REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION – MILIMANI

CIVIL CASE NO. 1649 OF 2001

PRIME BANK LTD……………..…………………….……PLAINITFF

VERSUS

DOMINIC ALOIS GEORGE OMENYE T/A OMENYE & ASSOCIATES.……………..…………DEFENDANT

RULING

By this application the defendant/applicant prays for orders that there be a stay of the warrant of arrest issued against him by the Deputy Registrar on 26th April, 2010, pending the hearing of this application. He also prays that the warrants of arrest issued by the Deputy Registrar on 26th April, 2010 be set aside, vacated and/or discharged, and the defendant's notice of motion dated 18th April, 2006 be heard and determined on its merits.

The application is dated 27th April, 2010, and is brought under Order XXI Rules 22 and 91 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act. It is supported by the annexed affidavit of Dominic A G Omenye, the defendant/applicant, and is based on some 10 grounds which are set out on the face of the application. It is also opposed by the replying affidavit sworn by Alka Shahi, the Senior Manager – Credit of the plaintiff/respondent bank.

The applicant's main contention is that by the time the respondent applied for a warrant for the arrest of the applicant, there were some orders for stay of execution which were still in force.

On the other hand, the respondent's case is that at the time of filing and hearing of the application for the issue of warrants for the arrest of the applicant, the order for stay of execution had expired. The main issue for determination is whether or not there was in force an order for stay of execution when the respondent applied for a warrant for the arrest of the applicant.

With leave of the court, both parties filed their respective skeleton submissions. After considering the pleadings and those submissions, I note that the chronology of this matter is that judgment in this case was entered on 25th October, 2004. The defendant/applicant thereafter filed an application for stay of execution pending the hearing of the appeal. When that application first came for hearing on 16th May, 2006, an interim order of stay was granted *ex parte*. The matter was thereafter mentioned severally and on each occasion the interim orders were extended. However, when the matter came for recording of a settlement before Warsame J, on 27th April, 2006, neither a settlement was recorded nor were the interim

orders extended. For that reason, it is not correct for the applicant to contend that the learned Judge "**noted**" the status quo. If he made a mental note or commented on their extension informally, it was never reduced into writing. Therefore, the interim order of stay became spent. The stay was thereafter extended during the subsequent mentions until 27th April, 2006 when the matter came before Warsame J, for recording a consent. However, the interim orders were not extended at that hearing.

The respondents strong contention is that by the time the applicant applied for the warrant of arrest, there were in force some order for stay of execution in particular, the respondent states in paragraph 7 of its grounds upon which the application is based that when the matter was mentioned before Warsame J, on 18th June, 2007, the learned judge "**stood over the matter generally noting the orders of status quo was until (sic) the hearing and determination of the application and therefore the issue of extension was superfluous**".

Unfortunately, this statement is factually incorrect. As outlined above, the correct position is that when the matter last came before Warsame J, on 18th June, 2007, it was stood over generally. However, the learned judge neither addressed nor noted anything to do with the order of status quo. In sum, he did not extend the interim orders as alleged or at all, with the consequence that those orders lapsed on that date.

From the above account, it is obvious that when the notice to show cause was issued, there were no interim orders in force. Therefore, there was nothing to bar the application for the issue of the warrant of arrest. The failure on the part of the applicant to attend court and show why he should not be committed to jail inevitably attracted the only consequence, which was an application for the issue of a warrant of arrest.

For the above reasons, the steps taken by the respondent were in tandem with both law and procedure. That renders the application for stay of execution unmeritorious and the same is hereby dismissed with costs to the respondent.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 18th day of July, 2011.

L NJAGI
JUDGE