

REPUBLIC OF KENYA

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

Misc. Appli. 399 of 2008

INDUSTRIAL COMMERCIAL

DEVELOPMENT CORPORATION..... APPLICANT

VERSUS

ELIAS M. MATEGWA.....RESPONDENT

R U L I N G

The applicant Industrial Commercial Development Corporation has come to this court under Order XLI Rule 4(1) & (2) of the Civil Procedure Rules seeking an order for stay of execution of the judgment issued in Milimani CMCC No.9547 of 2006 pending the hearing and determination of an intended appeal.

The applicant explains that it had lodged Civil Appeal No. 130 of 2008 and obtained temporary orders of stay of execution depositing the decretal amount into court as security. However, the appeal and application for stay of execution were struck out on 13th June, 2008 as the applicant's advocates were not properly on record.

The applicant's advocate thereafter moved to the lower court and regularized their appointment. The application for stay of execution filed in the lower court was however dismissed. It is now contended that the applicant will suffer substantial loss unless his current application is allowed as the intended appeal may be rendered nugatory. It is further contended that no prejudice will be occasioned to the respondent as the decretal amount is already deposited in court.

Counsel for the applicant submits that order XLI Rule 4(6) of the Civil Procedure Rules gives powers to the court to grant orders of injunction provided the process of instituting an appeal has been started. It was maintained that the applicant having annexed an application for proceedings which proceedings have not been provided they have shown that they are not able to get a certificate in accordance with Section 79G of the Civil Procedure Act. The case of *Halai & Another vs Thornton & Turpin 1963 Ltd [1990] KLR 365* and *International Laboratory for Research on Animal Diseases vs Kinyua [1990] KLR 403*, were relied upon.

The application was opposed through a replying affidavit sworn by the respondent Elias M. Mategwa. It was submitted on behalf of the respondent that the application is misconceived as the court has no powers to grant orders for stay of execution pending appeal where no appeal has been filed. It was further submitted that of the three conditions for granting an order for stay of execution provided under Order XLI Rule 4(2) of the Civil Procedure Rules the applicant has only satisfied the condition for providing security. He has not however established any substantial loss that will result if the order for stay of execution is not granted. In this regard the case of *Kenya Shell Ltd vs Benjamin Karuga Kibiru & Another [1982 -88] I KAR 1018* was relied upon. It was further submitted that there was inordinate delay in bringing the application.

I have considered this application. Under Order XLI Rule 4 of the Civil Procedure Rules, an order for stay of execution pending appeal can only be granted either by the court from whose order the appeal emanates or by the court to which an appeal has been made. In this case, there is no appeal pending before this court and therefore this court has no jurisdiction under Order XLI Rule 4 of the Civil

Procedure Rules to grant an order for stay of execution. Reference was made to Order XLI Rule 4(6) of the Civil Procedure Rules. However, that rule is not applicable herein as no order for an injunction pending appeal has been sought. It is not enough that the applicant may have applied for proceedings. A memorandum of appeal ought to have been filed in this court to give this court jurisdiction.

Secondly, the applicant has not satisfied this court that substantial loss will result to it unless an order for stay of execution is granted. A mere allegation that the applicant may not be able to trace the respondent if the decretal amount is released to him is not enough to establish substantial loss. For these reasons, I find no merit in this application. Accordingly, I dismiss it with costs.

Dated and delivered this 30th day of July, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Kiura for the Applicant

Keyonzo for the respondent