REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 19 of 2006

[Being an appeal from the Judgement of Mr. N. N. Njagi – S.R.M. in Senior Principal Magistrate's Court at Naivasha – SPMCC No. 924 of 2005 dated 2nd February, 2006]

TERESIA NJERI…….....…….APPELLANT

VERSUS

SOKO HURU TRAVELLERS LTD…….....……..…RESPONDENT

RULING

The applicant in the Notice of Motion dated 21st February, 2006 was the defendant in Naivasha SPMCC NO. 924 of 2005.

By a Judgement delivered in the above suit, the plaintiff's suit was allowed and an order of permanent injunction restraining the defendant by herself, servants, agents, assigns and/or employees and anyone else claiming under her from interfering with the operation of the plaintiff Company.

Being aggrieved with the above decree the applicant filed an appeal against the decision and simultaneously with the filing of the appeal filed this Notice of Motion whereby the applicant is seeking for orders of stay of execution of the above decree.

The grounds advanced in support of the order sought are that the applicant is threatened with execution unless the order of stay is granted. Secondly, unless the stay order is issued the appeal shall be rendered nugatory. Moreover during the hearing of the matter before the subordinate court, the applicant was granted an order of injunction which was later vacated. The execution would lock out the applicant from her passenger transportation business which is her sole source of income and that would occasion her great suffering.

Those grounds are further expounded by the supporting affidavit of the applicant and by he arguments of counsel for the applicant. Counsel submitted that the applicant's appeal has overwhelming chances of success as there are many glaring errors on the judgments which is not based on evidence. Particular emphasize was placed on the evidence by the plaintiff's witness who said the cause of action arose on 10th August, 2005 while the pleadings state that the cause of action arose on 9th August, 2005.

On the part of respondent this application was opposed as lacking merit for failure to comply with the mandatory provisions of order XLI rule 4(1) of the Civil Procedure. The Rules are clear that the

application for stay should first be made in the first Court which delivered the judgement.

The Provisions of Order 41 Rule 4(1) are clear and state as follows:-

"No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to have such order set aside."

Apart from the applicant failing to make the application before the court that issued the decree. This court has to satisfy two conditions that is, the applicant must establish that substantial loss may result unless the order is made and there must be security for due performance which is ultimately binding on the applicant.

I have carefully considered the effect of the decree which essentially is an order of injunction restraining the applicant from interfering with the operation of the plaintiff company. I am not satisfied that this order is capable of causing the applicant a loss of livelihood as it does not mention the respondents parking bay or transport business. Moreover this was an order that was issued after a full hearing of the case. More importantly the applicant has not complied with the mandatory provisions of order 41 4(1) of the Civil Procedure Rules. Besides, no security that would bind the applicant has been provided to this court.

Considering all the above, I find no merit in this application.

Accordingly, the application is hereby dismissed with costs to the respondent.

It is so ordered.

Ruling read and signed at Nakuru on 9th day of August, 2006.

MARTHA KOOME

JUDGE

9.8.2006

Before: Martha Koome – Judge

Mwiti: Court Clerk

Kayai for the appellant/applicant

Kurgat for the respondents

Ruling read and signed at Nakuru on 9th day of August, 2006.

MARTHA KOOME

JUDGE

9.8.2006