



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1580 OF 1991

LAKE TURKANA EL MOLO LODGES

LOIYANGALANI LTD.....PLAINTIFF

VERSUS

ATTORNEY GENERAL.....DEFENDANT

RULING

This is an application by way of Notice of Motion for an order that there be a stay of execution of the judgment delivered on 13th February, 1998 pending appeal. The application which is under Order 41 Rules 3&4 of the Civil Procedure Rules and section 75 of the Civil Procedure Act is supported by an affidavit of the learned counsel for the defendants. The learned counsel for the plaintiff has filed grounds of opposition and a replying affidavit.

The defendants have filed a Notice of Appeal and so under Order 41 Rule 4(4) the appeal is deemed to have been filed. An order for stay of execution shall not be made unless the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay. The court may also order provision of security. (see O.41 R.4(2) (a) & (b). Paragraph 10 of the affidavit in support of the application reads as follows:-

“11. THAT the applicant will suffer substantive loss as the applicant will pay a substantive sum of Kshs. 75,540,890.10 plus interest”

Other than that statement the applicants have not provided any evidence of the alleged substantial loss. The amount of money payable to a successful litigant is not evidence of substantial loss. And so, the first condition has not been satisfied by the applicants. My reading of Rule 4(2) (a) would mean that even if substantial loss is shown may result, the applicant, the application has to be made without unreasonable delay.

The application dated 7th July, 1998 was filed on 31st July, 1998 well over four months from the date of delivery of the judgment. The applicants did not need the proceedings to lodge an application for stay. They did not move expeditiously and I find the delay inordinate.

The order sought by the applicants is discretionary which discretion has to be exercised judicially. The plaintiff has a monetary decree in its favour and is entitled to the fruits thereof. On the other hand, the defendants have an undoubted right of appeal but which is yet to be filed considering that they are already out of time. As justice has to look at both sides I am inclined to grant a stay of execution on the following terms.

(a) The defendants/applicants shall pay the plaintiff a sum of kshs. 35,000,000 (kshs.35 million) which is just about half of the decretal sum awarded.

(b) The said payment shall be effected within 14 days from the date hereof.

(c) The defendants/applicants shall also pay  $\frac{1}{2}$ (half of the taxed costs to the plaintiff within the same period of 14 days from the date hereof.

(d) In default of the said payments execution proceedings shall continue.

(e) Costs in the cause.

Orders accordingly.

Dated at Nairobi this 10th day of December, 1998.

A. MBOGHOLI MSAGHA

JUDGE