

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII

Civil Appeal 304 of 2005

WILFRED MONYENYE YOGE.....APPELLANT

-VERSUS-

CREDIT BANK LTD.....RESPONDENT

RULING

It does not appear to be in dispute that the appellant took a loan from the respondent which he did not service. The amount owed is in excess of Kshs. 3.5 million and continues to attract interest. The respondent is a secured creditor under the arrangement. In September, 2005 the respondent instructed auctioneers to sell the property that had secured the loan. The appellant filed Kisii CMCC no. 447 of 2007 in which he sought a permanent injunction against the respondent. With the suit he filed application for interlocutory injunction. He obtained a temporary *ex parte* order. When the application was heard *inter partes* it was dismissed with costs for lacking merits. The appellant filed this appeal against the decision. The appeal was filed on 3/11/2005 and has not been heard. It is infact surprising that the appeal has not been admitted or directions taken. Yet, the original record together with typed copies of proceedings and ruling have been received in the High Court.

After the appeal was filed, the appellant went back to the subordinate court and sought stay of the order dismissing the injunction application pending the appeal. The court granted stay. This is what prompted the respondent to file the present application which seeks the setting aside of the stay order which was granted on 9/2/2006. The application was brought by motion under *Orders 41 rule 4 and 50 rule 1 of the Civil Procedure Rules, and section 3A of the Civil Procedure Act*. The appellant has raised preliminary objection to this application. He contents this court in its appellate jurisdiction cannot hear or determine the application. He argued, through his counsel Mr. Kaburi, that the application is incompetent, frivolous, and scandalous and an abuse of the process of the court. Mr. Nyanchoga for the respondent opposed the objection and submitted that under *Order 41 rule 4(1) of the Civil Procedure Rules* a party aggrieved by order of stay granted by the lower court can apply to the Court where the appeal has been lodged to set it aside. Mr. Nyanchoga has properly read the provision. *Order 41 rule 4(1)* provides as follows:-

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the

court appealed from the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it deem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

This Court is properly vested with jurisdiction to hear and determine the respondent’s application. It follows that the objection is not merited and is dismissed with costs.

I direct the Deputy Registrar to personally ensure that this file receives the necessary attention to enable the appeal and application filed to be heard expeditiously. This direction is given because it would appear from correspondence in the file that at one time the file was missing.

Dated, signed and delivered at Kisumu this 23rd Day of November, 2009.

A.O.MUCHELULE

JUDGE

23/11/2009

Before A.O.Muchelule-J

Court clerk-Mongare

Mr. Kaburi for the applicant

COURT: ruling in open court.

A.O.MUCHELULE

JUDGE

23/11/2009