



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**  
**CIVIL SUIT NO. 42 OF 2002**

**AMINA OMARI.....1<sup>ST</sup>**  
**PLAINTIFF**

**FREDRICK SUTER KILIMO .....2<sup>ND</sup>**  
**PLAINTIFF**

**=VERSUS=**

**LONRNO AGRIBUSINESS (E.A) LTD..... 1<sup>ST</sup>**  
**DEFENDANT**

**KENYA AIRPORTS AUTHORITY.....2<sup>ND</sup>**  
**DEFENDANT**

**R U L I N G**

The application before me is dated 4/6/2010. It is by the 1<sup>st</sup> plaintiff. It is expressed to be brought under Order XLI rule 4 of the Civil Procedure Rules. The applicant seeks one main prayer that there be stay of execution for taxed costs pending the hearing and determination of an intended appeal. The application is based upon the following grounds:-

1. That the applicant is aggrieved by the judgment of this court.
2. That the applicant has already commenced the process of appeal by filing and serving the requisite Notice of Appeal
3. That it is in the interests of justice that the execution process be stayed pending the appeal.

The application is supported by the applicant’s affidavit in which it is deposed, *inter alia* that the intended appeal raises serious points of law among them that the judgment was entered in favour of the respondent in respect of property which belongs to a third party. The applicant believes that unless the stay is ordered, the appeal will be rendered nugatory.

The application is opposed and there are grounds of opposition filed by the respondents’ advocates. In its view, the application is frivolous, vexatious and an abuse of the process of the court; that it is intended to delay the process of the court and deny it the fruits of its judgment; that the requisite conditions for the order of stay have not been met and that the applicant is guilty of laches.

The application was canvassed before me on 1/12/2011 when counsel reiterated the stand –points taken by their clients in their respective pleadings and documents.

I have considered the application, the affidavit, the grounds of opposition and the submissions of counsel. Having done so, I take the following view of the matter. The grounds upon which an application for stay of execution of a decree can be sought are stated in Order XLI Rule 4 of the Civil Procedure Rules which the applicant has invoked. Sub-rule (1) of the said order requires the applicant to show sufficient cause and sub-rule (2) requires the applicant to:

1. Establish that substantial loss may result to him unless stay is granted;
2. Show that the application has been made without undue delays;
3. Provide security

With regard to delay, the decree giving rise to the intended appeal was passed on 24/2/2006. The Notice of Appeal was lodged on 9/3/2006. Costs were then taxed on 29/4/2010 in the sum of Kshs 114,143/= as against the applicant. This notice of motion was then lodged on 4/6/2010.

The Notice of Appeal filed by the applicant relates to the decree given on 24/2/2006. By that decree, the applicant's suit was dismissed with costs and the 1<sup>st</sup> respondent's counter claim allowed with costs. The threatened execution is with respect to costs awarded to the 1<sup>st</sup> respondent. It is the intended appeal which provides the foundation for an application for stay under Order XLI. The order dismissing the applicant's suit is not capable of being stayed. The applicant does not also seek a stay of execution of the order made in favour of the 1<sup>st</sup> respondent or an injunction pending appeal. He only seeks stay of execution for costs. The costs were taxed on 29/4/2010. The applicant does not state that he lodged any objection against the said taxation. He has therefore not set in motion the process of challenging the taxation. It is apparent in the circumstances that there is currently no challenge made to the amount of costs.

Even if the orders made herein were capable of being stayed, I would hold that the applicant is guilty of delay as it is now nearly five (5) years since the orders were made.

The other requirement the applicant had to establish is that substantial loss would result to him unless the order of stay of execution is made. The applicant has alleged that the success of his appeal will be rendered nugatory unless stay is ordered. That cannot be the case given that the orders intended to be appealed against are not capable of being stayed. If his appeal is eventually allowed, the decree against him will be reversed. That is all. In my judgment, the plea that unless execution is stayed, the eventual success of the intended appeal will be rendered nugatory is without merit.

With regard to execution for costs, the applicant has not suggested that the same will not be recovered from the 1<sup>st</sup> respondent in the event the appeal succeeds. I therefore do not see how the applicant can suffer substantial loss unless the order of stay is granted even if the same had sound basis.

With regard to security, the applicant has offered none.

In the end the prerequisites for the grant of an order of stay have not been demonstrated. This application is therefore without merit and is dismissed with costs.

Order accordingly.

**DATED AND DELIVERED AT ELDORET THIS 26<sup>TH</sup> DAY OF JANUARY 2011.**

**F. AZANGALALA**

## **JUDGE**

***Read in the presence of:-***

1. **Mr. Mwinamo** for the defendant and
2. **Ms. Wafula** for the plaintiff.