



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**  
**CIVIL APPEAL NO. 246 OF 2010**

**PASTOR JOSEPH LIKAVO KHADIAGALA.....APPELLANT**

**VERSUS**

**EASTAR (E.A) LIMITED.....RESPONDENT**

**RULING**

The application is brought under Order 42 Rule 6 (1) & (2) of the Civil Procedure Rules and Sections 1A & 3A of the Civil Procedure Act, Cap 21 Laws of Kenya.

The Applicant had made an application for review of orders of the lower court and the court declined to give the order and the ruling was delivered on the 1<sup>st</sup> December, 2010.

The Applicant being aggrieved with the ruling filed an appeal against the ruling and also sought orders for stay of execution in the lower court.

The application for stay of execution was dismissed on the 21<sup>st</sup> April, 2011.

The Applicant now seeks an order for stay of execution from this appellate court.

Counsel for the Applicant and Counsel for the Respondent agreed to the putting in of written submissions.

The Applicant contends that if execution is levied he stands to suffer substantial loss. That if the judgment in the lower court is effected, then the Respondent will have been paid three times over and above the amount claimed.

The Applicant further submitted that the application was filed without unreasonable delay and that the appeal had overwhelming chances of succeeding.

The Applicant was also ready and willing to provide security, for due performance of the said decree.

The Applicant therefore prayed that the orders sought be granted.

The application was opposed by the Respondent's Counsel who submitted that the application for stay of execution was vague in that it did not specify whether the stay sought is pending hearing and determination of an appeal or the stay is against execution of a decree. Counsel submitted that the stay

sought must be specific.

It was further submitted that the Applicant having applied for review was precluded from lodging an appeal simultaneously.

Counsel further submitted that the Applicant did not have an arguable appeal and that the appeal was not bound to succeed on the grounds that it was incompetent.

The Applicant had also not demonstrated the loss that may result if the stay orders was not granted.

The Respondent therefore prayed that the application be dismissed with costs.

I have heard the arguments of both Counsel for the Applicant and the Respondent. I have perused the written submissions, the affidavits and authorities relied upon.

On the issue of appealing against an order for review I refer to the case of **PHILIP OCHILO ORERO VRS AMBROSE SEKO C.A NO. 53 OF 1984.**

The Appellant therein had moved the High Court under Section 80 and Order 44 of the Old Civil Procedure Rules, for the court to grant an order for review. The court of first instance refused to grant the orders and dismissed the application.

An appeal was preferred against the decision and the Court of Appeal set aside the order dismissing the application for review and the case was remitted back to the High court for hearing and determination.

I have perused the Memorandum of Appeal and it states that the appeal is against the ruling delivered on the 1<sup>st</sup> December, 2010.

I find that the Applicant is not precluded from appealing against the dismissal of the application for review and the case cited previously is in support of this finding.

On the submission that the application for stay of execution is not specific. Reference is made to the heading of the Notice of Motion dated the 19<sup>th</sup> May 2011 and the orders sought. The heading of the Notice of Motion and supporting affidavit both suffice to show that the Applicant is seeking orders of stay of execution pending appeal.

Under order 42 Rule 6 (1) the courts discretion is fettered. The court must be satisfied that substantial loss may result to the Applicant. The application must also show that the application was made without unreasonable delay, that the appeal has overwhelming chances of success and the Applicant must furnish security.

After perusing the file I find that the application made in the lower court for stay of execution was declined on the 8<sup>th</sup> April, 2011 and the Notice of Motion herein was filed on the 19<sup>th</sup> May, 2011. I find the application herein was therefore made timeously and expeditiously and made without unreasonable delay.

The Applicant has offered to furnish security for due performance of the decree.

From the Affidavits in support of the application and from the submissions filed herein, I am satisfied that the Applicant has shown that he stands to suffer substantial loss, if the order for stay of execution pending appeal is not granted.

The application for stay of execution pending the hearing and determination of the appeal has merit and it is hereby granted.

The Applicant must provide security for due performance. The Applicant to deposit the sum of Kshs 80,000/= in an interest earning Bank account in the joint names of the Counsel for the Respondent and the Applicant within fourteen (14) days from the date hereof, pending the hearing and final determination of the appeal.

The Respondent shall have costs.

**Dated and delivered at Eldoret this 29<sup>th</sup> day of March 2012.**

**A.MSHILA**

**JUDGE**

**Coram:**

Before Hon. Mshila J

CC: Andrew

Counsel for Appellant.....

Counsel for Respondent.....

**A.MSHILA**

**JUDGE**