



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**  
**CIVIL APPEAL NO. 139 OF 2010**

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

=VERSUS=

**PATRICK LUMUMBA LIKON** .....  
**RESPONDENT**

**RULING**

This Chamber Summons has been brought mainly under the provisions of Order XLI Rule 4 of the Civil Procedure Rules for primarily a stay of execution pending the hearing and determination of the appeal filed herein from the judgment and decree of the Senior Principal Magistrate (**A.C Ong'injo**) inn Eldoret CMCC No. 666 of 2009 dated 29/06/2010. The application is based on the following main grounds:-

1. That the respondent obtained judgment in his favour for Kshs 204,230/= inclusive of costs against which judgment the applicant has appealed.
2. That unless an order of stay is granted, the respondent may execute which event may render the success of the said appeal nugatory since the respondent does not have assets which are sufficient to enable him repay the decretal amount if it is paid to him.
3. That the applicant is ready and willing to provide security for the due performance of the said decree.

The application is supported by an affidavit sworn by one **Narinder Singh Lochab**, a director of the applicant. In the affidavit it is deposed inter alia, that the applicant has challenged the said decree and it would be prejudicial if the sums in the decree are paid to the respondent before the appeal is determined. That the applicant shall suffer substantial loss unless the stay is ordered because the respondent has no means to repay the decretal sum in the event the appeal succeeds; that the applicant is ready and willing to furnish security by depositing the log book of motor vehicle registration number KAS 009 and that his application has been lodged promptly. The same director also filed a further affidavit in response to a replying affidavit filed by the respondents. The averments in the supporting affidavit are reiterated in the said further affidavit.

The application is opposed and as already stated, there is a replying affidavit sworn by the respondent. In the affidavit, it is deponed, inter alia, that the applicant has not satisfied the requirements of order XLI rule 4 (2) of the Civil Procedure Rules; that the respondent stands to suffer prejudice should the stay be granted and that the memorandum of appeal raises no arguable grounds of appeal.

The application was canvassed before me on 30/11/2010 when counsel reiterated the stand points taken by their clients in their respective affidavits.

I have considered the application, the affidavits filed and the submissions of counsel. Having done so, I take the following view of the matter. Order XLI Rule 4(1) and (2) reads as follows:-

**“ 4 (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but’ the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made e.g. the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.**

**(2) No order or 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 delays; and**

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

The plain language of sub-rule (1) of rule (4) of order XLI of the Civil Procedure rules is that an applicant who has appealed has the right to apply for stay of execution to the appellate court notwithstanding that the court appealed from has declined such stay. This application cannot therefore be resjudicata as contended by the respondent merely because the Lower Court declined the applicant’s initial application for stay of execution.

Has the applicant demonstrated that substantial loss may result to it unless stay is ordered? Its director has deponed that the respondent has no assets sufficient to resort to in the event appeal succeeds and the decretal sum has been paid to him. That averment has not been rebutted by the respondent. That being the position, the applicant has persuaded me that substantial loss may result to it unless the order of stay is made.

With regard to delay, the applicant has deponed that its application for stay was dismissed on 12/10/2010 by the Lower Court. This application was then lodged on 15/10/2010 a mere three days thereafter. The applicant is not guilty of any delay.

How about security? The applicant is ready and willing to deposit the log book for motor vehicle registration number KAS 009 Q as security for the due performance of the decree of the lower Court. Deposit of a log book in my view cannot satisfy the requirements for security under order XLI rule 4(2) of the Civil Procedure Rules. I Say so because, a log book is not an asset. It is only evidence of an asset which asset (the motor vehicle) is liable to damage and infact destruction anytime. The asset can therefore be rendered worthless in the blink of an eye. It cannot in my judgment constitute sufficient security for the purposes of order XLI Rule 4(2). The applicant herein has therefore failed to give security. However, the court still has discretion to order the furnishing of security. As the applicant has satisfied the other conditions for the grant of stay of execution, I order that there may be stay of execution of the judgment and decree of the Lower Court if the applicant deposits the entire decretal amount in an interest earning account in a reputable financial institution in the joint names of the parties’ advocates within the next seven (7) days from the date of this order failing which this application shall stand

dismissed.

The applicant shall bear the 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:***

1. M/s Kalya advocate for the applicant and
2. M/s Alwanga holding brief for Yego for the Respondent