



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

**Civil Appeal 438 of 2008**

**SHEIKH ABDI SHAMSUDIN.....APPELLANT**

**VERSUS**

**MARK NGANGA GATHIRU.....RESPONDENT**

**R U L I N G**

Sheik Abdi Shamsudin has lodged an appeal in this court against the decision of the Auctioneers Licensing Board dated 22<sup>nd</sup> July, 2008 in Disciplinary Cause No.35 of 2008. The appellant has now moved this court under Order XLI Rule 4(1), (2) and (3) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking an order staying execution of the orders of the Auctioneers Licensing Board subject of his appeal pending the hearing and determination of the appeal. The appellant maintains that the decision requires him to pay a sum in excess of Kshs.280,000/= to the respondent Mark Nganga Gathiru, which amount the appellant claims he never received. The appellant contends that he will suffer irreparably if the execution of the orders is not stayed. He further maintains that once he pays the amount required the substratum of his appeal will be gone and his appeal which has overwhelming chances of success will thereby be rendered nugatory. The respondent objects to the application contending that it is an abuse of the process of the court, and that the appellant has not satisfied the conditions for granting an order of stay of execution as set out under Order XLI of the Civil Procedure Rules. Counsel for the respondent relied on the following cases:

- (i) *HCCC (Milimani) No.443 of 2001 Equatorial Commercial Bank Ltd & 2 Others vs Retreat Villas Ltd.*
- (ii) *HCCA (Miliman) No.772 of 2005 Equity Bank Ltd vs Taiga Adams Co. Ltd.*

Counsel submitted that the appellant had not demonstrated that he will suffer substantial loss if the order for stay of execution is not granted, nor had the appellant demonstrated that it can furnish security as he was given an order for conditional stay but failed to comply.

I have considered this application. I do note that the substratum of the appeal is the decision of the Auctioneers Licensing Board communicated vide the letter dated 22<sup>nd</sup> July, 2008. The letter which was annexed to the appellant's application indicates that the board ordered the appellant to remit the entire sum in issue in court within 30 days. The appellant was also ordered to pay a fine of Kshs.50,000/= and costs of Kshs.10,000/= to the respondent.

On 18<sup>th</sup> august, 2008, the appellant was granted a temporary order of stay of execution on condition that he deposits the amount ordered by the tribunal into court within 30 days. The appellant has not however complied with that order. This is a clear indication that the appellant is not ready to provide security. I concur with the respondent that the appellant has failed to comply with the conditions provided under Order XLI Rule 4(2) of the Civil Procedure Rules. Accordingly, he is not deserving of the exercise of this court's discretion. His notice of motion dated 13<sup>th</sup> August, 2008 is accordingly rejected.

Those shall be the orders of this court.

Dated and delivered this 26<sup>th</sup> day of November, 2008

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Muturi H/B for Kabue for the appellant

Advocate for the respondent absent