



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Civil Appeal 48 of 2009

TIMSALES (K) LTD.....APPELLANT
VERSUS
WILSON MAKHOKA MUREFU.....DEFENDANT
RULING

This is an application for stay of execution of the decree/judgment in Molo RMCC No.313 of 2003 dated 17th February, 2009 pending the hearing and determination of the appeal herein.

It is the applicant's contention that being aggrieved by the judgment in question, it has filed the appeal herein to challenge the same. That the applicant is apprehensive that the appeal may be rendered nugatory unless the order of stay is granted; that the applicant may also suffer substantial loss as the respondent does not have any known assets; that a similar application for stay was granted by the lower court which ordered the applicant to deposit half (½) of the decretal sum into court and pay over the other half (½) to the respondent within thirty (30) days from 26th May, 2009; that the applicant has not complied with that order out of the fear that should the appeal succeed the respondent may not have the means to reconstitute, hence this application.

The respondent in his reply has deposed that the lower court having granted a similar application on fair terms, the applicant

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cannot move to this court with a similar application without showing that the terms imposed by the lower court are unfair. I have considered the above arguments as well as the authorities cited in support of the applicant's application.

It is settled on the basis of those authorities that the jurisdiction of this court under **Order 41 rule 4(1) & (2)** of the **Civil Procedure Rules** in matters of stay of proceedings and execution is distinct from that of the Court of Appeal exercised under **rule 5(2) (b)** of the **Court of Appeal Rules**. That distinction was discussed in the case of **Halai & Another Vs. Thornton & Turpin (1963) Ltd.** (1990) KLR 365.

Although the consideration under the two jurisdictions are different, both jurisdictions are concerned with preventing substantial loss. See **Kenya Shell Ltd. Vs. Benjamin Karuga & Ruth Wairimu Karuga** (1986) LKR 410.

The applicant herein is apprehensive that if the decretal sum was to be paid over the respondent (even if only half (½) of it), the latter would not be in a position to refund it should the appeal succeed. The legal burden remains upon the applicant to demonstrate this. It is only after doing so that the evidential burden would shift to the respondent to show that he would be capable to refund the decretal sum if it is paid over to him and the appeal were

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to succeed. Both from the Memorandum of Appeal and this application there is no mention at all of the decretal sum.

It is not enough to merely allege that the respondent will not be able to reconstitute some undisclosed

figure. The applicant has failed in discharging its legal burden and it will serve no purpose to require the respondent to attempt to rebut it.

Although the other conditions for the grant of stay order have been met eg. security and the application being brought without undue delay, the application must fail for failure to demonstrate substantial loss.

Finally there is no bar in **Order 41 rule 4 (1)** aforesaid for an applicant whose application has been allowed or rejected by the court appealed from to apply to the court appealed to.

For what I have stated earlier on, this application is dismissed with costs.

Dated, Signed and Delivered at Nakuru this 18th day of January, 2010.

**W. OUKO
JUDGE**