

REPUBLIC OF KENYA

HIGH COURT AT ELDORET

CIVIL APPEAL 30 OF 2007

ELDORET STEEL MILLS LTD:.....APPELLANT

VERSUS

ELIJAH MOSOTA.....RESPONDENT

RULING

The applicant/appellant **ELDORET STEEL LMILLS LTD** seeks for orders of stay of the decree in Eldoret **CM.CC.NO.1453 of 2004** pending the hearing and determination of this appeal.

The appellant/applicant had been sued by the respondent in the lower court. The respondents claim is not disclosed in these proceedings but the court found infavour of the respondent and gave a money decree. The applicant being dissatisfied by the judgement preferred this appeal. He had made an application before the trial court for stay of execution pending hearing of the appeal but court is told the same was dismissed and hence this application.

It was deponed and submitted that the appeal has high chances of success and if order of stay will not be granted then the appeal will be rendered nugatory. The applicant stated he will suffer loss and that respondent is a man of straw and if the decretal sum is paid to him he may not be able to refund the same if the appeal succeeds.

The appeal was opposed. Mr. Kariuki the counsel for the respondent also deponed and filed a replying affidavit in which he stated that respondent is not a man straw as he runs a matatu business.

The court was told that applicant had made an application for stay in the trial court which was rejected. However provisions of order 41 Rule 4(1) CPR are clear. An application for stay can be made in the appellant court notwithstanding that one had been made in the trial court and the same allowed or rejected. The applicant therefore had a right to come to this court even if he had made an application in the trial court.

The applicant has already appealed. He has stated that the appeal has high chances of success and it will be rendered nugatory if the stay is not granted. This contention was not challenged. The other issue is that respondent was a man of straw and may not be able to refund the decretal sum. This fact was deponed to by the applicant. The respondent did not swear any affidavit to restated that akeremut intended it was his counsel who swore an affidavit to state that he runs matatu business. With respondent the counsel could not swear to such a fact. It is only the deponent who could have done so. The counsel could not say if the respondent is a man of straw or not even if he know his business. He does not run that business and does not know the income of the respondent. That akeremutation that the respondent is a man of straw – was not rebutted. If indeed he is a man of straw he may not be able to refund the decretal sum if the appeal succeeds. That would lead to irreparable loss to the appellant.

In the circumstances I allow the application and order there be a stay of execution of the judgement and decree of the trial court until the appeal is heard and determined. The appellant however should deposit the decretal sum and costs if already assessed in an interest earning account in the joint names of the counsels for the applicant and respondent within the next 30 days.

Costs in the approval.

Dated and Delivered at Eldoret this 3rd day of July,2007

KABURU BAUNI

JUDGE