



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 164 of 2004

SWAPAN SADHAN BOSEPLAINTIFF

VERSUS

KETAN SURENDRA SOMAIA1ST DEFENDANT

DOLPHIN HOLDINGS LIMITED2ND DEFENDANT

MARSHALLS (E.A) LIMITED3RD DEFENDANT

NYALI BEACH HOTEL LIMITED4TH DEFENDANT

RULING

By a ruling delivered by this court on 24th March, 2006 this court struck out the Plaintiff's amended Complaint as against the 4th Defendant. The costs of that dismissed suit were awarded to the 4th Defendant. The Plaintiff being aggrieved by that order filed an appeal. The present application is by chamber summons dated 11th July, 2006. This application seeks stay of the execution pending hearing and determination of the Plaintiff's intended appeal. The application was supported by an affidavit sworn by the Plaintiff's advocate. After setting out the information the basis of that application, the Plaintiff's counsel stated that the 4th Defendant filed a bill of costs. That bill of costs was taxed and a ruling delivered on that taxation on 27th June, 2006. The costs were taxed at Kshs.6,066,420/=. The Plaintiff's counsel stated that the Plaintiff by a previous order of the court made on 15th June, 2004 deposited Kshs.20 million as security for costs for all Defendants, each defendant having a share of Kshs. 5 million. That deposit is in joint names of the Plaintiff and the Defendant's counsels. The deposit slip of that security for costs was annexed to the application. The Plaintiff's counsel deposed that if stay is not granted as sought in this application, the Plaintiff's intended appeal would be rendered a nugatory in that the 4th Defendant will be at liberty to execute its share of deposit of security for costs forthwith. That the 4th Defendant is under receivership by a ruling of this court dated 20th March, 2006 in HCCC 10 of 2006. A copy of the ruling was annexed. That if the 4th Defendant is allowed to execute and the Plaintiff does succeed in the pending appeal the plaintiff will suffer irreparable loss. In the oral submissions Plaintiff's counsel repeated the information in the supporting affidavit and requested the court to note that matters in the court of appeal are fixed for hearing by the court. The application was opposed. The 4th Defendant's grounds of objection are as follows:-

1. The application is incompetent and does not lie;

2. **The application is without foundation or merit as the Applicant has not properly invoked the jurisdiction of this Honourable Court;**
3. **There is no Decree to be executed or capable of execution and the application is therefore misconceived;**
4. **The alleged nexus between the 1st and 4th Defendant is irrelevant and violates the common law principle in Salomon's case which issue has already been determined by this Honourable court;**
5. **The alleged fact that the 4th Defendant is in receivership does not of itself render the appeal nugatory;**
6. **Order 22 of the civil Procedure Rules has no application to the present application;**
7. **There is nothing to stay having regard to the nature of the Orders from which an appeal is to be preferred by the Plaintiff herein.**

In oral submissions the 4th Defendant stated that the present application is misconceived since the Plaintiff had failed to file a reference in respect of the taxation under Rule 11 of the Advocates (Remuneration) Order. He said that the appeal filed by the Plaintiff was in respect of the ruling dismissing the Plaintiff's suit as against the 4th Defendant. He therefore, was of the view that the court should examine if there is an order capable of being stayed in that respect. He submitted that the order the subject of that ruling was a negative order incapable of execution. He was of the view therefore, that there was nothing there to be stayed. He relied on the case **Andrew Ouko versus Kenya Commercial Bank Ltd & 3 others (unreported) (Nairobi High court civil Case No.558 of 2004)** in particular the following passage;

"As their Lordships said in the case of Venture Capital & Credit Limited –vs- Consolidated Bank of Kenya: Civil Application No. Nai 349 of 2003 (UR), "the prayer for order of stay of executive of the ruling is misconceived as the Learned Judge never made any positive order in favour of the Respondent which is capable of execution. Rather, the Learned Judge merely dismissed the Application for interlocutory injunction with the result that neither party was given any interlocutory relief."

The 4th Defendant submitted that the Court of Appeal was also of the view that a negative order was incapable of execution and therefore stay could be granted. This was held in the case **Exclusive Estates Ltd versus Kenya Posts and Telecommunications Corporation & Another [2005] 1 E.A. 53**. The 4th Defendant's advocate quoted the following passage;

"The second prayer in the application seeks an order that the execution of the order given on 12 March 2004 dismissing the suit be stayed.

The stay of execution envisaged by rule 5(2)(b) of the rules of this court is the execution of a decree or order capable of execution in any of the methods stipulated by section 38 of the Civil Procedure Act. A "decree holder" as defined in section 2 of the Civil Procedure Act:

"means any person in whose favour a decree has been passed or an order capable of execution has been made and includes the assignee of such decree or order."

The order which dismissed the suit was a negative order which is not capable of execution."

The 4th Defendant's counsel in regard to the submissions that the 4th Defendant is under receivership stated from the bar that the order placing the 4th Defendant under receivership had been stayed by the Court of Appeal in Civil Appeal No.136 of 2006. For that reason counsel was of the view that the Plaintiff's appeal will not be rendered a nugatory. In brief response the Plaintiff's counsel stated that the

Plaintiff was satisfied with the amount taxed on behalf of the 4th Defendant and the moment the Court of Appeal does dismiss the Plaintiff's appeal, the Plaintiff would pay the taxed amount. He distinguished the authorities relied on by the 4th Defendant by saying that both dealt with injunctions which was not the case here.

I have considered the arguments before me and have considered Order XLI Rule 4 of the Civil Procedure Rules under which this court is empowered to grant stay. Stay is granted on condition that Order XLI Rule 4(2) of the Civil Procedure Rules is satisfied. The court cannot order a stay unless it is satisfied that substantial loss may result to the applicant. The court also should consider whether there has been a delay in making an application for stay. The court can also order that security be performed pending appeal. The Plaintiff in this matter has deposited on behalf of the 4th Defendant Kshs. 5 million. That to my mind will take care of the requirement of the Plaintiff's supply of security. The main issue raised by 4th Defendant was that the present order being stayed is a negative order. I beg to differ.

When the ruling was delivered dismissing the Plaintiff's suit against the 4th defendant the court additionally ordered the plaintiff to pay costs. As I understand the Plaintiff's argument is that it is not questioning the quantum of that taxation but rather it seeks the stay of payment or execution of those costs pending appeal. That in my view is not a negative order. The order that the court can grant would be a stay of execution for costs awarded by this court. For that reason I do distinguish the authorities relied on by 4th defendant. On the issue of substantial loss the plaintiff deponed to its concern that the 4th Defendant may not be able to pay the costs if the Plaintiff does succeed in the appeal. I am of the view that the moment the plaintiff raised that concern the 4th Defendant bore the burden to prove that no substantial loss would be incurred. That was the finding of the case **CA No. NAI 238 of 2005 (UR.144/2005) National Industrial Credit Bank Ltd. V Aquinas Francis Wasike & another** where the Court of Appeal had this to say;

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has.”

That burden of proof having shifted to the 4th Defendant it was not enough for the 4th Defendant through its advocate to state from the bar that the 4th Defendant had the order of receivership stayed. The 4th Defendant ought to have done much more perhaps by disclosing the assets it has that would be sufficient to repay the taxed amount if the plaintiff does succeed in its appeal. I do therefore, find that the Plaintiff has shown sufficient cause why it would be just for this court to order stay of execution of the order issued by this court on 24th March, 2006. It ought to be noted that the Plaintiff cannot be said to have delayed in making the present application since costs were taxed on 27th June 2006. The orders of this court are:-

- 1. That this court does hereby grant the stay pending appeal of execution of the order made on 24th March, 2006.**
- 2. That the costs of the Chamber Summons application dated 11th July, 2006 shall abide by the pending appeal.**

MARY KASANGO

JUDGE

Dated and delivered this 17th day of October, 2006.

MARY KASANGO

JUDGE