

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Appeal 9 of 2009

KENYA POWER & LIGHTING LTD PLAINTIFF

VERSUS

ANDREW KAINGA M'MUNORU RESPONDENT

RULING

The appellant in this appeal has filed the Notice of Motion under Order XLI Rule 4 of the Civil Procedure Rules. The appellant seeks stay of the execution of the decree in Maua PMCC No. 20 of 2000 pending the hearing and the determination of this appeal.

In support of that application, the appellant counsel deponed that the appeal has overwhelming chances of success. This is because as he stated that the lower court in hearing the case acted unprocedural. Further the said counsel deponed that the respondent had threatened to carry out execution of the lower court's decision. Counsel also stated that the appellant would suffer substantial loss if stay was not granted.

The respondent in the replying affidavit deponed that counsel for the appellant failed to appear before the lower court and sent another advocate to seek an adjournment for him. The adjournment was refused and the hearing proceeded. He denied that the hearing before the lower court was unprocedural. He further stated that he is a man of means running miraa business and operating a busy petrol station. He however failed to attach any evidence of his means.

In a supplementary affidavit, the appellant counsel stated that the respondent had filed an amended plaint in the lower court which was not in compliant with the provisions of Order VIA Rule 7(1) of the Civil Procedure Rules.

I have considered the argument presented before court. I have also considered the authority relied by the appellant. A party who seeks stay of execution needs to satisfy the provisions of Order XLI Rule 4 that was clearly stated in the case of **Tropical Commodities Supplies Ltd and others Vrs International Credit Bank Ltd (in liquidation) 2004 E.A.** In this case it was held:-

“A party must satisfy three conditions to obtain a stay of execution namely; that substantial loss may result unless the order of stay is made, the application has been made without unreasonable delay, and security for costs has been given by the applicants.

Substantial loss does not represent any particular sum or amount but refers to any loss, great or small, that is of real worth or value as distinguished from a loss that is merely nominal. Application was allowed.”

Once the appellant stated that there was a likelihood of it suffering substantial loss, the burden shifted to the respondent to prove that the appellant would not suffer that loss. The respondent merely stated in his replying affidavit that he runs a busy petrol station and miraa business. For the court to find that the appellant would not suffer substantial loss, the respondent should have provided evidence of his business entities.

On the other hand, I have considered the appellant's appeal and the application before court. I am of

the view that the appellant has not raised an issue which would justify this court from denying the respondent his enjoyment of the lower court's judgment.

In my view, the interest of justice would best be served by a conditional stay being granted. The orders of this court are as follows:-

- 1. Stay of execution of Maua PMCC 20/2000 is granted on condition that the appellant does hereby provide the decretal amount within 30 days which amount shall be held in a joint interest earning account in the names of the advocate for the appellant and the advocate for the respondent.**
- 2. Failure to provide the decretal amount as stated in number 1 above, the stay will automatically be vacated.**
- 3. The costs of the notice of motion dated 2nd Feb. 2009 are awarded to the respondent in any event.**

Dated and delivered at Meru this 16th day of July 2009.

MARY KASANGO

JUDGE