



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 116 of 2009

RAMZAM IBRAHIM.....1ST APPELLANT/APPLICANT

**EBRAHIM & CO. LIMITED.....2ND
APPELLANT/APPLICANT**

VERSUS

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

RULING

1. By a Notice of Motion dated 13th March, 2009 Ramzam Ibrahim and Ibrahim and Co. Limited hereinafter referred to as the 1st and 2nd applicants, have moved this Court for an order of stay of execution and/or an injunction, against the decree pending the hearing and determination of the appeal, which they have filed in this Court. At the hearing of this application, the applicants abandoned their prayer for an injunction. The application is supported by grounds stated on the body of the application, as well as an affidavit sworn by Noorali Ibrahim Mavani a director of the 2nd applicant.

2. The applicants who have filed an appeal against the ruling delivered by a Senior Principal Magistrate in Milimani CMCC No. 5868 of 2002 contends that unless the order of stay of execution is granted they will suffer substantial loss as they will be required to pay the whole judgment sum together with interest spurning over a period of 6 years and that such an action will stifle the operation of the 2nd applicant. The applicants further contend that their appeal which has high chances of success may be rendered nugatory if the orders sought are not granted. On the 13th May, 2009, the applicants were granted a temporary order of stay of execution for 60 days on condition that the decretal sum is deposited in Court as security. The applicants did deposit a sum of Kshs.733,542/= into Court.

3. Referring to the case of *Shawaz Textiles Mills Ltd. v. Jane Ndirangu Kimeru, Civil Appeal No. 179 of 2004*, the counsel for the applicant submitted that the respondent has failed to rebut the applicant's contentions. Counsel further relied on the following authorities:

- *Allan S. Reynolds v. Twiga Chemicals Ltd. (2008) eKLR*
- *Action Aid International Kenya & 2 Others v. Ndunda Musau & 3 Others [2008] eKLR*
- *Dennis Kimbui & Another v. Lucy Gacheri Mburugu Civil Appeal No. 370 of 2008, [2008] eKLR*
- *Dee-Eem Investment Limited v. M/s Ukulima Co-operative Society & Another Civil Appeal No.479 of*

· *Gitahi v. Warugongo [1988] KLR 621*

4. The application is opposed through a replying affidavit sworn by Z.K. Mogaka the General Manager Remedial Management of the respondent. Mogaka swore that the 2nd applicant runs a supermarket along Moi Avenue in Nairobi by the name of Ibrahim Supermarket and was capable of comfortably settling the decretal amount without any negative effects to its operations. Mogaka further averred that the applicants were unable to suffer any substantial loss as the respondent was financially stable and capable of refunding the decretal amount to the applicants in the unlikely event of the appeal succeeding.

5. Mr. Ngugi who appeared for the respondents argued that the applicants had not placed any material before the Court upon which the Court could exercise its discretion in the applicant's favour. Mr. Ngugi maintained that the applicants had not established any sufficient cause for the granting of the orders sought. He argued that a bare statement by the applicants that its operations would be stifle was not enough. In support of this submission counsel relied on *K Rep Bank Ltd vs. Francis Ngige Nyoike & 2 Others HCC No. 119 of 2005*. Mr. Ngugi further argued that the applicants having deposited the decretal sum into Court, the money was in any case outside the reach of the applicants and it would not make any difference if the money is paid to the respondent.

6. Relying on *Wilson K. Mbanya vs. Inoi Farmers Co-operative Society Ltd. (HCCA No. 645 of 2007*, and also *Thomas Kimani Kabute vs. Isaac Mwangi Kamau (HCCA No. 325 of 2008)* counsel for the respondent maintained that the burden was upon the applicants to establish that the respondent will not be in a position to refund the decretal sum if required to do so, and that the applicants had failed to discharge that onus. Finally Mr. Ngugi urged the Court to find the authorities relied upon by the applicant's counsel distinguishable.

7. I have given due consideration to this application. I have also considered the submissions and the authorities cited. The circumstances under which an order for stay of execution pending appeal can be granted are clearly set out under Order XLI Rule 4(2) as follows.

1. That the applicant must satisfy the Court that substantial loss may result to him unless the order of stay of execution is granted.

2. That the application has been brought without undue delay.

3. That the applicant is ready and willing to provide security for the due performance of the decree as may be ordered by the Court.

8. In this case the applicant has complied with the second and third requirement, as the application was brought without undue delay, and the decretal sum has been deposited in Court as security pursuant to the Court order. However as concerns the first requirement for demonstration of substantial loss or the likelihood of **financial** loss, the applicant has only made a feeble claim, that the business of the 2nd applicant would be stifled if it was to pay the decretal sum. That claim has not been supported by any financial statements. Moreover the decretal sum having been deposited in Court, the reasoning cannot hold. On the other hand the respondent is a reputable financial institution and this Court has no reason to believe that it will not be able to repay the decretal sum if required to.

9. Substantial loss is essentially the ground upon which an application for stay of execution can be anchored. The applicant having failed to demonstrate substantial loss his application has nothing to support it. The application is accordingly dismissed with costs.

Dated and Delivered at Nairobi this 10th day of July, 2009

H.M. OKWENGU

JUDGE

In the presence of:

Advocate for the Appellant, absent

Ngugi for the Respondent