



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc Civ Appli 1206 of 2004

**IN THE MATTER OF AN APPLICATION UNDER SECTION 84 OF THE
CONSTITUTION OF KENYA FOR ENFORCEMENT OF FUNDAMENTAL RIGHTS
AND FREEDOMS**

AND

**IN THE MATTER OF THE WEIGHTS & MEASURES ACT CHAPTER 513
LAWS OF KENYA**

AND

IN THE MATTER OF THE INDUSTRIAL PROPERTY ACT 2001

AND

IN THE MATTER OF THE TRADEMARKS ACT, CHAPTER 506 LAWS OF KENYA

AND

IN THE MATTER OF THE STANDARDS ACT, CHAPTER 496 LAWS OF KENYA

AND

IN THE MATTER OF THE TRADE DESCRIPTIONS ACT, CHAPTER 505 LAWS OF KENYA

AND

**IN THE MATTER OF THE KENYA REVENUE AUTHORITY ACT, CHAPTER 469 LAWS OF
KENYA**

BETWEEN

**DOSHI IRON MONGERS LTD.....1ST
APPLICANT**

ASHOK DOSHI.....2ND

APPLICANT

VERSUS

THE WEIGHTS & MEASURES DEPARTMENT.....1ST RESPONDENT

**THE KENYA INDUSTRIAL PROPERTY INSTITUTE.....2ND
RESPONDENT**

THE KENYA BUREAU OF STANDARDS.....3RD RESPONDENT

**THE KENYA REVENUE AUTHORITY.....4TH
RESPONDENT**

THE ATTORNEY GENERAL5TH RESPONDENT

RULING

By this Notice of Motion dated 15th May 2006 the 4th Respondent/Applicant seeks orders:-

(1) That there be a stay of execution of the orders made by this court on 24th February 2006 pending the hearing and determination of the 4th Respondent/Applicant intended appeal.

The application is based on the grounds:-

1. That the 4th Respondent/Applicant has an arguable Appeal with a high probability of success.
2. That unless an order of stay is granted, the 4th Respondent/Applicant appeal will be rendered nugatory.
3. That if the stay pending appeal is not granted and execution takes place, the 4th Respondent/applicant will face serious financial hardship and were the 4th Respondent/Applicant to succeed in its Appeal it will face serious difficulties in recovering the decretal amount from the Applicant/Respondent .
4. That the Applicant/Respondent will not be prejudiced by the order of stay of execution pending Appeal.
5. That by virtue of O.41 Rule 6 as read together with Section 3(2) (a) of the Kenya Revenue Authority Act and the Government Proceedings Act, no security is required from the 4th Respondent/applicant.
6. That this application has been made without unreasonable delay; and
7. That it is in the interest of justice and equity that a stay be granted pending the hearing and determination of appeal.

An appeal having not been preferred what is sought is a stay pending an intended Appeal.

Before this application could be heard the Respondents/Applicants raised a Preliminary Objection on the

grounds:

1. That the 4th Respondent/Applicant is not candid in his application and has failed to reveal material facts and the discretion of the court is therefore not available.
2. That the application does not lie in law and is mischievous and resjudicata.

Mr. Omulele counsel for the Respondent submitted that when judgment in this suit was delivered on 24th February 2006, counsel for the Applicant/Respondent applied for stay of execution for 60 days within which it could file the appeal. That stay was granted. But it is now 130 days from that date and no appeal has been filed. Counsel further submitted that the allegation that the decree holder has threatened to execute is not true.

Miss Odundo counsel for the Defendant/JD in opposing the Preliminary Objection conceded that stay pending appeal was granted for 60 days but they had a problem in obtaining the typed proceedings to enable them to file appeal. After the judgment was delivered on 24th February 2006 the defendant applied orally for stay of execution for 60 days which stay was granted. The defendant was not able to file appeal within the 60 days because he was not able to obtain typed proceedings. The defendant has now made a formal application for stay pending appeal. But before that application could be heard counsel for the plaintiff raised a Preliminary Objection on the ground that this application is resjudicata.

With due respect to counsel the point of law raised is not a proper point of Preliminary Objection. The substance of the plaintiff's argument ought to have been canvassed in the substantive application. Raising it as a Preliminary Objection is a misconception of what constitutes a true Preliminary Objection, namely a pure point of law which if successfully taken would have the effect of disposing the suit or application entirely.

In the case of MUKISA BUSWIT CO. VS. WEST END DISTRIBUTORS 1969 EA 696 SIR CHARLES NEWBOLD P had this to say:-

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and on occasion, confuse the issues. This improper practice should stop.”

The issues raised by counsel in this Preliminary Objection could have been argued in the normal manner in the Notice of Motion dated 15th May 2006.

The Preliminary Objection is overruled.

Costs be costs in the cause.

Delivered and dated at Nairobi this 19th day of September 2006.

J.L.A. OSIEMO

JUDGE