



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT NAIROBI  
CIVIL APPLICATION NO. NAI. 97 OF 1999

PEPCO CONSTRUCTION CO. LTD ..... APPLICANT

VERSUS

CARTERS & SONS LIMITED ..... RESPONDENT

(Appeal from a Ruling and Order of the High Court of  
Kenya at Nairobi (Hon. Justice Shields) dated 26th November, 1992

in

H.C.C.C. NO. 5638 OF 1989)

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**RULING OF THE COURT**

This is an application under *rule 5(2)(b)* of the Court of Appeal Rules for a stay of execution of a decree passed against *Pepco Construction Company Limited (the applicant)* by Shields J on 26th November, 1992. The applicant and two other defendants, namely, *Kenya Finance Corporation Limited* and *Karugu Construction (Kenya) Limited* had been sued by *Carter and Sons Limited* (the respondent) in the superior court to recover an Excavator and damages for its detention. The respondent's claim was resisted but after a trial the learned Judge gave judgment in favour of the respondent for Kshs 7.2m against all three defendants jointly and severally. It is against that decision that the applicant has appealed (CA No. 80/99) and now seeks a stay of execution of that decree pending the determination of that appeal which we are informed by Mr Regeru, for the applicant, will be heard next month.

Mr Regeru is contesting the amount awarded to the respondent on the ground that in arriving at the final figure the learned Judge had stated-

*Both the plaintiff and the third defendant =s evidenc e categorise the Excavator as a profit earning chattel and there is little difference between their assessment of what this profit earning chattel should earn. I fix the amount it could earn at Shs 200,000/= per month. I would award damages for wrongful d etention for three years i.e Kshs 7,200,000.*

Mr Regeru submitted that in thus directing himself the learned Judge had awarded the respondent **special damages** which did not form part of the claim, and in any event had not been proved as required by law; and the fact that the learned Judge did not refer to the award as **special damages** is immaterial.

All in all, Mr Regeru submitted that the applicant's appeal is arguable and would, if successful, be rendered nugatory, unless a stay of execution is granted. For this submission he relied on an affidavit

sworn by a private investigator to the effect that the respondent has no known assets in Kenya and that if the applicant parted with the decretal amount chances of recovery would be slim, if the appeal succeeded.

*Mr Sharma* , for the respondent, on the other hand, submitted that the appeal is frivolous and not arguable. Although the learned Judge used loss of profit as a basis for his calculation of damages for wrongful detention, Mr Sharma maintained that the award cannot be categorised as special damages.

After a careful consideration of the material before us and submissions of counsel, we have come to the conclusion that this is a very borderline application. The decree was issued way back in November 1992. In the interest of justice and to protect the interest of both parties, we allow this application and grant a stay of execution of the decree on terms that the applicant will deposit the sum of Kshs 7.2m in an interestbearing account in the joint names of the Advocates for both parties at a Bank to be agreed between them within 14 days from today. In default, the application to stand dismissed with costs to the respondent.

Those are the orders of the Court.

**Dated and delivered at Nairobi this 15th day of October, 1999.**

**R. O. KWACH**

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**JUDGE OF APPEAL**

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**A. B. SHAH**

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**JUDGE OF APPEAL**

**I certify that this is a true copy of the original.**

**DEPUTY REGISTRAR**