



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAKURU**

**Civil Case 1 of 2005**

**SALMON NDALO OBEDE.....APPLICANT/PLAINTIFF  
VERSUS  
NATIONAL BANK OF KENYA LIMITED...REPODENT/DEFENDANT**

**RULING**

The respondent in this application has sued the applicant for wrongful dismissal. The applicant filed a defence and a counterclaim. On 16<sup>th</sup> October, 2006, the applicant applied for leave to amend the counter-claim. The respondent opposed the application. But in her ruling delivered on 27<sup>th</sup> February, 2009 Koome, J dismissed the application prompting the instant application in which the applicant seeks an order of stay of proceedings pending the hearing and determination of the appeal in the Court of Appeal.

The application is based on the grounds that while the appeal is pending hearing the respondent may list the suit for hearing, thus rendering the appeal nugatory; that the intended appeal is arguable with high chances of success; that no prejudice will be caused to the respondent while further proceedings of the suit will prejudice the applicant and; that the application has been made without unreasonable delay.

*H.C.C.C.NO.1*

*OF 2005*

The respondent has filed both a replying affidavit and grounds of objection to the effect that the application is misconceived, bad in law and is without merit. That it is an abuse of the court process and offends **Order 41 rule 1(1)(2), rule 4 (1)(2)(3)(4) (5) and (6), rule 8B (4)(a) to (g)** of the **Civil Procedure Rules** and **Rules 74, 81 and 82** of the **Appellate Jurisdiction Act**; that a stay of proceedings can only be granted where an appeal has been instituted; that there being no appeal instituted, there cannot be talk of a high chance of success; that the ruling from which the applicant wishes to appeal was on a preliminary point of law and no appeal can be instituted without leave; that the applicant has delayed, without explanation to file the record of appeal.

I have considered the application and the foregoing averments. I have also read the authorities submitted by both sides. It should be clear that both the applicant and the respondent have spend substantial part of their arguments submitting as if the application has been brought under the provisions of the **Court of Appeal Rules** – particularly **rules 5(2)(b), 74, 81 and 84**. All the authorities except one also relate to these provisions. I shall return to these provisions shortly.

This application is premised on the provisions of **Order 41 rules 4** of the **Civil Procedure Rules**, which vests in the High Court power to grant a stay of execution or proceedings if sufficient cause

*H.C.C.C.NO.1*

*OF 2005*

is shown. The rule further stipulates under **subrule (2)** three other conditions which must be satisfied in an application for stay of execution.

It is noted that under that **subrule (2)**, the conditions are specifically to be satisfied in an application for stay of execution as opposed to an application for stay of proceedings. Visram, J (as he then was) observed this lacuna in **Prime Bank Ltd. Vs. Esige**, (2005), KLR 160, and recommended that the Rules Committee relooks at the provision in order to make its application clearer. The Judge then

went ahead to apply **Rule 5(2)(b)** of the **Court of Appeal Rules** in an application seeking stay of proceedings in the High Court. Whether that was correct is not for me to say. Suffice to state though, that there is a clear distinction and different considerations between this court's jurisdiction in matters of stay and the jurisdiction of the Court of Appeal. For instance, the latter's jurisdiction is premised on two well known grounds, namely, that the intended appeal is arguable and not frivolous and secondly that the intended appeal will be rendered nugatory if the stay is not granted and the appeal were to succeed.

The jurisdiction of the High Court governed by **Order 41 rule 4** of the **Civil Procedure Rules** outlines four (4) conditions to be met before a stay can be granted, namely that there must be sufficient cause; that the applicant may suffer substantial loss unless an order of

*H.C.C.C.NO.1*

*OF 2005*

stay is granted; that the application for stay must be brought without unreasonable delay and; that the applicant must give an undertaking as to security. In my considered view therefore, it is not open for this court to consider whether the appeal is arguable. That can only be for the final court.

For these reasons, I find that as things stand, all this court has to consider in an application for stay of proceedings is whether there is sufficient cause. Has the applicant demonstrated sufficient cause?

The applicant has challenged, in the Court of Appeal, this court's (Koome, J) decision dismissing his application for amendment. What harm, loss or prejudice does the applicant stand to suffer if the suit were to proceed to hearing? There is no doubt that the power to amend can be exercised at any stage before judgment. The amendment sought but rejected was intended to enumerate the persons to whom it is alleged that the respondent extended unauthorized lending thereby occasioning a loss of Kshs.23,618,995.00 to the applicant. The respondent has deposed and this has not been rebutted that the applicant has instituted suits against the persons concerned to recover the alleged loss. If the only thing that the amendment wishes to introduce is the list and a slight adjustment of the amount of money lost, then in my considered view, there can not be any prejudice, loss or harm to the applicant should the proceedings commence. After all, the case file numbers of the

*H.C.C.C.NO.1*

*OF 2005*

suits against the persons to whom it is alleged the respondent made unauthorized lending have been provided and is not contested by the applicant.

Regarding the amount lost as a result of the lending, the difference being only Kshs.579.00, between the original and the amended figure, that amendment can be introduced orally during the hearing.

Having so far found and before I conclude there are only two other matters raised by counsel for the respondent which I now turn to. First, she submitted that the ruling being challenged in the intended appeal arose from a preliminary objection and that the applicant has no leave to appeal.

It is clear from the proceedings of 20<sup>th</sup> January, 2009, that counsel for the respondent relied on the notice of preliminary objection as well as two affidavits in reply dated 13<sup>th</sup> November, 2006 and 11<sup>th</sup> July, 2007. It is therefore not correct to say that the ruling was purely on the notice of preliminary objection.

The second issue relates to the question whether or not there is an appeal. In terms of **Order 41 rule 4** aforesaid, the filing of an appeal alone cannot operate as a stay of execution or proceedings. There must specifically be an order for stay.

For the purposes of **rule 4** above, an appeal to the Court of Appeal is deemed to have been filed when under the rules of that

*H.C.C.C.NO.1*

*OF 2005*

court notice of appeal has been given. See **Order 41 rule 4(4)**. **Rule 74** of the **Court of Appeal Rules** only requires a person who desires to appeal to that court to lodge a notice which shall be substantially in Form D in the First Schedule, with the registrar of the superior court within fourteen (14) days. It is the duty of the registrar on receipt of a notice of appeal to forward a copy forthwith to the appropriate registry of the Court of Appeal. An intended appellant on the other hand is required to serve with the notice of appeal all persons directly affected by the appeal.

Once the notice of appeal has been filed, the appeal process moves to the Court of Appeal. The notice of appeal can only be challenged in that court under **Rule 80** of the **Court of Appeal Rules**. The applicant has annexed to this application what is headed "*Memorandum of Appeal*." and not a notice of appeal. That "*Memorandum of Appeal*" is also substantially in Form D in the First Schedule as provided

by the rules.

On this ground and the other grounds stated earlier, this application fails and is dismissed with costs.

Dated, Signed and Delivered at Nakuru this 22<sup>nd</sup> day of January, 2010.

**W. OUKO**  
**JUDGE**