



**REPUBLIC OF KENYA**

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

**COMMERCIAL SUIT NO. 13 OF 2016**

**NATIONAL INDUSTRIAL CREDIT BANK LIMITED.....APPELLANT**

**VERSUS**

**SAMUEL ORINDO MANANI OMOKAYA.....RESPONDENT**

**RULING**

1. By a notice of motion dated 11.4.18 brought under Section 1A, 1B, and 3A of the Civil Procedure Act and Order 22 Rule 22, Order 42 rule 6, Order 51 rule 1 and all enabling provisions of the law, the applicant/appellant prays for orders that

a. ....

b. ....

**c. There be a stay of execution for costs herein and herein and any consequential orders pending the hearing and determination of the intended appeal**

**d. Costs of this application do abide the outcome of the appeal**

2. The application is based on the grounds among others that the appellant is aggrieved by the judgment in which its suit was dismissed with costs; that respondent's Bill of Costs has already been taxed; that the appeal has a high chance of success and it may be rendered nugatory since respondent may be unable to refund the costs.

3. The application is supported by an affidavit sworn on 11th April, 2018 by Kenneth Mawira, Assistant Legal Manager of the appellant who reiterates the grounds on the face of the application. He avers that the appellant is ready and willing to abide by any conditions that the Court shall order in granting the stay of execution of costs herein pending the hearing and determination of the appeal. Attached to the affidavit is a copy of Notice of Appeal filed on 11th April, 2018 marked **KMI**.

4. The application is opposed on the grounds set out in the respondent's grounds of opposition filed on 16th April, 2018 in which it is averred that applicant has not met the threshold set under the provisions of Order 42 rule 6 of the Civil Procedure Rules.

5. I have considered the application in the light of the supporting affidavit and the grounds of opposition. I have also considered respondent's written submissions filed on 4th May, 2018.

6. Order 42 (6) of the Civil Procedure Rules provides:

**(2) No order for stay of execution shall be made under sub rule**

**(1) Unless—**

***a. The court is satisfied that substantial loss may result to the applicant unless the order is made***

***b. That the application has been made without unreasonable delay; and***

***c. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.***

**i. Unreasonable delay**

7. This notice of motion herein was filed on 11th April, 2018 which was 1 month and 20 days after the Costs sought to be stayed were taxed. It is my considered view that the application was filed without delay.

### **ii. Substantial loss**

8. There are a myriad of cases on what constitutes substantial loss. In Civil Appeal No. 186 Of 2007 Standard Assurance Co. Ltd –Vs- Alfred Mumea Komu the Court stated-

*“Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. That is what has to be presented. Therefore without this evidence, it is difficult to see why the respondents should be kept out of their money.”*

9. Similarly in Civil Case No. 41 Of 1995 United Builders & Contractors (Africa) Limited –Vs- Standard Chartered Bank Ltd the Court stated-

*“If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other suits.”*

10. From the affidavit evidence, the applicant has not established what substantial loss it would suffer if the order of stay of execution is not granted.

### **iii. Security**

11. Security is a legal requirement under 42 (6) (2) (c) of the Civil Procedure Rules. It has been averred that the appellant is ready and willing to abide by any conditions that the Court shall order in granting the stay of execution of costs herein pending the hearing and determination of the appeal. The respondent has not demonstrated that he would be in a position to refund the costs in the event that the appeal succeeds.

### **Decision**

12. Although I have found that the applicant has not established substantial loss, it has offered security for the due performance of the decree herein. The overriding objective of the court is to exercise latitude in its interpretation of the law so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out.

13. Section 3A of the Civil Procedure Act Cap 21 Law of Kenya provides that:

*“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”.*

14. Consequently and for the reasons stated hereinabove, I find that it would be in the interest of justice to exercise my discretion in favour of the applicant.

15. The upshot of the foregoing is that the notice of motion dated 11.4.18 is considered and allowed on the following conditions:

a. *The applicant deposits the total taxed costs in an interest earning account in the names of both advocates within 60 days from today's date*

b. *Costs of this application shall abide the outcome of the appeal*

**DATED AND DELIVERED THIS 24<sup>th</sup> DAY OF May 2018**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

**Court Assistant - Felix**

**Appellant/Applicant - N/A**

**Respondent - Ms. Awinja holding brief for Ms. Nasiloli**