REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO 104 OF 2010

BETWEEN

SOUTH SIOUX FARM LIMITED::::::::::::::::::::::::1ST PLAINTIFF
FRANCIS NZIVO MUNGUTI::::::::::::::::::::::::::::2ND PLAINTIFF

AND

FALCON COACH LIMITED::::::::::::::::::::::::::::DEFENDANT

RULING

This application brought under Order XLI Rule 4, Order L Rule 1 of the Civil Procedure Rules, and Sections 1A and 3A of the Civil Procedure Act, is seeking one main order that there be stay of execution and/or further execution of the decree in Eldoret CMCC NO. 993 of 2006 pending the hearing and determination of this appeal. The main reasons for the application are that unless the stay is granted, the respondents may execute the said decree which event will render the appeal nugatory as the respondents do not have assets and will not be in a position to refund the decretal amount should the appeal succeed and therefore a substantial loss shall ensue. The applicants further state that they have an arguable appeal and are ready and willing to provide security for the due performance of the decree as provided under Order XLI Rule 4(2)(b) of the Civil Procedure Rules. There is an affidavit in support of the application sworn by the 1st applicant's director, **Amrick Singh**. It is deponed in the affidavit, *inter alia*, that the applicants will suffer substantial loss as the respondents are unlikely to refund the sums they were awarded in the lower court if the same are paid over to them and the appeal eventually succeeds. The said manager has also deponed that the applicants are ready and willing to provide security for the due performance of the decree of the lower court and further that their appeal has high chances of success.

The application is opposed on the basis of Grounds of Opposition and an affidavit in opposition, sworn by the respondents advocate, **Francis Odhiambo Omondi**. It is deponed in the affidavit, *inter alia*, that as an application for stay was dismissed by the lower court this application is *res judicate* and is an abuse of the process of the court; that the applicants will not suffer loss, and that the lower court's decree has been executed although the attached properties are on a running attachment.

When the application came up before me for hearing on 16th March, 2001, counsel agreed to file written submissions which were in place by 30th March, 2011.The submissions elaborated the stand-points taken by the parties in their respective affidavits. I have considered the application, the affidavits and the said submissions. Having done so I take the following view of the matter. For an applicant to succeed in an application for stay of execution, he must satisfy three conditions. Firstly he must demonstrate there is sufficient cause to make such an order. Secondly he must establish that he would suffer substantial loss unless the order is granted and thirdly he must furnish security. The application

must of cause be made promptly.

With regard to delay, I note that the lower court declined the applicant's application for stay on 29th October, 2010. This application was lodged on 3rd December, 2010. The delay involved is of slightly over a month. I do not consider that delay in-ordinate.

With regard to the establishment of substantial loss the applicant has deponed that the respondents are unlikely to refund the sums awarded to them if paid and the appeal eventually succeeds as they do not have sufficient assets to cover the said sums. The respondent has not itself filed any affidavit in opposition to the application. It's counsel has however deponed that any loss to be suffered would be by the Insurance Company which instructed counsel and not by the applicants. There is however, no averment in response to the averment by the applicants that the respondents have no assets and will not be in a position to refund the decretal sums if paid to them and the appeal subsequently succeeds. The applicants in my view, have therefore established that if the decretal amount is paid to the respondent, it will not be in a position to refund the sums. I am therefore satisfied that substantial loss would ensue from a refusal to grant stay.

With regard to security the applicants have deponed that they are ready and willing to provide security for the due performance of the decree of the lower court by depositing the sums involved together with costs in an interest bearing account in the names of the parties advocates. That in my view is sufficient security.

I have read the memorandum of appeal lodged on 10th June, 2010. 10 grounds of appeal are given. The applicants challenge the lower court's findings on facts and law. *Prima facie*, I am unable to hold that those grounds are not bona fide. In all those premises I found and hold that the applicants have established sufficient case for the grant of stay.

The applicants have therefore satisfied all the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules. Before concluding this ruling, I should comment on the respondents' submission that this application is *res judicata*. Counsel for the respondents quite properly in my view acknowledged that, Order 42 Rule 6 donates independent and original jurisdiction to consider an application for stay of execution to the High Court notwithstanding that such an application may have been declined by the Lower Court. Counsel however contented that the said rule is inconsistent with section 7 of the parent Act (the Civil Procedure Act, Cap 21 Laws of Kenya). With all due respect to counsel, that contention cannot be correct. The mischief intended to be prevented by section 7 is not the same as the mischief intended to be addressed by Order 42 Rule 6 of the Rules. The latter's objective is how the rights of the parties to a ligation in progress may be safeguarded pending final conclusion of the litigation. The litigation may be considered as a single transaction which is interrupted by the appeal process. The applicants have preferred an appeal from the decree of the Lower Court. The application for stay is made in the appeal. The application is obviously independent of the application made before the lower court. It cannot therefore be said to be *res judicate*. It would have been *res judicate* if it was made before the Lower Court a second time. Any subsequent application for stay before this court will also be *res judicate* on the conclusion of this ruling. In Civil Appeal No. 36 of 1996: **Uhuru Highway Development Limited -Vs- Central Bank of Kenya and 2 others (UR)**, the Court of Appeal decided that a matter of interlocutory nature decided in a suit cannot be the subject of another similar application in the same suit. The *ratio decidendi* was therefore that the principle of *res judicate* applies to applications heard and determined in the same suit. In that case an application for injunction was filed a second time when a similar application had been declined by the High court and the Court of Appeal. Obviously those facts are distinguishable from the facts herein. Here, an application for stay was declined by the Lower Court and a similar application has been lodged in the appeal. Clearly the principle of *res judicate* cannot apply. Order 42 Rule 6 in my view is a handmaiden to facilitate disposal of the interlocutory issue of execution pending appeal and is not inconsistent with section 7 of the Civil Procedure Act which aims to bring litigation to an end.

Counsel has further submitted that the decree has already been executed. He however adds that the execution is by way of a running attachment. The attachment is therefore conditional and is not

complete. The order sought by the applicants is therefore available.

In the end. The application is allowed. I make the following orders:-

1) The applicants shall deposit into an interest bearing joint account to be opened in a reputable financial institution in the names of the parties' advocates the decretal amount plus costs within thirty (30) days of today.

Pending such deposit there will be a stay of execution of the lower court decree
2) On deposit of the said sums there shall be a stay of execution of the said decree pending the hearing and determination of this appeal.

In default of compliance with (1) above, this application shall stand dismissed with costs.

3) Costs of this application shall otherwise abide the results of the appeal.

Orders accordingly.

DATED AND DELIVERED AT ELDORET
THIS 23rd DAY OF May, 2011.

F. AZANGALALA
JUDGE

Read in the presence of:
Mr. Khayo for the Applicant and
Mr. Kamau for Mr. Omondi for the Respondent.

F. AZANGALALA
JUDGE
23RD MAY, 2011