



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CIVIL APPEAL NO. 140 OF 2010

ELDORET STEEL MILLS LIMITED:.....:APPLICANT

VERSUS

DANIEL WAFULA OKOTH:.....:RESPONDENT

RULING

Eldoret CMCC No. 62 of 2009 was, on 29/6/2010, decided in favour of the respondent **Daniel Wafula Okoth** and against the applicant, **Eldoret Steel Mills Limited**. The senior Principal Magistrate A.C. Onginjo awarded the respondent Kshs. 75000, general damages Kshs. 1500/- special damages and costs were assessed at Kshs. 49,445.50. The applicant was not satisfied and filed this appeal on 28/7/2010. On 15/10/2010, it lodged this application for stay of execution under Order XLI Rule 4 of the Civil Procedure Rules pending hearing and determination of the appeal.

In his supporting affidavit Navinder Singh Lochab, the applicant's director has stated *inter alia* that the applicant challenges the lower court's findings on liability and quantum and if execution proceeds the appeal may be rendered nugatory even if it eventually succeeds as the respondent is unlikely to refund the decretal amount if paid to him. In that event, the said director contends, the applicant will suffer substantial loss. With regard to security the applicant offers the log book for motor vehicle registration number KAS 009Q.

The application is opposed and there is a replying affidavit sworn by the respondent. It is deponed in that affidavit, *inter alia*, that this application is resjudicata; that the applicant has not satisfied the prerequisite conditions set out in order XLI rule 4(2) of the Civil Procedure Rules and that the respondent will be prejudiced if the application for stay is allowed.

When the application came up before me for hearing on 30/11/2010, counsel agreed that the arguments made in HCCA No. 139 of 2010 be adopted herein. In that application counsel reiterated the stand – points taken by their clients in their respective affidavits. That is the position herein.

I have considered the application, the affidavits filed and counsels, submissions. Having done so, I take the following view of the mater. There are two important considerations on an application for stay of execution; one that the successful litigant should not be deprived of the fruits of his judgment and secondly that when a party is exercising his undoubted right of appeal, the court ought to ensure that the appeal, if successful, is not rendered nugatory.

Order XLI Rule 4, under which this application has been brought, empowers the court for sufficient cause to order stay of execution pending determination of appeal and under Order XLI Rule 4(2) no order of

stay should be made unless (a), the court is satisfied that substantial loss may result to the applicant unless that 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 the ultimate decree or order has been given by the applicant.

So, I have power to make an order for a stay of execution “for sufficient cause” but no order should be made unless the conditions, set out in order XLI Rule 42 are met.

With regard to delay, it is noted that the applicant’s application for stay made to the lower court was dismissed on 12/10/2010. This application was then lodged on 14/10/2010, two days thereafter. There is, in the premises, no delay in lodging this application.

The other requirement the applicant had to establish is that of substantial loss. The applicant contends that the respondent has no means to refund the decretal amount if it is paid to him and the appeal succeeds eventually. The respondent has merely stated that he stands to suffer prejudice should this application be allowed without stating his means to refund the decretal amount in the event the appeal succeeds. The object of stay is to ensure that the ultimately successful party gets tangible success and not a sham success. As the respondent has not demonstrated how he can repay the decretal sum if paid to him in the event of a successful appeal, I am satisfied that the applicant has demonstrated substantial loss.

With regard to security, I am of the view that the deposit of the log book of vehicle registration number KAS 009Q is not adequate given that a motor vehicle’s life span is uncertain. However, notwithstanding the failure to give security by the applicant, the court still has a discretion to order the furnishing of such security for the due performance of the decree as may ultimately be binding on it. As the applicant has established the other requirements of order XLI Rule 4(2), of the Civil Procedure Rules, I will grant the application for stay of execution pending determination of the appeal herein if the applicant deposits the entire decretal amount into an interest earning bank account in the joint names of the parties’ advocates. The said deposit be made within seven days from the date hereof failure which the application shall stand dismissed.

The applicant shall pay the respondents costs of this application.

Orders accordingly.

**DATED AND DELIVERED AT ELDORET
THIS 19TH DAY OF JANUARY 2011**

**F. AZANGALALA
JUDGE**

Read in the presence of:-

Ms. Khayo for the applicant and

Mr. Alwanga H/B for Mr. Yego for the respondent

**F. AZANGALALA
JUDGE
19TH January**