



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Case 1785 of 2001**

**ELF OIL KENYA LIMITED ..... PLAINTIFF/RESPONDENT**

**VERSUS**

**HUNKAR TRADING CO. LIMITED ..... DEFENDANT/APPLICANT**

**RULING**

The notice of motion dated 7<sup>th</sup> August 2009 seeks for orders for stay of execution of the judgment delivered by Lesiit J on 17<sup>th</sup> July 2009 and all consequential orders pending the hearing and determination of the appeal. On 17<sup>th</sup> July 2009 Lesiit J delivered a judgment against the defendant for a sum of Ksh.10,031,358.15/- together with interest at court rates until full payment.

The affidavit of **Jackson Kahungura Kariuki** sworn on behalf of the defendant on 7<sup>th</sup> August 2009 contends that the defendant is dissatisfied with the judgment and intends to exercise its right of appeal and they have already lodged a notice of appeal. He further contends the appeal has overwhelming chances of success and unless the stay is granted the appeal will be rendered nugatory as the defendant will have been crippled financially and rendered insolvent if it has to pay the decretal sum. Counsel urged the court to exercise its discretion because the defendant is able to show he will suffer substantial loss as was held in the case of **Halai & Another vs Thornton & Turpin [1963] Limited.**

This application was opposed by the plaintiff, **Lawrence Kinyanjui** the legal officer of the plaintiff swore the replying affidavit on 15<sup>th</sup> September 2009. Counsel for the plaintiff urged the court to consider that the application failed to meet the criteria set out in **Order XLI r4 (1) and (2) of the Civil Procedure Rule**. It was also pointed out that the provisions of rule 5(2) (b) of the Court of Appeal Rules are different in that the Court of Appeal has jurisdiction to consider whether the intended appeal is an arguable one. This court has to be satisfied that the defendant would suffer substantial loss and the defendants must provide security for due performance of the decree. The defendants are only alleging the decree is a huge sum of money which is not sufficient. Secondly, they have not offered any security therefore their application lacks merit.

In analyzing the facts of this application, the court is guided by the provisions of **Order XLI rules 4(2)** and the questions to determine are whether substantial loss may result unless the order of stay is granted. Secondly, the application should be made without delay and thirdly, the applicant has to provide security. I agree with counsel for the plaintiff that the discretion under rule 5(2) (b) of the Court of Appeal rules is wider and all the authorities cited were based on the Court of Appeal Rules.

It is clear from the pleadings and the judgment that this was a liquidated claim in respect of goods supplied to the defendants by the plaintiff. This application was brought to court without delay. I am not certain about substantial loss because the plaintiff claims that it is a large company dealing with the petroleum and in the event of the appeal succeeding, they will repay the money. On the other hand the defendant contends that settling the claim will render their company insolvent thereby rendering the results of the appeal nugatory.

Balancing those two factors it is necessary for the defendant to provide security for the very reasons that they fear to be rendered insolvent, if the appeal succeed in the same way, they may have no money to pay even when their appeal is not successful. I therefore allow the application for stay of execution on condition that the defendant will deposit a sum of Kenya shillings five million (Ksh.5 million) being about 50% of the decretal sum in an interest earning account to be operated in the joint names of the plaintiff's advocates and defendant's advocates within 30 days. Failure to comply with the above conditions, the order of stay will lapse. The plaintiff will have the costs of this application.

RULING READ AND SIGNED ON 20<sup>TH</sup> NOVEMBER 2009 AT NAIROBI

**M.K. KOOME**

**JUDGE**

