



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Appeal 772 of 2005

EQUITY BANK LIMITED.....PLAINTIFF

VERSUS

TAIGA ADAMS COMPANY LIMITED.....DEFENDANT

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R U L I N G

The application herein filed in Court on 11/10/05, seeks the following orders:-

- 1.]
- 2.]
- 3. **Stay of execution of the decree in CMCC No. 2681 of 2005, dated 5/10/05 pending the hearing and determination of the appeal herein.**

Then costs.

The application is brought under Order 41 Rule 4, Order 21 rule 22; Order 50 Rule 1, of the Civil Procedure Rules, and Sections 3 and 3A of the Civil Procedure Act, Cap 21, Laws of Kenya and on the grounds that: the appellant has filed an appeal which has high chances of success; the application has been made without delay; unless the stay is granted the respondent will proceed to execute the decree for the judgment of K.Shs.1,395,612/- when infact the same is based on an irregular and erroneous judgment.

In opposition, vide their Replying Affidavit of Alex Daiga Mureithi, the Respondents aver, **inter alia**, that the application is bad in law, misconceived and unsustainable as against the Respondent and it should be struck out; the applicants letter of 28/12/04 constitutes a clear and/or constructive admission by the appellant of the Respondent’s claim and the lower court was right in finding so; the Respondent had objected to the appellant’s conversion to a Bank and only withdrew its objection on the consideration that the appellant had admitted the Respondent’s claim in the letter of 28/12/05; the letter of appellant to the Finance Minister, dated 28/12/05, is a clear manifestation of the appellants **mala fides** in that the appellant wrote two letters on the same date – one to the Minister denying the Respondent’s claim while

the other to the appellant's advocates admitted the claim; the appellant intended to hoodwink the Respondent to withdraw its objection to the conversion by the appellant; after the objection was withdrawn by the Respondent, the appellant backtracked and denied the Respondent's claim; the application does not meet the tenets of Order 41 Rule 4(2) in that the appellant has not demonstrated that it would suffer substantial loss if the stay is not granted; and no security has been offered.

Having perused through the pleadings herein, and considered the submissions of the learned counsel for both sides, I have reached the following findings and conclusions.

For the success of an application for stay of execution pending appeal, the applicant must meet all the tenets – requirements of- Order 41 rule 4 of the Civil procedure Rules. Failure to satisfy any one of the tenets stipulated in that rule is fatal to the application. Accordingly, whereas the applicant/appellant might have an arguable appeal, and whereas the application was brought without undue delay, those are not all that the rule calls for.

As was held in **CARTER & SONS LTD. V. DEPOSIT PROTECTION FUND BOARD & TWO OTHERS – Civil Appeal No. 291 of 1997, at Page 4** “.....the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay.”

This court's discretion in granting a stay order is not unfettered. Such discretion is fettered by all the tenets in Order 41 rule 4, of which good cause is only one out of four. Again, as the court of appeal said, at Page 3, in the CARTER & SONS LTD. case **supra:.....the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.”**

In the application before me, the applicant has not shown or established the substantial loss that would ensue if this stay is not granted. The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the Respondent – that is execution is carried out – in the event the appeal succeeds, the Respondent would not be in a position to pay- reimburse – as he/it is a person of no means. Here, no such allegation is made, much less established, by the appellant/applicant.

Of even greater impact is the fact that the applicant has not offered any security at all, and this is one of the mandatory tenets under Order 41 rule 4, especially sub rule (2) (b) of the Civil Procedure Rules, under which the application is brought. As a matter of fact, security is not mentioned either in the grounds of the application nor in the Supporting Affidavit of the appellant/applicant.

Accordingly, I find that the applicant has not satisfied two of the four mandatory requirements under Order 41 Rule 4, which are precedent to a grant of a stay order.

The pre-amble to sub-rule (2)of Rule 4 of Order 41 is couched in very clear language and words: “**No order for stay of execution shall be made under sub-rule (1) unless.....**” then follows the requirements, above, which have not been met by the applicant herein.

Let me conclude by stressing that **all the four, not one or some,** must be met before this court can grant an order of stay.

All in all therefore, the application herein fails and is dismissed with costs to the Respondent and against the appellant/applicant.

DATED and delivered in Nairobi this 8th day of November, 2006.

O.K. MUTUNGI

JUDGE