



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Commercial Civil Case 39 of 2010**

**MABATI ROLLING MILLS LTD.....PLAINTIFF**

**VERSUS**

**M. A. BAYUSUF & SONS LTD.....DEFENDANT**

**Coram:**

Mwera J.

Njeru for Plaintiff/Respondent

Omondi for Defendant/Applicant

Furaha Court Clerk

**R U L I N G**

On 24<sup>th</sup> May, 2012, the defendant company filed a notice of motion under Order 42 rule 6 of Civil Procedure Rules and sections 1A, 1B, 3A of Civil Procedure Act with the sole prayer:

(i) that the execution of the order made on 27<sup>th</sup> March, 2012 be stayed until the determination of the applicant's appeal.

Two grounds stated that the applicant was dissatisfied with the said order which if executed would occasion it substantial loss.

In the supporting affidavit, a notice of appeal was exhibited adding that the undersigned had on 27<sup>th</sup> May, 2012 directed that the applicant do make a deposit in court US\$ 339,568.02 in sixty (60) days. To make such a deposit was considered by the applicant to constitute substantial loss. The applicant neither proposed an alternative to be deposited nor placed before court audited accounts or such other evidence to demonstrate loss.

On 24<sup>th</sup> May, 2012 an interim stay order was granted.

In the plaintiff's replying affidavit it was averred that the applicant had not demonstrated how it stood to suffer substantial loss and that the present application had not been made timeously. It was added that the deposit in court would be refunded in the event of a successful appeal.

Both sides submitted, in essence, each maintaining its stand as per the affidavits save to file authorities. Ofcourse each side went into the background of their dispute essentially in a manner of

presenting/opposing the claim. That would rather await trial of which both sides were directed to prepare, but do not appear to have proceeded in that direction.

In the plaintiff's submission it was stated that under Order 42 rule 6 Civil Procedure Rules for one to get a stay order one must express willingness to abide by the court's order to provide security for due performance and that the defendant had not done that at all. It had not demonstrated how it stood to suffer substantial loss if the stay order was not granted and the case of **Dr. Daniel Chebutuk Rotich vs. Murgan Kimaset Chebutuk** e-KLR 2005 was cited. Finally, that the application was brought after two months delay from the date of the ruling, without explanation.

On its part the defendant argued that it had a fundamental right to be heard on its (intended) appeal and requiring it to deposit what was termed a "*staggering*" sum as ordered would militate against that right. And that this application was brought within the sixty (60) days in which the deposit was to be made.

In this matter save for claiming that the deposit of US\$339,568 was "*staggering*", there is no evidence in what context it is staggering. If it will constitute a substantial loss, it must be shown in the totality of circumstances/consequences e.g. the applicant's finances. Such circumstances were not shown to the court and the court cannot assume them. Even if the sum is considered colossal but in what context? The application may have been filed timeously but there was no alternative offer made to the ordered deposit or willingness to abide with an order of security for due performance. This court is minded to hold that in the circumstances of this case, the plaintiff deserved the orders to deposit security.

In sum, this application fails with costs.

Delivered on 4<sup>th</sup> October, 2012.

**J. W. MWERA**  
**JUDGE**