



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 2158 of 2001**

**JACQUELINE  
KIARAHO.....PLAINTIFF/APPLICANT**

**VERSUS**

**THE CO-OPERATIVE BANK OF KENYA  
LIMITED.....DEFENDANT/RESPONDENT**

**R U L I N G**

1. By her Notice of Motion application dated 10/09/2009, the Plaintiff/Applicant Jacqueline Kiaraho seeks ORDERS that the execution of the decree dated 10/12/2008 be stayed pending the hearing and determination of the intended appeal. A temporary stay was granted exparte on 11/09/2009 pending hearing and determination of this application.
2. The application is based on 6 grounds appearing on the face thereof, that is to say –
  - a) *The intended appeal will be rendered nugatory should the decree dated 10<sup>th</sup> December, 2008 be executed by the Respondent;*
  - b) *The Applicant has an arguable appeal as evidenced in the annexed draft Memorandum of Appeal;*
  - c) *The Defendant/Respondent has now taxed its Party to Party Bill of Costs and was awarded the sum of Kshs.732,927/60 on account of costs on 14<sup>th</sup> August 2009.*
  - d) *The Applicant now faces a real threat of execution as it is just a matter of time before the Defendant extracts the Certificate of Costs in relation to the taxed Bill after which the Respondent shall demand payment of the said sum of Kshs.732,927/60 from the Plaintiff;*
  - e) *Should the Defendant/Respondent execute the Decree dated 10<sup>th</sup> December, 2008, the Plaintiff/Applicant will suffer substantial loss;*

f) *No prejudice will be occasioned to the Respondent by the granting of the orders sought.*

3. The Applicant has also sworn an affidavit dated 10/09/2009 in support of the application. The Applicant deposes that her claim against the Defendants was dismissed on 8/08/2008 with costs to the Defendants. That being dissatisfied with the judgment of the court (Khamoni J) the Applicant filed Notice of Appeal dated 19/08/2008 and while she awaits receipt of certified copy of judgment and typed copy of proceedings to enable her lodge an appeal, the Defendants/Respondents have already extracted the decree which is dated 10/12/2008 and have also had their (Defendant's) Party and Party Bill of Costs taxed in the sum of Kshs.732,927/60. The Applicant says that she is apprehensive that if the stay sought herein is not granted, the Defendant/Respondents are likely to execute the decree and thus render her intended appeal nugatory. The Applicant has exhibited the extracted decree dated 10/12/2008 to her affidavit as annexure JK 3. She has also annexed a copy of the ruling on taxation dated 14/08/2009 taxing the Defendants Bill of costs in the sum of Kshs.732,927/60.

4. The application is opposed. The Defendants filed Grounds of Opposition under Order 50 Rule 16 of the Civil Procedure Rules through the firm of Ochieng, Onyango, Kibet and Ohaga Advocates. The Grounds in opposition to the application are –

1. *That the interim orders issued on 11.09.2009 are ex facie irregular herein ought to be discharged ex debito justitiae for the reason that the applicant herein in the application dated 10.09.2009 never sought any ex parte orders neither did the application at the very minimum seek that the matter be certified urgent this violates the cardinal principle that a court can only grant orders specifically sought by a party.*

2. *The application is incurable (sic) defective substantially as it fails to address the requirements for a stay of execution under Order XLI of the Civil Procedure Rules but concerns itself with considerations the Court of Appeal would have under Rule 5(2)(b) of the Court of Appeal Rules which are inapplicable with reference to the present application made in the High Court;*

3. *There is in essence no positive decree sought to be 'executed' as the court dismissed the substantive suit filed by the Plaintiff what is sought to be recovered are taxed costs on a certificate of taxation for which a specific stay has not been sought by the present application which seeks a stay of execution of a decree out of a dismissed suit.*

4. *That within the basic interpretation of the words 'Order' and 'Decree' under section 2 of the Civil Procedure Act, Cap 21 it is crystal clear that the certificate of taxation out of the ruling of a taxing officer is not a decree capable of being stayed as sought by the Plaintiff;*

5. *In any event the Plaintiff has not satisfied threshold under Order XLI Rule 4 in that:*

(a) *There has been no offer to provide security for the costs that have been assessed in favour of the Defendants.*

6. *The application is nonetheless incurably incompetent as it is brought under the wrong provisions of law and makes no distinction between a judgment/decree and a ruling on taxation/certificate of costs.*

5. The Defendant's/Respondent's counsel were duly served with the hearing notice together with the application on 15/09/2009. The hearing notice was for 5/10/2009, but when the application came up on that day only Miss B.A. Ouma for the Plaintiff/Applicant was present in court. Being satisfied that the Defendants/Respondents were duly served the court allowed the application to proceed, the Defendant/Respondent's absence notwithstanding. At the hearing, Miss Ouma reiterated the averments appearing on the face of the application and in the sworn affidavit of the Applicant. She argued that if the Defendant executes the decree, the substratum of the intended appeal would be destroyed thus rendering the intended appeal nugatory.

6. Regarding the Defendant's Grounds of Opposition, Miss Ouma submitted that contrary to the Defendant's contention, there is a Decree dated 10/12/2008. Miss Ouma also submitted that if the Applicant is required to give or furnish security the same should be reasonable considering that the Applicant is still unemployed.
7. The prerequisites for the granting of a Stay of Execution are set out in Rule 4(2) of Order XLI of the Civil Procedure Rules, which are that the Applicant must show (a) that she will suffer irreparable loss if the order sought is not granted, (b) that the application has been brought without unreasonable delay and (c) that she has made an offer for security of costs should the intended appeal not succeed. The Defendant's contention is that the Applicant has not satisfied those conditions in that she has failed to provide security for the costs that have been assessed in favour of the Defendant. The Defendant also contends that the Applicant's emphasis on the arguability of her intended appeal raises issues that ought to be considered by the Court of Appeal under Rule 5(2) of the **Court of Appeal Rules** which are inapplicable with reference to the present application.
8. The issue that arises for determination is whether the Applicant has satisfied the prerequisites for the granting of an order of stay as provided under Rule 4(2) of Order XLI of the Civil Procedure Rules. The wording of the said subrule is punctuated by the conjunction "and" so that an Applicant seeking an order of stay must satisfy all the three (3) prerequisites set out thereunder. I have considered the grounds on the face of the application and the averments of the supporting affidavit of the Applicant and note the glaring absence of an offer by the Applicant to provide security for the costs that have been assessed in favour of the Defendant. At no point after being served with the Grounds of Opposition in which this anomaly was pointed out, did the Applicant ask for leave to file a supplementary affidavit to tell the court that she was ready and willing to offer such security as may be ordered by the court. Instead, counsel for the Applicant stated from the bar that the Applicant was unemployed and was asking for reasonable terms of any conditional stay. Although the Applicant says at paragraph 10 of her supporting affidavit that she has no source of income, she does not state anywhere in her affidavit that she wants the court to give reasonable terms of any conditional Stay Offer of security is a critical ingredient of Rule 4(2) of Order XLI of the Civil Procedure Rules, and without complying with it, this application cannot succeed.
9. It is also apparent from the application, the affidavit in support and the submissions made on behalf of the Applicant that the main thrust of the Applicant's case is that her intended appeal has overwhelming chances of success. As correctly pointed out in the Defendant's/Respondent's Grounds of Opposition, it is the Court of Appeal which can say whether or not the Applicant's intended appeal has high chances of appeal. The intended appeal emanates from a judgment of this Honourable Court and for the Applicant to expect this court to agree with her that the intended appeal has high chances of success would be to ask this court to sit on appeal on its own decision.
10. Before I conclude this ruling, I must say something about the Defendant's sixth Ground of Opposition to the effect that the Applicant's application is nonetheless incurably incompetent as it is brought under the wrong provisions of law and makes no distinction between a judgment/decreed and a ruling on taxation/certificate of costs. While it may be true that the Applicant did not cite the correct order or section of the law, such defect is nonetheless curable under Order L Rule 12 of the Civil Procedure Rules. It is also curable under Section 1A of the Civil Procedure Act as it is indeed the duty of this court to do justice between the parties when adjudicating on issues arising under the Civil Procedure Act, Cap 21 and not to insist on the technicalities of lack or want of form.
11. In the result and for the reasons given above, the Applicant's application dated 10/09/2009 cannot stand. The same is dismissed with no order as to costs.

Orders accordingly.

Dated and delivered at Nairobi this 28<sup>th</sup> day of October, 2009.

**R.N. SITATI**

**JUDGE**

Delivered in the presence of:-

Miss B.A. Ouma (present) for the Applicant

No appearance for the Respondent

Weche - court clerk