



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Appeal 788 of 2007**

**STEPHEN GESAIGA**

**SILVANUS OROO OMBOGA.....APPELLANTS**

**VERSUS**

**E.A. PORTLAND CEMENT CO. LTD.....RESPONDENT**

**R U L I N G**

1. Stephen Gesaiga and Silvanus Oroo Omboga hereinafter referred to as the Applicants are the appellants in this appeal. By a Notice of Motion dated 23/2/09, the Applicants seeks an order for stay of execution of the judgment and decree pending determination of their appeal.
2. The Applicants maintain that unless the order of stay of execution is granted, their appeal which has high chances of success will be rendered nugatory.
3. Silvanus Oroo Omboga has also sworn a supporting affidavit in which he explains that if execution proceeds he would suffer irreparable loss as his only source of livelihood will be disposed off.
4. The application is opposed through grounds of opposition filed on 22<sup>nd</sup> April 2009 as well as a replying affidavit sworn by Eric Chelule on the same day. Chelule who is a licensing and Insurance Officer of East Africa Portland Cement Co. Ltd., (the Respondent herein) maintains that the Respondent is a big company listed in the stock market and is capable of paying back the decretal sum incase the appeal succeed.
5. It is submitted on behalf of the Respondent that the Applicants have offered no security for the performance of the decree and have also failed to demonstrate substantial loss. Further it is contended that the application for stay of execution pending appeal having been brought more than one year after the appeal, the same was brought after unreasonable delay.
6. I have carefully considered the application before me. For the Applicants to succeed, they must satisfy the conditions of OXLI Rule 4(2) of the Civil Procedure Rules i.e (1) The Applicant must show that they will suffer substantial loss if the order of stay of execution is not granted (2) Application must have been brought without undue delay (3) Applicants must be ready to furnish security for the due performance of the decree.
7. In this case, the Applicant claims that they will suffer substantial loss as their appeal is likely to be rendered nugatory. However the Applicants appeal cannot be rendered nugatory by the mere execution of the decree. The Applicant has not shown that the Respondents will not be able to restitute the decretal sum should that become necessary.
8. Further although the Applicants have endeavoured to explain the apparent delay in filing their application that explanation is not satisfactory at all. Nothing has been exhibited to this court to show when the Applicants instructed their advocate to file the application for stay of execution in this court nor has there been any evidence of any efforts made by the Applicants to know the outcome of such an application. It is evident that the Applicants went to sleep after filing their appeal and only woke up when the Respondent initiated the execution proceedings.

9. For the above reasons I find no merit in the Notice of Motion dated 23<sup>rd</sup> February 2009 and do therefore dismiss the same with costs.

Delivered and dated at Nairobi this 19<sup>th</sup> day of June, 2009

**H. M. OKWENGU**

**JUDGE**

Delivered in the presence of:-

Nyabicho for the appellants

Kariuki H/B for the respondent

Erick – court clerk