

“Before we can decide this application, this Court must have regard to the requirements of Order XLI rule 2 of the Civil Procedure Rules. Under rule 2, the applicant must satisfy us of two matters. Firstly, we must be satisfied that substantial loss may result to the applicant unless the application is granted. Prima facie this means that if the appeal succeeds, the Respondent will not be in a position to make full restitution. It does not mean, as Mr. Mundavia for the Applicant appears to have suggested, that the Applicant will suffer because he cannot continue the appeal unless the stay is granted. The applicant has not satisfied us on this matter. [S]econdly the rule requires the applicant to give such security as the court may order. The Applicant freely admits that he has no security to offer. [U]pon an application to the learned trial judge for a stay of execution, he took the view that substantial security was necessary. We take the same view, and accordingly this application is dismissed with costs.”

In **Kenya Shell Ltd v. Benjamin Karuga Kibiru & Ano**. (1982 – 88) KAR 1018 (HANCOX, J.A., PLATT & GACHUHI Ag. J.J.A (as they were)), PLATT, Ag. J.A. (as he then was) said as follows at p. 1022:-

“The application for stay made before the High Court failed because the first of the conditions set out in Ord. 41 r 4 of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents would be unable to repay the decretal sum plus costs in two Courts[I] am bound to say that the respondents are right, on the basis of ord. 41 r. 4 of the Civil Procedure Code (sic). There was no evidence of substantial loss, and such loss cannot be inferred in this case.”

The issue before this Court is whether the Applicant has satisfied the requirements of Order XLI Rule 4(2).

In his oral application for stay of execution, Mr. Ahmednasir did not address this court at all on the issue of substantial loss. The Defendant has not demonstrated what substantial loss, if any, would it suffer if stay is not granted. Nor is there any evidence that the Plaintiffs would be unable to repay that amount and costs in the event of a successful appeal by the Defendant. Although the Defendant has offered security, that in itself is no reason to deny the Plaintiffs the fruits of their judgment. Accordingly, the Defendant’s application for stay of execution is hereby dismissed with costs to the Plaintiffs.

DATED and DELIVERED at NAIROBI this 9th day of July, 2001.

ALNASHIR VISRAM

JUDGE.