



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

[CORAM: AZANGALALA, J]

CIVIL APPEAL NO. 140 OF 2010

B E T W E E N

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

A N D

**DANIEL WAFULA
OKOTHRESPONDENT**

RULING

On 19th January 2011, I allowed the applicant's application for stay of execution on terms that it deposits the entire decretal amount into an interest earning bank account in the joint names of the parties' advocates within seven (7) days of the date of the order failing which the applicant's application would stand dismissed. The applicant failed to do so and has now come back seeking extension of the time to make the deposit. The application is brought mainly under section 95 of the Civil Procedure Act and Order 50 Rule 6 of the civil Procedure Rules.

The main reason for the application is that the applicant has to settle many other decrees in various suits filed before Eldoret Chief Magistrate's Court. The application is supported by an affidavit sworn by one **Narinder Singh Lochab** in which the above ground is elaborated.

The application is opposed by way of replying affidavit sworn by counsel for the respondent. The thrust of the opposition is that the extension cannot be ordered given that the period appointed in the order of stay has since lapsed and that no basis has been laid for the grant of the same.

When the application came up before me for hearing on 1st March 2011, counsel adopted their submissions in HCCA NO. 139 OF 2010.

I have considered the application, the affidavits filed and counsels' submissions. Having done so, I take the following view of the matter. There is no dispute that the applicant has not complied with the condition for stay of execution within the time appointed in the order or at all. Is the applicant in those premises excluded from moving the court as it has done? I do not think so given the express provisions of section 95 of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules. Under the provisions, notwithstanding the expiration of the seven (7) days granted in the order of stay, the Court still has power to enlarge the time within which the deposit was to be made. The principal concern of the Court is the justice of the case.

The respondent in this case did not file any affidavit to challenge the factual position given by the applicant. There is therefore no evidence that he may be prejudiced by the order sought beyond what is compensatable in costs. **As Lord Denning stated in Republic –vrs- Bhomsbury and Marylebone County Court: exparte Villerwest Ltd [1976] 1 All ER 897 a 900, [1976] 1 WLR 362 at 366.**

“ If a condition is not fulfilled within a specified time, even though the action may be said to cease to exist the court always has power to bring it to life again by extending the time.”

In the premises, I am inclined to allow the application. The applicant should now comply with the order on deposit within seven (7) days from the date hereof failing which the application shall stand dismissed.

The applicant shall bear the costs of this application.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 15TH DAY OF MARCH 2011

F. AZANGALALA

JUDGE

Read in the presence of:

Mr. Nyairo for the applicant and

Mr. Yego for the respondent.

F. AZANGALALA

JUDGE