



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appli 86 of 2003 (UR. 49/03)**

ISAAC AWUONDO APPLICANT

AND

SURGIPHARM LIMITED 1ST RESPONDENT

LIZA M. KIMBO 2ND RESPONDENT

(Application for stay of execution pending the lodging hearing and determination of an intended appeal from the decision of the High Court of Kenya

irobi at Milimani Commercial Court (Nyamu, J) dated 21st March, 2003

In

H. C. C. C. No. 1522 of 2001)

RULING OF THE COURT

The applicant, *ISAAC AWUONDO*, moves this Court under *rule 5(2)(b)* of the Court of Appeal Rules for an order that the ruling and execution thereof in HCCC No. 1522 of 2001 at Milimani, Nairobi, dated 21st March, 2003 be stayed until the determination of two Civil Appeals – Nairobi Civil Appeals Numbers 104 of 2003 and 209 of 2003 - are heard and determined.

The suit in the superior court is predicated on a claim for goods allegedly supplied on credit by the 1st respondent, *SURGIPHAM LIMITED*, to a third party and guaranteed by the applicant and the 2nd respondent. It is averred in the plaint filed by the 1st respondent in the superior court on 3rd October, 2001 that on the 26th August, 1997 one *Pharma Med Limited* applied to the 1st respondent for the supply of goods on credit agreeing to pay interest at 30% p.a. on delayed payments and by a continuing guarantee in writing dated the 26th August, 1997 signed by the applicant and 2nd respondent and addressed to the 1st respondent, they, in consideration of the 1st respondent supplying goods and giving and continuing to give credit to the said *Pharma Med Limited*, guaranteed and bound themselves for the repayment to the 1st respondent of all sums of money the said *Pharma Med Limited* might then or from time to time thereafter owe to the 1st respondent.

It is further averred that the 1st respondent accordingly supplied the said *Pharma Med Limited* with goods on credit worth Shs.8,243,407/=.

The 1st respondent alleged that the applicant and the 2nd respondent failed to pay the claim due and, despite having been given notice of intention to sue, neither **Pharma Med Limited** nor the applicant and the 2nd respondent have paid the sum due which stood then at Shs.8,243,407/= together with interest at the agreed rate of 30% per month as from 31st December, 1999 until payment in full.

In a terse statement of defence the applicant admitted, inter alia, that one **Pharma Med Limited** applied to the 1st respondent for the supply of goods on credit but denies that there was an agreement to pay interest at 30% on delayed payments. He further averred that the application for credit facilities was limited to a maximum credit of Kshs.75,000/= and that he was discharged from any further obligations under the subject guarantee on 28th August, 1992 when a certain account held by him with the 1st respondent was closed with a zero balance. It is his case that he is not liable under his guarantee for the goods supplied or any other account.

By a Notice of Motion dated 19th November, 2001, the 1st respondent sought a summary judgment or alternatively the striking out of the defences filed by the applicant and the 2nd respondent and entering of judgment on the ground that the defences were scandalous, frivolous and vexatious.

In a lengthy ruling the learned Judge Nyamu, J. held, inter alia, that the guarantee executed by the applicant and the 2nd respondent did cover the amount claimed in the plaint and was of a continuing nature and the guarantee was unlimited. The learned Judge found no bona fide triable issue or any triable issue in the suit and entered judgment in favour of the 1st respondent for the sum claimed in the plaint.

Mr. Chacha Odera for the applicant contends that the applicant has an arguable appeal with prospects of success. We cite three grounds of appeal enumerated in the appeals already lodged:-

(i) THAT the learned Judge erred in failing to appreciate sufficiently or at all that the pleadings, affidavits and submissions made before him disclosed several triable issues which could only be effectively and properly determined at a trial of the suit.

(ii) THAT the learned Judge made a fundamental error of law in determining the said issues on conflicting and insufficient affidavit evidence and relying on materially altered documents.

(iii) THAT the learned Judge erred in law in finding that the appellant had no defence to the respondent's claim and that the appellant's statement of defence did not disclose or raise any reasonable or plausible triable issues.

Mr. Nagpal, who together with Mr. Goswami, appeared for the 1st respondent argued that the appeals preferred by the applicant cannot be said to be arguable and urged us to dismiss it. However, he stated that the 1st respondent would be satisfied if the decretal amount is deposited with a bank in the joint names of the two Advocates for the parties. The applicant is the Managing Director of Commercial Bank of Africa in Nairobi.

We have considered the rival submissions of the parties and we have also perused the grounds of appeal, which will be canvassed in the appeals which have already been lodged. We are prepared to assume without considering the issues therein that the appeals are arguable and not frivolous.

On the issue whether or not the appeal will be rendered nugatory if we do not grant a stay, we take into account the statement by Mr. Nagpal that the 1st respondent is not averse if the decretal amount is either deposited in a jointly held account or for that matter if a suitable security is offered.

Weighing the interest of each side, we grant an order of stay on condition that the applicant shall, within thirty (30) days of the date hereof provide a Bank Guarantee in the sum of Shs.8,000,000/=. If that is not done within the stated period the application for stay shall stand dismissed with costs, but, if the Bank Guarantee is provided as aforesaid there shall be a stay of execution until the hearing and determination

of the intended appeal. The costs of the motion shall be in the appeal. Those are our orders.

DATED and DELIVERED at NAIROBI this 3rd day of May, 2007

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

W.S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR