

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 50 of 2009

TM-AM CONSTRUCTION GROUP (AFRICA) PLAINTIFF

VERSUS

COUNTY COUNCIL OF MURANGADEFENDANT

R U L I N G

Application brought under **Order XLI Rule 4 and 6, Order L Rule 1, Civil Procedure Act, Section 3 A**. Orders sought is stay of execution of ruling given on 26/3/2009 in this case pending the hearing and determination of the appeal lodged in Court of Appeal and that the properties impounded by the respondent be preserved or returned to the applicant pending the hearing of this application.

The grounds on which the application is based is that the applicant has filed an appeal in Court of Appeal and that the respondents have impounded the applicant's graders and they intend to impound more on the road construction site unless the stay is granted, the appeal shall be rendered nugatory.

That finally the applicant has an arguable appeal. The supporting affidavit shows that the applicant did file a Notice of Appeal dated 1/4/2009 which was filed and lodged in the court registry.

That the respondent has impounded two M Graders No.KW 9034 and KRW 125 the property of applicant. That if the orders are not granted the applicant shall suffer loss.

It is the court's observation that **Order 41 Rule 4** empowers the court to grant stay pending appeal on certain conditions;

- 1. That the application shows sufficient cause for stay;***
- 2. And that no stay shall be granted unless the applicant shows that if no order is granted substantial loss shall be suffered and that the application is brought without inordinate delay;***
- 3. That the applicant shall give security for any order that may be ultimately be binding on him. In this matter the applicant is an incorporated company doing road construction works in Muranga District. No doubt if the graders were to be impounded the business may come to a standstill causing contractual consequences on the contractor's part.***

This point has not been emphasized in their arguments. Furthermore, the respondent is a local authority and it was not emphasized that they may not afford to pay the plaintiff if the appeal was successful. No security has been offered.

Nevertheless, to avoid causing inconvenience and loss to the plaintiff/applicant, it is my view that the applicant may have stay if it pays Kshs.4.5 million which shall be deposited in an interest earning account to be held jointly by advocates for applicant and the respondent pending hearing and determination of appeal. I say nothing regarding the impounded assets. In default of making deposit within 21 days from today, the stay granted shall lapse.

It is so ordered.

DATED and DELIVERED at Nairobi this 19th day of May 2008.

JOYCE N. KHAMINWA

JUDGE