



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPLICATION NO. 68 OF 2008**

**HARIT SHETH t/a HARIT SHETH ADVOCATE .....APPLICANT**

**AND**

**SHAMAS CHARANIA .....RESPONDENT**

**(An application under rule 5(2)(b) of the Court of Appeal Rules for stay of execution and stay of further proceedings pursuant to the orders under the ruling of 9<sup>th</sup> April, 2008 by (Kimaru, J.) pending the filing, hearing and final determination of an intended appeal from the ruling of the High Court of Kenya at Milimani Commercial Courts**

**in**

**H.C.C.C. NO. 1651 OF 2001)**

**\*\*\*\*\***

**RULING OF THE COURT**

This motion expressed to be brought under **rule 5 (2) (b)** of the Rules of the Court seeks an order of stay of execution as well as all other proceedings pursuant to the ruling and order issued by the superior court, (Kimaru, J) on 9<sup>th</sup> April, 2008 pending the hearing and determination of Civil Appeal No. 252 of 2008 now pending before this Court.

The applicant, Harit Sheth, is a well known advocate of the High Court of Kenya currently practicing in Nairobi. It was the respondent's case in the superior court that sometime in or about 1995 he paid the sum of Shs.32 million to the applicant, who was then acting as his advocate, to hold as a stakeholder in respect of a sale transaction of a property known as L.R. No. 2951/19, Loresho, Nairobi, measuring 20.4 acres or thereabouts at a purchase price of Shs.70 million, which property belonged to a company known as Mathaga Limited, the vendor, in which the applicant was one of the directors at the time. The respondent averred in his Amended Plaintiff that the applicant was selling the said property on behalf of the vendor and that the sale transaction failed to crystallize because the vendor was unable to complete his part of the bargain. The respondent contended that since the collapse of the transaction, it behoved the applicant to refund the deposit of Shs. 32 million so made to him by the respondent.

The applicant's defence to the suit was terse. At all material times he never dealt with the respondent personally in the transaction. Though he received the sum of Shs.32 million, the money was paid by an entity known as Deltron Ltd and he transmitted the said amount to Mathaga Limited. He was under no obligation to the respondent to refund any money to him as the same was released on instructions of the purchaser to the vendor.

By a notice of motion dated 24<sup>th</sup> July, 2007, the respondent applied under the provisions of **Order XXXV rules 1 and 8, Order XII rule 6 and Order L rules 1 and 3** of the Civil Procedure Rules for summary judgment to be entered in his favour against the applicant for the sum of Kshs.32 million as prayed for in the Amended Plaintiff and in the alternative, judgment to be entered against the applicant on admission.

In granting the application, the learned Judge, in a reserved ruling held:-

***“The defendant was the advocate of both the vendor and the purchaser in the sale transaction in respect of the suit property. The defendant was required to hold the said sum of Kshs.32 million as a stakeholder. It is apparent that the defendant released the said sum of Kshs.32 million to Mathaga Limited without the consent of the plaintiff. In any event, the defendant presented no proof in form of payment vouchers or cheques or correspondences that he had paid the said sum of Kshs.32 million to the said Mathaga Limited. I further hold that the defendant has not been candid as to his connection with both Deltron Ltd and Mathaga Ltd. The plaintiff established that the defendant had control of both companies and was therefore a beneficial owner of Mathaga Limited.”***

The learned Judge also held that:-

***“The defence filed by the defendant is sham, evasive, and contains mere denials and is meant to delay the just determination of this suit.***

***..... The upshot of the above reasons is that summary judgment is entered for the plaintiff as against the defendant as prayed in the amended plaintiff. Judgment is entered for the plaintiff for the sum of Shs.32 million ..... with interest .... costs ....”***

Being aggrieved by the said decision, the applicant duly lodged this application; and subsequently, Civil Appeal No. 252 of 2008.

The grounds in support of the application have been set out in detail in the affidavit of Mr. Harit Sheth, which he swore on 18<sup>th</sup> April, 2008. He depones in the main, that he received the deposit of Kshs.32 million from Deltron Ltd which he released to Mathaga Limited after the completion date to stop accumulation of interest, which pursuant to the Sale Agreement, was Shs.36% per annum. He never acted as an advocate for the respondent but for Deltron Ltd which was the purchaser under the said agreement.

Mr. Ngunjiri, the learned counsel for the applicant, submitted that the appeal is arguable in that summary judgment cannot be granted where there are allegations of fraud and also where the defendant in a suit has pleaded that the plaintiff's claim is statute barred. He further stated that the applicant's practice is not in a position personally to pay the sum of Shs.32 million plus interest and costs; and in the event attachment is levied against his practice then he will be left with no option but to shut down the same and accordingly his appeal would be rendered nugatory. Further, he argued the goodwill and his reputation would be lost forever.

The respondent, who was represented by Mr. Gilbert Mungu, has vehemently opposed the application. His grounds of opposition have been set out in *extenso* in the replying affidavit sworn by him on 8<sup>th</sup> May 2008. First, Mr. Mungu submitted that the applicant had admitted that the deposit was to be refunded to the respondent and there was no valid reason as to why he resiled from the agreement. Secondly, the respondent cannot now plead inability to repay when he had had the benefit of enjoying the deposit since 1995. He argued that the appeal would not be arguable at all nor be rendered nugatory and there was therefore no reason to deny the respondent the enjoyment of the decretal sum.

On our part, we have carefully considered the conflicting claims of both parties; and especially, the history of the dispute and the litigation. We have further considered the grounds of appeal which are the subject of Civil Appeal No. 252 of 2008. We are, however, satisfied without deciding, that the appeal is certainly arguable and not frivolous.

The next aspect of such an application like this is, however, difficult to resolve. This is whether or not the appeal, if successful would be rendered nugatory. In our view, the sum of Shs.32 million is relatively substantial taking into account the station of the applicant's legal practice. We draw guidance herein from this Court's decision in the well known case of **Oraro & Rachier Advocates v. Co-operative Bank of Kenya Ltd [1999] 1 EA 236**. Further in this regard, we have also taken into account the provisions of **section 1A** and **1B** of the Civil Procedure Act and **section 3A** and **3B** of the Appellate Jurisdiction Act, which provisions came into force on 23<sup>rd</sup> July, 2009. By these new concepts of jurisprudence the courts, including this Court, in interpreting the Civil Procedure Act or the Appellate Jurisdiction Act or in exercising any power must take into consideration the overriding objective as defined in the two Acts. The principal aims of the overriding objective include the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of *equality of arms* is maintained and that as far as it is practicable to place the parties on equal footing. See **E. Muriu Kamau t/a Muriu Njoroge & Co. Advocate v. National Bank of Kenya Ltd Civil Application No. Nai. 258/2009 (unreported)**.

We accept, therefore, that unless stay is granted the appeal if successful would be rendered nugatory, and taking into account the principle aim of the overriding objective as recently introduced into the said Acts, we would allow this application. We have also pondered at length whether security should be provided by the applicant, but, we have held otherwise in the interests of justice.

In the result, we grant an order of stay in terms of prayer No.1 of the notice of motion dated 18<sup>th</sup> April, 2008. Costs herein shall be in the appeal.

***Dated and delivered at NAIROBI this 12<sup>TH</sup> day of MARCH, 2010.***

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**D.K.S. AGANYANYA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**