



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal Case 916 of 2005

EAST AFRICAN ENGINEERING CONSULTANT...APPELLANT

VERSUS

ANTONY MILIMU LUBULELAH..... RESPONDENT

R U L I N G

On 24/11/05, the Appellant/Plaintiff herein, moved to this court, by way of a Notice of Motion, under Order 41 Rule 4, Order 50 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, seeking the following orders:

- 1.
2. ...Already spent
3. Stay of execution of the decree and enforcement of

the decree given in Milimani CMCC No. 2082 of 2004 – pending the hearing and determination of the appeal herein.

4. Costs of this application.

The application is supported by an Affidavit by Levi Omondi Ameka, dated 24/11/05, and is on the grounds, **inter alia** that: the applicant is apprehensive that “if the Respondent executes the decree before the appeal is heard and determined it would cause substantial loss to the applicant; the applicant is ready to abide by any terms on security if so ordered by this court; the applicant’s appeal raises serious issues of law.

In opposition, the Respondent, **vide** his Replying Affidavit, filed on 13/12/05 **avers**, **inter alia** that; the appeal has no merit as the appellant’s witness failed to produce his claim form which he admitted in cross-examination showed the accident occurred on the road contrary to his evidence alleging that the accident was off the road; this is a monetary decree in the sum of K.Shs.128,596/- and the appellant has not shown that the Respondent, an Advocate of the High Court, would be incapable of paying, in the event the appeal succeeds; the appellant has not shown what substantial loss they would suffer.

I have carefully gone through the pleadings and submissions by both sides; and I have reached the following findings and conclusions.

Order 41 rule 4 of the Civil Procedure Rules, under which this application is brought stipulates the tenets that an applicant must meet prior to a grant of a stay of execution order. These tenets, as enshrined in sub-rule (2) are that: the applicant/appellant must satisfy the court that he would suffer substantial loss if the stay of execution is not granted; that the application has been made without unreasonable delay, and give such security as the court may order for the due performance of such decree or order as may ultimately be binding on the applicant. Finally, the applicant/appellant must show that he has an arguable appeal with high chances of success.

It is important that each of the four tenets herein above must be satisfied. Put differently, all the four – not one or two or three – tenets must be satisfied before the court can grant an order of stay of execution, pending an appeal.

Looking at the pleadings and the submission, it is clear that the applicant/appellant has not shown what substantial loss it would suffer if the order of stay is not granted. Substantial loss can only be shown if the appellant/applicant satisfies the court that the Respondent is a person of straw, with no capacity to refund/pay the decretal sum if paid to him prior to the determination of the appeal, and in the event the appeal succeeds.

To the contrary, the evidence before me is that not only is the Respondent a person of substance but that he is an Advocate of the High Court, and the appellant had earlier on done investigations and established that fact.

Accordingly, I find and hold that the applicant has not met the conditions set under the law under which the application is brought.

The law is that a successful litigant must not be kept at bay or denied the enjoyment of his successful litigation, unless there is good cause to do so.

Here, there is no cause good or otherwise to deny the Respondent the enjoyment of his successful litigation, other than that there is a pending appeal. And what guarantee is there that even if the stay is granted, the appeal will be successful. Until the appeal is heard and determined, there is no knowing which way the final order will go.

For all the above reasons, I find and hold that the application herein fails.

Applicant/Appellant to pay the costs of this application to the Respondent.

It is so ordered.

DATED and delivered in Nairobi, this 2nd Day of December, 2008.

O.K. MUTUNGI

JUDGE