



**Rule 4 of Order XLI of the Civil Procedure Rules; it is wrong for a party to seek variation of conditions of stay imposed by the lower court, right procedure is to seek to set aside or to apply for stay afresh.**

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERICHO**  
**CIVIL APPEAL NO. 9 OF 2010**

**WILLIAMSON TEA CO. LTD .....APPELLANT**  
**VERSUS**  
**RAYMOND KIPKEMBOI KORIR ..... RESPONDENT**

**RULING**

The appellant, Williamson Tea Company Ltd, applied to this court on 15<sup>th</sup> June 2010 by way of a Notice of Motion for a temporary order of stay of execution of the decree issued in suit No. Kericho PMCC 701 of 2005 pending the hearing and determination of the application herein. In the application herein, the appellant seeks an order for enlargement and/or extension of time for complying with the condition imposed by lower court in the suit No. Kericho PMCC 701 of 2005. In granting stay pending the hearing and determination of the appeal herein, the Lower Court imposed a condition that the decretal dues amounting to Kshs. 185,000 would be deposited in a Joint Bank Account within 30 days. The applicant did not beat the deadline. The applicant has in its application herein given reasons why it was unable to beat the deadline. Relying on the affidavit sworn on 15<sup>th</sup> June 2010 by himself in support of the application, Mr. Onyinkwa, learned counsel for the appellant, urged the court to grant an order extending the time imposed in the order of the Lower Court to enable the appellant to deposit the decretal dues in a Bank account as ordered so as to forestall execution.

The application was opposed by Mr. Orai, learned counsel for, Raymond Kipkemboi Korir the respondent. Mr. Orai contended that as the order setting the time within which the decretal sum was to be deposited was not made by this court, but rather, by the Lower Court, the appellant's application was misplaced. It was Mr. Orai's contention that in any case, the order having been by consent, the same could not be varied.

I have perused the application to this court and the replying affidavit sworn on 21<sup>st</sup> May 2010 by the respondent. I have also duly considered the submissions made by both counsel.

The Lower Court ordered stay of execution as per the order issued on 6<sup>th</sup> May 2010 which is annexed to the affidavit of the respondent and is marked "D002". Regardless of that order for stay, this court has power under **Rule 4 (1) of order XLI** of the Civil Procedure Rules, on application being made, to make such order thereon as may appear to it just. **Rule 4 (1)** also empowers any person aggrieved by an order of stay made by the lower court to apply to this court to have such order set aside.

The application before this court is neither an application for stay nor an application for setting aside the lower court order. Rather, it is an application to vary the Lower Court order by enlarging the time imposed by the lower court. It should have been made to the Lower Court. It does not come under **Rule 4 (1) of order XLI**. All that the appellant needed to do was to apply for stay to this court regardless of whether the Lower Court had granted or refused stay. The appellant did not do so. Nor did the appellant apply, as it was entitled to do, for an order to set aside the Lower Court order for stay if it was aggrieved by it. The application by the appellant purporting to be made under **Rule 4 of order XLI** seeking variation of the lower court order by enlargement of time is misplaced and is defective. I hereby strike it out with costs to the respondent.

**DATED at KERICHO this 19<sup>th</sup> day of July, 2010**

**G.B.M KARIUKI, SC**

**RESIDENCE JUDGE**

**COUNSEL APPEARING**

Mr. Denis Onyinkwa of Onyinkwa & Co. Advocates appeared for the Applicant

Mr. Orai of Orai & Co. Advocates appeared for the Respondent