



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CIVIL CASE NUMBER 34 OF 2003**

**NAKURU INDUSTRIES LIMITED.....PLAINTIFF**

**VERUS**

**VINOD SHAH.....1<sup>ST</sup> DEFENDANT**

**J.S.SHAH.....2<sup>ND</sup> DEFENDANT**

**B.L.SHAH.....3<sup>RD</sup> DEFENDANT**

(Sued in their respective capacities as the Registered Trustees of SHREE VISA OSHWAL  
COMMUNITY - NAKURU)

**RULING**

1. By its application dated 25<sup>th</sup> April 2016 the defendant sought an order of stay of execution of the decree obtained in the suit pending hearing and determination of an appeal filed from the whole judgment delivered on the 24<sup>th</sup> March 2016.

The application was opposed and parties agreed to file written submissions on the same.

2. On the 11<sup>th</sup> January 2017 both counsel highlighted their respective submissions.

At the close of the respondents submissions, Mr. Chacha Odero Advocate proposed that an order of *status quo* may be appropriate as none of the parties will suffer substantial loss. He however urged the court to make an order that the Applicant do pay costs of the suit pending hearing and determination of the appeal.

Following therefore, by consent of parties, an order of stay of execution of the decree pending hearing and determination of the appeal was recorded.

3. I am to determine whether costs ordered in favour of the defendant for the main suit ought to be paid pending hearing and determination the appeal.

**Section 27** of the **Civil Procedure Act** gives the Judge wide discretion and power to determine by whom and to what extent such costs are to be paid and to give directions for the purposes aforesaid. The defendant was awarded costs of the suit. The judgment has been appealed from, and a stay of execution has been recorded pending the hearing.

I have seen the defendants bill of costs filed on the 11<sup>th</sup> April 2013 but not yet taxed. It is in the sum of Kshs.5,178,185/00.

4. Judgment of this court is subject to appeal. It may be confirmed or it may be set aside. That includes the award of costs to the defendant. The court is concerned with reserving the rights of both parties pending the appeal.

It is not my duty to advantage the defendant while disadvantaging the plaintiff. Costs awarded to the defendant ought to be secured as a condition precedent to the order of stay of execution, which has already been granted. This ought to be by way of security for costs should the appeal not be successful - See **Order 42 rule 6 of Civil Procedure Rules**. In the case **The Official Receiver and Liquidator of Saipai Ltd -vs- Naradas Nanji Chandrani (1961) EACA**, the applicant argued that the purpose of an order for security for costs is merely to secure costs that may be payable to ensure that frivolous, vexatious and/or unsuccessful proceedings do not prejudice the successful parties in terms of costs.

The court may in its discretion order security for the whole or part of the costs of any depending on each case. See **Order 26 rule 1 of the Civil Procedure Rules**.

5. The principles to be applied in the matter of security for costs were ably stated in the case **Keary Development -vs- Tarmac Construction (1995) 3 All ER 534** as a guide on how a court should exercise its discretion on an application for security for costs.

*“----The court must carry out a balancing exercise, must weigh the injustice to the plaintiff if prevented from pursuing its claim by an order for security, and injustice to the defendant finds himself unable to recover from the plaintiff the costs which have been incurred in defence of the claim, among others----”*

6. I have considered the above principles and have weighed the justices and injustices that may occur to either party by granting an order for costs.

To balance the parties interests and circumstances the order that comments itself to me on costs is that:

*1. The plaintiff shall provide security for costs in the sum of Kshs.3,000,000/=(three Million shillings) by depositing the said sum in a joint interest earning account in the names of both Advocates for the plaintiff and the defendant in a reputable bank to be agreed upon within 30 days of this order.*

*2. Failure to comply with the above order within the stipulated time in (1) above shall cause the order of stay of execution of the decree of this court dated the 11<sup>th</sup> January 2017 to lapse.*

*3. Parties are at liberty to apply.*

**Dated, Signed and Delivered this 16<sup>th</sup> Day of February, 2017.**

**J.N. MULWA**

**JUDGE**