

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU Civil Appeal 166 of 2008

LUCY NJERI.....APPELLANT

VERSUS

**NYAHURURU VETERINARY & AGRICULTURAL
SUPPLIES.....RESPONDENT**

RULING

This application is brought under **Order 41 rules 1 and 2** of the **Civil Procedure Rules** and **section 3(A) of the Civil Procedure Act**. In it the applicant Lucy Njeri who is the appellant in Civil Appeal No. 166 of 2008 seeks orders of this court as follows:

That there be a stay of execution of the judgment entered against her in Nakuru CMCC No. 1143 of 2004 pending the hearing and determination of the appeal. She also prays costs of the application be provided for. A temporary stay was granted to the applicant when the matter came up under certificate of urgency on 28th January 2009 and extended thereafter pending the hearing and determination of the application.

In support of the application the applicant filed a supporting affidavit sworn on 27th January 2009 in which she explains her two months delay in filing the application blaming it on lack of knowledge as to the delivery of the judgment. The grounds set out in support of the application are that the appellant has an automatic right of appeal which, in her opinion entitles her to an order of stay of execution. She also contends that she will suffer irreparable loss in the event that she is ordered to pay the decretal sum yet her appeal has chances of success. The applicant states that she has not offered any security for the due performance of the decree as required by the provisions of Order 41 rule 2 for reasons that she is not financially capable of doing so. She basis her argument on the authority for **New Stanley Hotel Limited vs. Arcade Tobacconists Limited [1986] KLR 757** which she says supports her case. The application is opposed on the grounds of opposition filed on 9th February 2009 in which the respondent states that the application was not promptly brought as required by law, it has no merit and that the appeal would not be rendered nugatory if the stay order sought herein is refused.

Submitting on behalf of respondents, Mr. Njuguna advocate told this court that that the two month's delay in bringing the application was not properly explained and that the alleged substantial loss has not been demonstrated by the applicant. According to counsel it is the respondent who stands to suffer loss. Counsel submitted further that the provisions as to the giving of security under order 41(2) are mandatory and failure on the part of the applicant to comply with those provisions show that the application is not brought in good faith. He distinguished the present application from the New Stanley case in that the former suit involved an issue of mesne profits whereas the matter before this court relates to a liquated claim which was found to be due to the respondent. Mr. Njuguna further submitted on the strength of the decisions in **HALAI & ANOR. VS. THORNTON & TURPIN (1963) LIMITED [1990] KLR** page 364 and **Kwa hoLa pharmacy vs. Copy cat COAST LTD [2002] 2 KLR 269** that the failure by the applicant to annex the order sought to be stayed for the court's perusal is fatal to the application.

I have considered the submissions made by counsel on both sides and the authorities cited in support of their arguments. Under Order 41 rule 4(1) this court is empowered to grant or refuse an order for stay of execution pending appeal at its own discretion. However **Order 41 rule 4(2)** clearly states that no order for stay of execution shall be made under sub rule 1 above unless;

(a) The court is satisfied that substantial loss may result to the applicant if the order for stay is not granted and that the application has been brought without undue delay.

(b) That such security as the court orders for the due performance of such decree or order as may be ultimately binding on the applicant has been given by the applicant.

The above requirements were dealt with in the New Stanley Hotel case and I see no departure from the mandatory nature of those provisions on the part of the court in that case. As rightly stated by counsel for the respondent, the issue of mesne profits made it impossible for the Judge to determine what security, if any, would be ordered in that case, hence the exercise of discretion in favour of the applicant therein. In the present case the applicant has clearly stated that she would not offer any security simply because she believes she would succeed in the appeal. Chances are that she may not.

Willingness on the part of an applicant to give security for the due performance of the decree or order sought to be stayed must be demonstrated by an applicant. The court would ordinarily order for security in line with the offer made by the applicant seeking an order for stay. The remedy under Order 41 rule 4 being an equitable remedy it appears that the same cannot be granted where the applicant clearly shows her unwillingness to comply with the provisions of Order 41. The applicant has not provided this court with any evidence of her financial standing as to persuade the court that she is not capable of providing any security nor has she demonstrated that the respondent would be unable to refund such security in the event that she is successful in her appeal. Moreover, this appeal not being one brought under Rule 5(2) of the Court of Appeal Rules, I am not bound to consider the merits of the appeal over and above the mandatory requirements of Order XLI Rule 4(2). I am not satisfied that the application before me has fulfilled the requirements of order 41 rule 2 to enable the court to grant the order sought. That being the case, I have no option but to dismiss the application with no order as to costs.

Dated, signed and delivered at Nakuru this 10th day of July 2009

M. G. MUGO

JUDGE