



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 297 of 2008

TOTAL KENYA LTD.....1ST APPELLANT

ELF OIL SERVICE STATION.....2ND APPELLANT

VERSUS

KINGSWAY TYRES LTD.....RESPONDENT

R U L I N G

By a notice of motion dated 6th June, 2008, Total Kenya Ltd and Elf Oil Service Station the appellants herein, seek an order for stay of execution pending the hearing and determination of their appeal. The appellants further seek an order that the respondent Kingsway Tyres Ltd be restrained from interfering with the appellants' quiet possession of their property pending the determination of the appeal.

The appellants have filed an appeal against the ruling of the Senior Resident magistrate delivered on 16th May, 2008 in which the magistrate struck out the appellants' defence and entered judgment for the respondent. The appellants maintains through an affidavit sworn by their advocate that the appeal has good chances of success but may be rendered nugatory if the application for stay of execution is not granted. It is contended that the appellants are likely to suffer substantial loss as the respondent would not be able to pay the appellants as its income is unknown and the decretal amount is substantial. The appellants have deposited the decretal amount in court as security pursuant to an order issued by Visram J. Relying on the *High Court Civil appeal No. 3 of 2007 (Meru) Kenneth Bundi Kubute & Others vs Daniel Njagi David*, counsel for the appellant submitted that the respondent has failed to rebut the allegations of impecunity.

The application is opposed through a replying affidavit sworn by Mahendra Shah the credit controller of the respondent's company. It is contended that the appellants' appeal lacks merit and has no chances of success. It is further maintained that the appellants do not deserve equitable orders as they have deliberately withheld information from the court with the intention of misleading the court. It was maintained that the respondent is not impecunious and that the appellants have failed to demonstrate that they will suffer irreparable harm if the orders sought are not granted. Counsel for the respondent distinguished the case of *Kenneth Bundi Kubute* (Supra) submitting that whereas that case involves

individuals the respondent is a limited liability company. Counsel further relied on the case of **Bob Morgan Systems Ltd & Another vs Jones (2004) 1 KLR 194**.

I have carefully considered this application. The conditions upon which an order for stay of execution can be granted are clearly provided under Order XLI Rule 4(1) and (2) of the Civil Procedure Rules. Essentially the conditions are three i.e:

1. That the court is satisfied that the substantial loss will result to the applicant if the order for stay execution is not granted.
2. That the application has been made without unreasonable delay.
3. That such security as may be required for the performance of the decree or order has been provided by the applicant.

In this case, the appellants have complied with the second and third conditions as the application was brought timeously and the appellants have provided security. However, as regards the first condition, the appellants have only relied on an averment made by their advocate in paragraph 9 of the supporting affidavit that the respondent may not be able to restate the decretal sum to the appellant if they are successful on appeal as the respondent's income is unknown. Such an averment is not sufficient to establish that the respondent will not be able to restate the decretal sum if need be. There must be reasonable cause for such a conclusion. The mere fact that the appellant is unaware of the respondent's income is not sufficient. The burden remains on the appellants to establish that they will suffer substantial loss. The appellants have apparently not discharged this burden. For this reason, I find that the appellant has failed to satisfy Order XLI Rule 4(2) of the Civil Procedure Rules. Accordingly, I dismiss the Notice of Motion dated 6th June, 2008. Costs to the respondent.

Orders accordingly.

Dated and delivered this 31st day of July, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Ms Kagundu H/B for Kairu for the appellant

Advocate for the respondent absent