



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CIVIL APPEAL NOS. 140, 141, 142 & 143 OF 2011**

**K-REP BANK LIMITED.....APPELLANT**

**VERSUS**

**GEORGE A. SINO T/A JONE BROOKS CONS. LTD.....RESPONDENT**

**RULING**

The applicant's application is dated 27<sup>th</sup> September 2011 praying for the following orders:-

**(i) That a stay of proceedings in Misc Civil Application No. 16 of 2011 be and is hereby granted pending the hearing and determination of this application**

**(ii) That a stay of execution in Misc Civil Application No. 16 of 2011 be granted pending the hearing and determination of the appeal.**

**(iii) That costs of this application be provided for.**

The same is supported by affidavit of one **Josephine Musembi** when this matter came up for hearing it was mutually agreed by the counsels for both the applicant and the respondent that the outcome of this application shall apply in equal force to the following other files namely **Kisumu Civil Application No. 141, 142 and 143 of 2011.**

From the averments in the affidavit of Josephine Musembi all that the applicant is asking for is stay pending an appeal which they have preferred against the respondent in this court. The same is as a result of taxation proceedings before the lower court. The respondent did file grounds of opposition in opposing the said notice of motion.

I have perused the application carefully together with the annexures thereon. I have further seen the grounds in opposition of the said application and further heard the able counsels for both parties.

Under the provisions of order 42 (1) and (2), this court shall grant stay only if it's satisfied that there is sufficient grounds to do so and in particular that there is a good ground of appeal and that if stay isn't granted the appellant may suffer substantial loss. It has to satisfy also the preconditions of security.

The Ruling in the lower court was delivered on 7<sup>th</sup> September 2011. The applicant's vide the provisions of Rule 55 (4) of the Auctioneers Rules 1997 which states:-

**“An application from a decision of a registrar or a magistrate or the Board under Sub Rules (2) and (3) shall be to a judge in Chambers.”**

**55 (5) The Memorandum of Appeal by way of Chamber Summons setting out the grounds of the appeal shall be filed within seven (7) days of the decision of the registrar or magistrate”.**

The Ruling in the lower court was decided on 7<sup>th</sup> September 2011. Seven (7) days would mean at least by 14<sup>th</sup> September 2011 the applicant ought to have filed the said appeal.

The Appellant filed it's Memorandum of Appeal on 28<sup>th</sup> September 2011 clearly the same doesn't comply with Rule 55 quoted above. My assumption is that the applicant filed the same as though it was a normal Civil suit process. It must be emphasized that what was in contention in the lower court was an Auctioneers bill which had been filed by way of a Miscellaneous Application. If indeed the legislature intended that the appeal from the registrar or the magistrate be filed in the normal procedure under Order 42 of the Civil Procedure Act then it would have provided the means under Rule 55 of the Auctioneer Rules 1997. For the above reason this application ought to fail.

It has been argued by the counsel for the applicant that the respondent is incapable of repaying the money if the sum already deposited in court is released to the applicant. This presumption is wrong. No affidavit of means of the respondent has been adduced to show that indeed the respondent is incapable of paying back. Needless to say, since there is no such appeal on record it shall be pointless at this juncture to stop the respondent from enjoying the fruits of his labour. Perhaps if the applicant had satisfied me that it had valid appeal on record I would have considered.

My attention is drawn to the provisions of Section 159 (d) of now new constitution where it states:-

**“Justice shall be administered without undue regard to procedural technicalities”.**

In the instant case, the applicant has not brought itself to at least a proper perview of the rules. It's far away and with due respect this very relevant Section of our constitution cannot salvage the applicant's application. I therefore dismiss the applicant's application with costs to the respondent. Any earlier order of this court is vacated.

Orders accordingly.

**Dated, signed and delivered this 26<sup>th</sup> day of October 2011.**

**H. K. CHEMITEI  
JUDGE**

*HKC/aao*