

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

Civil Appeal 68 of 2005

LUCY MWANGI T/A MWAWAJI ENTEPRISES APPELLANT

VERSUS

DADAAB INVESTMENTS LIMITED RESPONDENT

RULING

This is an application for stay of execution of the interlocutory judgment and/or decree entered against the Appellant by the lower court, pending the appeal filed herein. The Applicant also seeks stay of sale of the Appellant's goods which have been attached pursuant to the decree of the lower court.

The application has been brought under Order 21 Rule 22 (1) which is clearly the wrong provision of the law. That Order applies where a temporary stay is sought before the court executing the decree which in this case is the lower court.

However, I presume the Applicant is before this Court under Order 41 Rule 4, and I will proceed to determine this application as if it was correctly before me under Order 41, Rule 4.

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.

The Applicant's promptitude in filing this application cannot be faulted. She did so within about three weeks of the delivery of the Ruling of the lower court.

As to substantial loss, the Applicant has not demonstrated what substantial loss, if any, she would suffer if an order of stay was not made. She has not explained how, for instance, she would not be able to recover the decretal sum if she were to succeed in the appeal.

And, finally, the Applicant must be willing to offer security for the due performance of the decree. No such offer has been made. In fact, Counsel for the Applicant submitted that stay should be "unconditional". There is no such thing as "unconditional stay" under Order 41 Rule 4, and he has not persuaded this Court why stay should be "unconditional".

Accordingly, this application must fail, and is dismissed with costs to the Respondent.

Dated and delivered at Nairobi this 16th day of June, 2005.

ALNASHIR VISRAM

JUDGE