

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO.53 OF 2014

KENYA ECLOF COMPANY LIMITED.....APPELLANT

VRS

PATRICK KALABAYI.....RESPONDENT

RULING

1. Before court is an application by way of Notice of Motion brought under section 3A & 63 (E) of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules. The Notice of Motion is dated the 21st day of July 2014 and supported by the affidavit of one Philemon Misoi.

2. The orders sought were to have the send application certified urgent, a temporary stay of execution pending determination of the same and a stay of execution of the decree and judgment of the Principal Magistrate, Bungoma in CMCC No.578 of 2010, pending hearing and determination of the appeal herein and costs. Prayers a & b are spent, for the court's determination is prayer (c) and (d).

3. The Respondent opposed the application and filed grounds of opposition dated 28th July, 2014 and a Replying Affidavit dated the same day signed by the Respondent Patrick Kalabayi. It is the Respondent's case that the Applicant does not meet the required thresh-hold necessary for granting of a stay pending appeal, the application is scandalous, frivolous and lacks merit. He submitted further that there was due service of the plaint though no appearance nor a defence was filed.

4. Order 42 rule 6 (2) provides:-

“(2) No order for stay of execution shall be made under sub-rule (1) unless;

a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

5. Having considered the pleadings and submissions onrecord, I am of the view that in the circumstances of this case, the application was brought to court timeously and the Appellant is likely to suffer substantial loss. I therefore order:-

i) That there be a stay of execution pending hearing and determination of the appeal subject to the applicant depositing the sum of Kshs.250,000/= in an interest earning account in the names of the two counsels onrecord for the applicant and respondent within the next 10 days.

ii) Costs abide the outcome of the appeal.

Dated and delivered at Bungoma this 17th day of February, 2015.

ALI- ARONI

JUDGE