



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

**Civil Appeal 89 of 2006**

**EVANS MALAGU & 2 OTHERS..... APPELLANTS**

**VERSUS**

**SAMKEN LIMITED..... RESPONDENT**

**RULING**

This application, by way of Notice of Motion, dated 17/2/06, under Order 41 rule 4(1); 6 of the Civil Procedure Rules, seeks the following orders:

- 1.....]
- 2.....]... Already spent
- 3.....]
4. Stay of execution of the judgment of 15/4/05 pending the hearing and determination of the appeal.
5. Injunction against, and restraining the Respondent, its agents, servants, selling or otherwise dealing with attached property belonging to the appellants pending the hearing and determination of the appeal herein.
6. Costs.

The application is supported by an Affidavit by Andrew Lone Nangurai and is on the grounds, *inter alia* that; the matter proceeded *ex parte* at the Chief Magistrate's Court and judgment entered against the appellant/applicants on 15/4/05; pursuant to the judgment, Respondent has a decree and has secured warrants of attachment and sale in execution of the decree and carried the attached goods in execution of the decree; the appellants Chamber summons of 23/1/06, seeking stay of execution was dismissed; appellant stands to suffer irreparable loss if the stay is not granted.

In opposition, the Respondent avers, **inter alia**, that all the statements by the appellants are an abuse of the court process; that appellant/ applicants have not complied with the conditions of Order 41 rule 4 of the Civil Procedure Rules, under which the stay application is made.

Having carefully perused the pleadings and considered the submissions by Learned Counsel for both sides, I have reached the following findings and conclusions.

Order 41 rule 4 of the Civil Procedure Rules, under which the stay application herein is brought, has specific conditions which an applicant must meet as condition precedent to a grant of the stay of execution order. These tenets are: evidence of substantial loss that would be suffered if the stay is not granted; timeliness of making the application **vis-à-vis** the Ruling or judgment; offer of such security as the court may order for the due performance of such decree or order as may ultimately be binding on the appellant/applicant, and evidence that the appeal is arguable. [It has high chances of success].

This court has repeatedly held that all the four tenets of Order 41 rule 4 of the Civil Procedure rules, not one or some, but **all** must be satisfied before an order of stay of execution pending appeal can be granted. [See Equity bank Ltd. Vs. Taiga Adams Co. ltd. HCCCA. 772/05; CARTER & SONS LTD V. DEPOSIT PROTECTION FUND BAORD, Civil Appeal No. 291 of 1997]

A quick perusal of the applicant's pleadings shows that the only condition under the requisite provisions that is met is that the application was made without unreasonable delay. The Ruling against which the appeal herein relates was delivered on 10/2/06, [the Appeal – Memo of Appeal filed on 17/2/06] and this application made on the same date i.e. 17/2/06 and filed in court the same date.

Other than the timelines of making the current application, the appellants/applicants have not complied with any of the other three (3) conditions stipulated under Order 41 rule 4 of the Civil Procedure Rules. No security is offered; no evidence of the substantial loss (not irreparable loss) that would be suffered.

Perusal of the pleadings shows that the appeal may be arguable – has good chances of success. But even granting that benefits of the doubt, that would still not satisfy the conditions of the provisions under which the application is brought. And those conditions are mandatory. For instance Order 41 rule 4(2) provides

**“No order for stay of execution shall be made under Sub rule (1) unless”**

then follows the conditions outlined herein above

In conclusion, the learned counsel for the applicant/appellants admitted, during the hearing and in the cause of his submissions, that the above mandatory conditions had not been complied with by the applicants.

That sealed the fate of the application herein.

All in all, and for the above reasons, the Notice of Motion herein, dated 17/2/06 is hereby dismissed with costs to the Respondents, and against the applicant/appellants.

DATED and delivered in Nairobi, this 14<sup>th</sup> day of March, 2007.

**O.K. MUTUNGI**

**JUDGE**