

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 188 of 2008

SHAILESH RAJANI 1ST PLAINTIFF

KENYA UNITED STEEL CO. LTD. 2ND PLAINTIFF

VERSUS

PONANGAPALLI VENKATA ROMANA RAO

***t/a* TACT CONSULTANCY SERVICES DEFENDANT**

RULING

Application by notice of motion dated 27/2/09 seeking order for stay of execution of decree of this court made on 6/2/2009 pending hearing and determination of appeal. Notice of appeal has been filed on 10/2/2009 and sufficient cause is shown as required under Order 41 rule 4 (1). The appeal has high chance of appeal. There is a right of appeal in this case. On the issue of substantial loss if the order of stay is not granted it is true the plaintiff has admitted that they are in financial difficulties and therefore if payment is made to them it shall be difficult to recover the same and the applicant has offered a security by way of banks guarantee in the sum of Kshs.3,835,000/=. There has been no delay in filing this application.

The defendant state that there is no demonstration of substantial loss. There is no evidence that the applicant can refund the decretal amount if the appeal is successful. The defendant has relied upon the decision of the court in HCC No.106 of 2002 – Kenya Oil Co. Ltd. vs. Westmount (Power) (Kenya) Ltd. where the court must be satisfied that substantial loss may result if orders are not granted. That is if appeal succeeds the respondent would not be in a position to make a full restitution.

(a) The applicant has to give such security as the court may order.

(b) That application has been made without unreasonable delay.

In that case the applicant was willing to furnish bank guarantee

to the total of Kshs.3,835,000/=. Mr. Ndegwa relied on the decision of court in regarding the requirement of Order 41 rule 2 which requires a demonstration of substantial loss. There was long argument by both sides. The dispute relates to arbitration proceedings.

In this matter the amount of decree is substantial and as applicant is already in poor financial position it may not be able to refund in the event of the success of appeal. I am of the view that this is a reasonable case to grant stay pending appeal.

I grant the stay on condition that the applicant shall provide a security by bankers' guarantee in the sum of Kshs.3,835,000/= properly drawn and approved by counsel for the respondent. Such guarantee to be filed within the next 7 days and in default the stay granted shall lapse.

The applicant shall pay the costs of this application.

Orders accordingly.

DATED and DELIVERED at Nairobi this 4th day of May 2009.

JOYCE N. KHAMINWA

JUDGE