



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MASIME JA, CHESONI & COCKAR Ag JJ A)

CIVIL APPLICATION NO NAI 42 OF 1990

INTERNATIONAL LABORATORY

FOR RESEARCH ON ANIMAL DISEASES APPLICANT

VERSUS

KINYUA..... RESPONDENT

(An application for stay of Execution in an intended appeal from a judgment of the

High Court of Kenya at Nairobi (Gicheru J) dated 19th October, 1989 in HCCC No 949 of 1986)

RULING

The High Court on 20th December, 1989 gave judgment for the respondent, a former employee of the applicant, in the sum of Kshs 145,000/- less tax plus costs with interest @ 12% per annum from the date of judgment. A Notice of Appeal against the whole of the judgment was filed on 20th December, 1989, the same day.

An application for stay of execution dated 30th January, 1990, was dismissed by the High Court hence this application under Court of Appeal Rule 5 (2) (b) was filed on 28th March, 1990. The main ground on which the application is based is stated in paragraph 6 of the supporting affidavit dated 15th March, 1990, and sworn by Mr Sampson, a senior partner in the firm of the applicant's advocates, Paragraph 6 reads as follows:-

“That there is a reasonable and justifiable apprehension on the part of my firm that in the event that the Court of Appeal comes to a different conclusion from the one of the trial court, it is unlikely that my firm will recover any money from the plaintiff / respondent who may have squandered the whole sum.”

Mr Sampson submitted that because there was no evidence of the respondent's means or financial resources the applicant reasonably and justifiably feared that once the judgment sum passed into the hands of the respondent there was every likelihood that in the event of the appeal succeeding the respondent may not be in a position to retribute, and the appeal would thereby be rendered nugatory. The applicant had in fact offered to deposit the whole of the judgment sum in a joint interest bearing savings account pending final disposal of the appeal. On the premises Mr Sampson urged for a stay of execution to issue.

Mr Sehmi for the respondent strongly opposed the application. He referred to both 0.41 of the Civil Procedure Rules and Rule 5 (2) (b) of the Court of Appeal Rules and pointed out that the mere filing of an appeal was not a sufficient cause for the granting of a stay. We must point out at this stage that this court is not bound by the considerations prescribed in 0.41 of the Civil Procedure Act which the High Court must observe when dealing with an application for stay of execution pending hearing of appeal in that court. Under rule 5 (2) (b) of the Court of Appeal Rules this court has an unfettered discretion to grant a stay provided it is just to do so.

Mr Sehmi referred to passages at page 1284 of the English Supreme Court *Annual Practice, 1965*, and page 35, paragraph 51 of *Halsbury's Laws of England* 3rd Edition, dealing with grounds for stay. Both stress that as a rule a stay will be granted only if there are special circumstances which, according to the passage in *Halsbury*, must be deponed to on affidavit unless the application is made orally at the hearing. Referring to *Atkins vs Great Western Railway Company* at page 400 Times Law Reports Vol 2, and then to the judgment in the Kenya Court of Appeal Civil Application No 97 of 1986, *Kenya Shell Ltd vs Benjamin Karuga Kibiru & Anor* (also cited by Mr Sampson), Mr Sehmi submitted there was a duty on the applicant to show that a favourable decision in the appeal would be rendered nugatory if the application was not granted.

We have considered what Mr Sehmi has said. However, we must observe that the onus was on the respondent to rebut by evidence the claim that the intended appeal if successful would be rendered nugatory on account of his (respondent's) alleged impecunity. Mr Sehmi's contention was that the words "apprehension", "unlikely to recover" and "squandered" used in paragraph 6 of Mr Sampson's affidavit in support of the application did not constitute special or exceptional circumstances required to be deposed to on affidavit. In our view we do not need proof of special or exceptional circumstances in order to grant a stay of execution as there is no such requirement under Rule 5(2)(b) of this Court's Rules.

In this application it has been deponed that there was a reasonable and justifiable apprehension of it being unlikely to recover the money from the respondent who may have squandered the whole sum. This allegation in our view called for rebuttal evidence from the respondent which was not forthcoming. Indeed nowhere in the 12 paragraphs constituting the replying affidavit sworn by Mr Sehmi on 17th April, 1990, and the replying affidavit sworn by him on 7th February, 1990, in the Superior Court which forms an annexure is there evidence of the respondent's means. Mr Sampson's affidavit in support of the application has in fact been deposed to that effect. In the case of *Kenya Shell Ltd* the respondent produced evidence of his financial means and position which evidence was accepted by the court.

It may be observed that references made by Mr Sehmi both in his address and in paragraph 6 of his replying affidavit to undue hardship that would be caused to the respondent if he is deprived of the fruits of the judgment until the appeal is heard and decided may not reflect favourably on the respondent's financial resources and his ability to re-pay the judgment sum if called upon to do so.

All the above circumstances favour the grant of stay of execution. Mr Sampson submitted that under the terms of service the respondent was entitled to a 3 months' notice before the termination of employment, a fact we take into account. Accordingly there shall be a stay of execution in respect of the whole of the decretal amount less three months' salary less statutory deductions. The balance of the judgment sum shall be deposited in an interest bearing savings account in the joint names of the advocates for the parties within 21 days from the date of this ruling. In default the respondent to be at liberty to execute the decree. Costs of the application shall abide the result of the intended appeal.

Dated and Delivered at Nairobi this 25th Day of May, 1990

J.R.O. MASIME

.....

JUDGE OF APPEAL

Z.R. CHESONI

.....

JUDGE OF APPEAL

A.M. COCKAR

.....

Ag JUDGE OF APPEAL