



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA

AT NAKURU

HCC 277 OF 2009

SIRBROOK (LTD) ..... APPLICANT

VERSUS

NAKURU INDUSTRIES LTD ..... RESPONDENT

**RULING**

1. This Ruling relates to an application by way of a Notice of Motion dated 3rd May 2013 for a stay of execution pending the hearing of an intended appeal. An order of stay was near granted on 7th August 2013 for a period limited to forty two (42) pending the reasons therefore. However for reasons beyond the court's control, the 42 days period was not achieved and is regretted.

2. The motion is grounded upon the reasons on the face thereof, and is supported by the Affidavit of the Applicant and that the decree firstly involves payment of substantial but indeterminate sums of money and secondly determination of its protected tenancy otherwise as provided by law and both events would cause the plaintiff irreparable loss, because the Applicant has made massive investment into the suit premises.

Against Motion, the Respondent filed Grounds of Oppositions dated 17<sup>th</sup> May 2003 and says that -

- (a) The Motion is defective because it does not comply with the requirements of order 51, rule 13 (2) of the Civil Procedure rules, 2010, and being a defect in substance is not curable by article 159 (2) of the Constitution.***
- (b) That the decree being sought to be stopped is a money decree and that there are no grounds advanced for such stay.***
- c. The Appellant was granted a stay of 120 days, and that the application was at this stage is mischievous and devoid of merit.***
- (d) The Applicant has made no tender or deposit of the decretal sum or any part thereof.***
- (e) The applicant was given more than sufficient window to comply with the orders of court, and cannot be heard to be seeking more concessions from the court by way of stay of execution.***

3. Prior to the order for 42 days stay made on 7.8.13, counsel for the Applicant filed a decision of Virsram J as he then was in the case of **Standard Chartered Bank (K) Ltd Vs Ayaga M. Sangale** (Civil Appeal No 247 of 2004) in which the learned judge said “inter alia -

***“..... in an application of this nature under Order 41 rule 4 (Now order 42, rule 6, of the Civil Procedure Rules 2010), the Applicant will succeed if he demonstrates to the satisfaction of the court that substantial loss will ensue if the order of stay is not granted, that he has filed the application without undue delay, and that he had offered such security as may be ordered for the due performance of the decree. The onus is upon the Applicant to discharge the above through a disposition”***

4. With regard to the two considerations of Order 42 rule 6, - timelines of the application and security, counsel for the Respondent pointed out and quite correctly so, that the application for stay was premature as there was already an order of stay in the court's judgment delivered on 12-4-2013 for a period of 120 days to enable parties to comply with the other orders of the court. The period of 120 days, from 12.4.2013 ended on 12.08.2013. The application herein was made on 23.7.2013, and was clearly pre-mature, by 21 days and was consequently in my opinion, made in bad faith for the sole purpose of frustrating the existing court orders.

5. On the question of deposit, there being finding in the judgment of the sum of Ksh. 4,152,000/=, the applicant made no effort to deposit the said sum or any lesser sum to the court in part settlement to the defendant.

6. In opinion therefore, the applicant has failed to fulfill or demonstrate compliance with any of the conditions precedent to the grant of a stay under Order 42, rule 6 of the Civil Procedure Rules.

7. As the 120 days of stay granted under the Judgment of 12th April 2013, and as the further 42 days (which run concurrently with the said 120 days) expired on 18.9.2013, the question before me is whether I should reinstate and extend such orders for stay of execution. There is no reason for anxiety in giving an answer to that question.

8. The applicant is liable to the Respondent in the sum of Sh. 4,152,000/= and has not demonstrated that it has paid any such sum to the Respondent which is not insolvent and cannot be said to be not in a position to refund or credit the Applicant with the rents due (if not it all). The applicant cannot therefore be said to be likely to suffer irreparable loss by such payment or if an order of stay is denied.

9. The applicant was given in the Judgment of 12.04.2013 a road map for determination of a fair market rental. The applicant is interest on appeal on the grounds that the judgment is indeterminate. A figure of Sh 4,152,000/= cannot be indeterminate. The leeway to ascertain what it paid (if any), under the 120 days stay at the extreme and cannot be indeterminate.

10. However, for the sake of amity between both the Appellant and the Respondent and in exercise of the court's discretion under order 42 rule 6 (2) (b) of the Civil Procedure Rules, I order an order of stay for the period of 30 days upon the condition that the Applicant shall deposit the sum of Sh.4,152,000/= into court within the said 30 days. For avoidance of doubt, there shall be a stay pending appeal after the said sum Ksh. 4,152,000/= is paid into court within the said period.

The Applicant shall also pay the costs of the application herein.

It is so ordered.

**Dated, signed and delivered at Nakuru this 17th day of December, 2013.**

**M. J. ANYARA EMUKULE**

**JUDGE**