



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI COMMERCIAL AND ADMIRALTY DIVISION

Civil Case 1387 of 2007

CHIMANLAL K. N. SHAH.....1ST PLAINTIFF

VANDANA C. K. SHAH.....2ND PLAINTIFF

RAKSHIT C. K. SHAH.....3RD PLAINTIFF

DIPESH C. K. SHAH.....4TH PLAINTIFF

VERSUS

TRUST AGENCIES LIMITED.....1ST DEFENDANT

AJAH I. SHAH.....2ND DEFENDANT

M. BILLING Practicing as

GURAM & COMPANY, ADVOCATES.....3RD DEFENDANT

RULING

The defendants filed notice of motion pursuant to the provisions of **Order XLI Rule 4** of the **Civil Procedure Rules** seeking to stay execution of the decree and judgment of this court pending the hearing and determination of **Nairobi Civil Appeal No.20 of 2003** which was filed against the judgment and decree of Mbaluto J delivered on 10th December 2002. The defendants state that they had so far paid to the plaintiffs the sum of KShs.89,022,637/= of the decretal sum. They contend that since their appeal challenges the superior court's decision to award interest at the rate of 24% per annum, it will only be just that stay of execution is granted pending the hearing and determination of the appeal. They state that the defendants, and particularly the 2nd and 3rd defendants, will suffer irreparable loss as they will be in danger of losing their liberty. They further state that their appeal would be rendered nugatory if they are compelled to pay the balance of decretal amount which essentially constituted the disputed interest. The application is supported by the annexed affidavit of M. Billing, the 3rd defendant.

The application is opposed. The plaintiffs filed grounds in opposition to the application. They averred that the application was *res judicata* and an abuse of the due process of the court. They state that the defendants were estopped from seeking to further stay execution of the decree herein as a similar application filed in the past was dismissed by the court. The plaintiffs argued that an order to stay execution was no longer available to the defendants since they had exhausted all legal avenues. It was the plaintiffs' case that the defendants had no basis either in law or in fact to make the present application for stay. They further noted that there was no nexus between the alleged appeal and the present application. The plaintiffs urged the court to dismiss the defendants' application with costs.

Counsel for the parties to the application agreed by consent to put in written submissions which the court would consider and thereafter render its ruling. I have read the pleadings filed by the parties herein in support of their respective opposing positions. I have also considered the said written submissions. The issue for determination by the court is whether the defendants established a case for the court to stay execution of the judgment and decree of this court. The principles to be considered by the court in determining whether or not to grant stay of execution pending the hearing of an appeal are well settled. Under **Order XLI Rule 4(2) of the Civil Procedure Rules**, the applicants must establish that they would suffer substantial loss. The Court of Appeal in **Joseph Kahugu Wakari vs. Barclays Bank of Kenya Limited CA Civil Appl. No. NAI 237 of 1998 (UR)** (*unreported*), in defining what constitutes substantial loss stated that:

"... there must be substantial reasons for grant of stay of execution. It is not enough to say that the applicants will be burdened financially. That is the natural consequence of a judgment entered against him. It is also not enough to say that the fact of filing of the proposed appeal entitles an applicant to a stay of execution of decree."

The above decision was cited with approval by Azangalala J in **Nairobi HCCC No. 1950 of 2000 Alibhai Shariff & Sons Limited vs. Technical Trading Company Limited (Milimani)** (*unreported*). Courts have been reluctant to stay execution of money decrees especially where it is established that the decree-holder has means to refund the decretal sum should the intended appeal be successful. The leading case on this point is that of **Kenya Shell Limited vs. Karuga [1982-88] 1KAR 1018**.

To succeed in its application, the applicant must file the application for stay without undue delay. Courts have frowned on litigants who have taken their sweet time before seeking to stay execution of the decree pending the hearing of the intended appeal. The thinking behind this policy is that any person wishing to appeal against a decision made against him, should do so immediately so that the successful party is put on notice of such party's intention. It will not do for a judgment-debtor to wait until execution has been levied against him, for such party to move the court to stay execution of the decree. Of course, the applicant is required to give security for the due performance of the decree. This court is mindful of the fact that in some instances it may be required to stay execution of the decree where it is established that the intended appeal may be rendered nugatory (See **Butt vs. Rent Restriction Tribunal [1982] KLR 417**).

In the present application, certain facts appear not to be in dispute. Since judgment was entered in favour of plaintiffs, the defendants have reached an understanding with the plaintiffs whereby the decretal amount has been paid by installments. Over the years since the decree was issued in 2002, the defendants have paid over KShs.89 million to the plaintiffs by installments. The pending appeal seems not to have been an issue when the defendants were paying the said decretal amount by installments. Are the defendants justified to invoke the jurisdiction of this court to stay the execution of the decree herein when they have substantially complied with the financial requirements of the decree? I do not think so. It appears that the defendants moved the court when they decided not to pay interest on the principal sum which they appear not to agree with. The defendants cannot purport to challenge part of the decree by filing an application to stay execution of the decree.

This court was not persuaded that the pending appeal relates to the decree that the defendants are seeking to stay. The defendants did not annex a copy of Memorandum of Appeal of the pending appeal as proof that they had challenged the rate of interest that was ordered to be paid on the principal sum by

the court. I agree with the submission made on behalf of the plaintiffs that there appears to be no nexus between the present application and the intended appeal. The time that it has taken the defendants to file the present application disentitles them to exercise of discretion by this court. The defendants have been indolent. The delay has been unconscionable. Further, the defendants did not persuade this court that they would suffer a loss that is more substantial than the ordinary loss that is normally suffered by a judgment debtor who is being executed against.

In the premises therefore, I find no merit in the defendants' application seeking to stay execution of the decree of this court. I think what the defendants should demand from the plaintiffs is proper accounts to be taken in regard to decretal sum that has already been paid, and the manner in which interest has been applied to the principal sum, thereby determining the amount that is still outstanding. The application is dismissed with costs to the plaintiffs.

DATED AT NAIROBI THIS 4TH DAY OF NOVEMBER, 2009.

L. KIMARU

JUDGE