

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

Civil Appeal 456 of 2006

ELECTRO SYSTEMS LIMITED APPELLANT

VERSUS

BUSTRACK (K) LIMITED RESPONDENT

RULING

In this application, dated 12th July, 2006, made under Order 41 Rule 4 of the Civil Procedure Rules, the Appellant/Applicant seeks to stay execution of the Ruling and Order of the lower Court delivered on 6th July, 2006, pending the hearing and determination of this Appeal.

The facts giving rise to this appeal are fairly straight forward. The Appellant, relying on an agreement it had with the Respondent's agent, seized and repossessed some eight motor vehicles belonging to the Respondent, on account of the Respondent's failure to settle its debt to the Appellant, amounting to Kshs.747,820/= or thereabout. The Respondent rushed to the lower Court, and obtained an Order for the release of the said motor vehicles. The Appellant is now seeking a stay of that Order. If a stay is indeed granted, the Appellant would continue holding these eight buses pending the determination of this appeal, which could take anywhere up to three years. Meanwhile, storage charges would continue mounting, and the Respondent would be unable to utilize these buses, resulting in huge losses, including deterioration of these unused assets. From a business and practical point of view, that kind of a situation is not in anyone's interest.

All the same, what is before me is an application under Order 41 Rule 4. That rule "fetters" my discretion, as clearly my discretion is not absolute [See ***Visram Ramji Halai vs Thornton Turpin (1963) Limited*** {***Civil Application No Nairobi 15 of 1990 (U R)***}].

Order 41 Rule 4 (2) of the Civil Procedure Rules states as follows:

"(2) No order for stay of execution shall be made under subrule (1) unless –

(a) the Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."

For the Applicant to succeed in this application he must demonstrate to the satisfaction of this Court that substantial loss will ensue if the Order is not granted; that he has filed this application without delay; and that he is willing and able to give such security as is ordered by the Court for the due performance of the decree. That is the plain reading of the Rule, and the onus is on the applicant to satisfy **all** the conditions through his deposition, and not through bold statements from the bar.

Now, let us see if the Applicant has satisfied all the three conditions outlined above. First, this application was clearly made in time – within six days of the Ruling by the lower court. Second, has the Applicant demonstrated what substantial loss, if any, it will suffer if an Order for stay is not granted? In paragraph 12 of the affidavit in support of the application, the Applicant says that it will suffer substantial

loss “as the respondent company is going under and it has no other attachable assets.” This is a fairly serious allegation to make without providing any evidence to back it. That onus is on the Applicant, and in my view has not been discharged. Thirdly, and finally, has the Applicant offered any security? No, none at all – either in the supporting affidavit or in its submissions before this Court.

Accordingly, I find that the Applicant has not satisfied the conditions required for the grant of stay pending appeal, and I dismiss its application with costs to the Respondent. I also vacate the interim orders issued in favour of the Applicant.

Dated and delivered at Nairobi this 5th day of December, 2006.

ALNASHIR VISRAM

JUDGE