



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 579 OF 2018**

**MERIDIAN ACCEPTANCES LIMITED.....APPELLANT**

**VERSUS**

**BOBJANE CREDIT COMPANY LIMITED.....RESPONDENT**

**RULING**

1. In the Notice of Motion dated 7<sup>th</sup> December 2018, the appellant *Meridian Acceptances Limited* (the applicant) seeks two substantive orders in prayer (c) and (d) of the motion. In prayer (c), the applicant beseeches this court to grant fresh orders of stay of execution of the judgment delivered by *P. N Gesora* on 6<sup>th</sup> November 2018 pending the hearing and determination of Civil Appeal No. 550 of 2018 while in prayer (d), the applicant prays for orders of stay of any proceedings in CMCC No. 3427 of 2013 pending the hearing and determination of Civil Appeal No. 550 of 2018.

2. In the grounds anchoring the motion and in the supporting affidavit sworn by *James Ndwigah Muchongu*, a director of the applicant, the applicant makes it clear that this appeal challenges the ruling delivered by the trial court on 6<sup>th</sup> November 2018 in which the learned trial magistrate gave conditional stay of execution of the judgment and decree issued in the respondent's favour in CMCC No. 3427 of 2013 pending the hearing and determination of Civil Appeal No. 550 of 2018. The applicant is aggrieved by the conditions imposed by the trial court in granting the aforesaid stay which in his view are unjust and unreasonable and wants this court to grant fresh orders of stay on terms it deems fit and just.

3. The application is opposed. *Patrick Kinyua Njagi*, a director of the respondent swore a replying affidavit on 11<sup>th</sup> January 2019 in which he deponed *inter alia*, that the current appeal is a waste of judicial time because the appellant was appealing against the trial court's decision on an application for stay pending appeal and at the same time making an application for stay in this court meaning that a determination of the application will defeat the purpose of the appeal; that denying or granting stay of execution is dependent on the exercise of the court's judicial discretion and that in granting conditional stay on terms set out by the trial court, the learned trial magistrate properly exercised his discretion after he was satisfied that the respondent was in a position to refund the decretal sum if the appeal succeeded; that the instant application was a scheme meant to frustrate the respondent from accessing the fruits of its judgment.

4. The application was canvassed by way of written submissions which I have duly considered. I have also considered the application, the affidavits on record together with all their annexures.

Having done so, I note that though the application seeks to stay execution of the trial court's judgment and to stay proceedings in the lower court pending the disposal of the appeal filed in HCCA No. 550 of 2018, it was filed in a different appeal registered as HCCA No. 579 of 2018. This court is therefore being asked to stay execution of the trial court's judgement and to grant fresh orders of stay pending the hearing of a different appeal other than the one filed by the applicant in this matter. This in my view is to say the least highly irregular and unprocedural.

The applicant ought to have filed the instant application in HCCA No. 550 of 2018 which was filed in this court on 20<sup>th</sup> November 2018 as evidenced by the court's date stamp on the memorandum of appeal annexed to the supporting affidavit marked as exhibit "JWMI". The applicant did not disclose why it chose to file the application in the instant appeal and not in HCCA No. 550 of 2018 which is the appeal that challenges the validity of the trial court's judgment.

5. Since the aforesaid appeal is not currently before me, I am unable to ascertain the status of the appeal, that is, whether it is still pending or whether it has already been determined. With the material placed before me, it is also impossible for me to establish whether any interlocutory orders had already been made by the court pending determination of the appeal if the same is still pending.

6. The fact that the applicant chose to file the instant application in the current appeal instead of doing so in the appeal in which stay orders are sought is proof that the application is not only mischievous but that it amounts to an abuse of the court process. Given the facts disclosed in the application, it is my finding that the respondent's claim that the application was filed with the intention of frustrating or delaying the realization of the fruits of its judgment is not farfetched.

7. For all the above reasons, I am satisfied that the application is not merited and it is hereby dismissed with costs to the respondent.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 24<sup>th</sup> day of May, 2019.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

No appearance for the appellant though duly notified

No appearance for the respondent though duly notified

Mr. Salach: Court Assistant