



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1887 OF 1994

KENYA POWER AND LIGHTING COMPANY LTD.....PLAINTIFF

versus

NJILUX MOTORS

LIMITED.....DEFENDANT

R U L I N G

This is an application by Notice of Motion under order 41 Rule 4 of the Civil Procedure Rules for an order that there be a stay of execution of the decree/order of this court dated 21st May, 1998 pending the hearing and determination of the intended appeal.

The grounds upon which the application is based have been set out. there is also an affidavit in support of the application sworn by one Peter Murigi Njirwa, the Managing Director of the Applicant/defendant company. The said application is opposed and I have the replying affidavit sworn by one Cyrus Kabiu Njungu the Distribution Manager (Design and Construction) of the plaintiff Company.

The learned counsel appearing for the parties herein have also made their submissions which I have on record. Some authorities have also been cited.

The applicant has filed a Notice of Appeal. It has on undoubted right of Appeal. For an application for stay to succeed, the applicant has to satisfy the court that substantial loss may result unless the order is made and that the application has been made without unreasonable delay. The applicant may also be required to provide security for due performance of such decree or order as may ultimately be binding on the applicant.

I have read the cited cases and the guiding principles set out in Erinford Properties Ltd -v- Cheshire County Council (1974) Z All E.R. 443. Each case however should be decided on its own peculiar facts and circumstances.

In the judgment sought to be stayed, I gave the reasons for arriving at the findings therein. In dismissing the applicants case I found inter alia that, the letter of allotment was in the name of Njima Investments and not the applicant herein. This has been conceded in paragraph 4 of the affidavit in support of the application. However M/s Njima Investments did not obtain title thereto and as matters stand now the plaintiff/respondent holds the title in respect of the suit property. That aspect I have addressed in the said judgment.

Both in the application and the affidavit in support of the same, it has been stated that the defendant will suffer substantial loss and will be ruined if an order for stay is not granted.

On the other hand, the affidavit by Mr. Njungu has set out the nature of the project the plaintiff is about to undertake the cost thereof and the loss that will be incurred if stay is granted. On the other hand, the affidavit by Mr. Njungu has set out the nature of the project the plaintiff is about to undertake the cost thereof and the loss that will be incurred if stay is granted.

Substantial loss is that loss may not be made good by monetary compensation. And so, a party is bound to show what such loss is and why an award of damages will not be sufficient compensation. With

respect, the applicant has fallen short of stating what loss will be suffered if stay is not granted. One would have expected the applicant to show that an alternative parcel of land will not be suitable for the same business in the event the appeal succeeds. No figures have been given and one is left to speculate.

With respect, therefore, the applicant has failed to pass the basic test for the grant of stay pending the intended appeal. Consequently the application is hereby dismissed with costs. Order accordingly.

Dated and delivered at Nairobi this 21st day of September, 1998.

A. MBOGHOLI MSAGHA

JUDGE