



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 40'A' OF 2009

ELDORET STEEL MILLSAPPELLANT

VERSUS

ERNEST NJEKA OMBANGO.....RESPONDENT

RULING

The Notice of Motion dated 10th February 2011 is for the basic order that there by a stay of execution of the orders made on 30th December, 2010 pending the hearing and determination of this application. If this be the case, then the determination of this application today would render the application spent. However, in as such as the application is made under Order 42 Rule 6 of the Civil Procedure Rules 2010, it would appear that there was an oversight on the part of the applicant in failing to indicate that the application is essentially for stay of execution of the orders made on 30th December 2010 pending the hearing and determination of an intended appeal.

A look at the grounds in support of the application reveals that the application is for stay of execution pending appeal rather than the hearing and determination of the application. The omission by the applicant is on form rather than substance. In that regard, the omission is excusable and does not render the application spent and/or fatally defective.

Be that as it may, Order 42 Rule (6) (2) provides for conditions for the grant of stay of execution pending appeal. **Firstly**, the court must be satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay. **Secondly**, security for the due performance of the disputed decree or order as may ultimately be binding on the applicant has to be given as the court orders.

Having considered the application in the light of the objection thereto by the respondent and also having heard the rival arguments advanced by the parties, this court is satisfied that the applicant is ready and willing to provide security as may be ordered.

However, this court is far from being satisfied that the applicant may suffer substantial loss if stay of execution is not granted. Nothing in the supporting affidavit demonstrates that there is the likelihood of the applicant suffering substantial loss if stay is not granted. Whether the order made by the court on 30th December 2010 was irregular, improper and/or unlawful is a matter which will best be determined after the hearing of the intended appeal. This court cannot purport to sit on appeal against an order made by a court of equal jurisdiction.

In the end result, the present application is devoid of merit. It is hereby dismissed with costs.

J.R. KARANJA

JUDGE

(Read and signed this 3rd day of March 2011 in the presence of M/S Khayo holding brief for Nyairo for respondent and Mr. Omboto holding brief for Miyienda for applicant).