank of Kenya and the Deposit Protection Fund Board, did not oppose the application for stay of execution, in principle, though his clients have an interest to the order directing the deposit of Kshs.17,952,929/= in court.

The respondent's do not oppose the order for stay because they challenge the “process” used in arriving at the order to deposit the said money in court. They also contend that the Receiver was condemned without being heard, and further still, that by the plaintiffs now asking the former Receiver to deposit security, they are behaving irregularly because they have always opposed the idea of the Receivers depositing security in court once they are appointed.

Mr. Kalove who represents the plaintiffs in the main suit, but the respondent in the application submitted that the court has a discretion whether to order a stay of execution or not, and whether on terms such as security or not. He submitted further that since the receiver has stated that he cannot pay any money back the plaintiffs will suffer great loss in these circumstances.

I note from the record that since the orders of Oguk, J were granted a temporary stay of execution for 10 days was granted by the Hon. the Chief Justice when the applicant's counsel want to seek leave from him to file the application for stay. The oral application for stay made before Oguk, J on the day he delivered the Ruling was not allowed and the parties were directed to file a formal application for stay, which application they could not file without leave from the Hon. the Chief Justice following directions from the Court of Appeal.

The temporary stay of execution for 10 days granted by the Hon. the Chief Justice expired and the Duty Judge granted further stay which has also expired.

The Hon. the Chief Justice who heard the initial application for stay did in his wisdom find that there is “an arguable appeal”. I would have no reason to come to any different finding, except to add that nothing can take away a litigant's right of Appeal, under it is statute barred or a Court of Law orders otherwise. The applicant in this case has the right to challenge the orders granted against him, but before he can do that he wants a stay of the whole ruling by Oguk, J until the appeal is heard, and he says further that he cannot deposit any money in court as security or otherwise, because he has utilized all the money

paid to him as salary, a total of Kshs.17,952,929/=.

In considering this matter, I read through the provisions of Order XLI Rule 4(a) (1) as amended by Legal Notice No.36 of 2000.

The amendment reads,

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may for sufficient cause order a stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty , on application being made to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to appellate court to have such orders set aside.....”.

(the above underlining is mine).

I have considered the arguments before me on the matter of stay and the circumstances of this case and I have decided to give a stay of execution for 14 days only from the Orders of Oguk, J of 4th October, 2000.

I consider this to be sufficient time to enable the applicant to seek further orders of stay in the court to which he has already preferred an appeal by filing a Notice of Appeal. In making this order, I am relying on the new Rule 4 of order XLI as amended, and I believe this will best serve the interests of Justice in this case.

I direct that costs of the application for stay of execution be costs in the main suit.

Dated at Nairobi this 11th day of December, 2000.

JOYCE ALUOCH

PUISNE JUDGE