

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO 5400 OF 1991

HALL EQUITORIAL LIMITED PLAINTIFF

VERSUS

OLYMPIC FRUIT PROCESSORS DEFENDANT

RULING

The application before me is for stay of execution pending appeal under Order 41 Rule 4. For stay to be granted there must be an appeal pending.

There is no proof that an appeal has been preferred against the decision of the Lower Court – none is annexed to the affidavit in support. Counsel for the applicant handed me the Memorandum of Appeal date stamped 2nd February, 2004, so I will give him the benefit of doubt and proceed with this application on the assumption that an appeal has been preferred.

For the applicant to succeed in an Order 41 Rule 4 application, he must demonstrate to the satisfaction of this Court that substantial loss will ensue if the Order is not granted; that the application has been filed 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.

Unfortunately, none of the above three conditions have been satisfied. The applicant has not shown how he will suffer substantial loss if stay is not granted. He has instead chosen to argue that he has an arguable case, and that his appeal will be rendered nugatory. He relies on a false guarantee, and argues that he is not liable under the guarantee, and that he is not a party to this suit.

At this stage I cannot go into the merits of the appeal. I need to be satisfied on substantial loss. However, there is no averment about substantial loss in the deposition.

Secondly, I note that the Memorandum of Appeal which Counsel handed over to me, was filed on 2nd February, 2004, while this application was filed on 21st July, 2004 – a delay of five months. The applicant has not explained the delay, and has therefore not satisfied the conditions in Order 41 Rule 4.

Finally, there is no offer of security at all. In fact, the Applicant is not willing to offer any security.

Accordingly, none of the conditions outlined in Order 41 Rule 4 have been satisfied and, therefore, this application for stay is dismissed with costs to the Respondent.

Dated and delivered at Nairobi this 22nd day of September, 2004.

ALNASHIR VISRAM

JUDGE