



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

**Civil Suit 699 of 2003**

**BERNARD MBUGUA KINYANJUI.....PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**EL-DIMA LIMITED.....2<sup>ND</sup> DEFENDANT**

**GEORGE GATHITU WAINAINA.....3<sup>RD</sup> DEFENDANT**

**R U L I N G**

The Plaintiff has by Chamber Summons application dated 25<sup>th</sup> September, 2007 and brought under Order XXXI rule 25 of Civil Procedure Rules sought to have the execution of the decree in this case stayed pending the hearing and determination of a Civil Appeal No. 714 of 2005 between the Plaintiff and the 3<sup>rd</sup> Defendant.

The basis for the application is that:

1. That the money which the 3<sup>rd</sup> Defendant in this case wants to recover from me arises out of costs awarded in this case.
2. The suit was regarding my property which the 3<sup>rd</sup> Defendant claims to have bought in an auction.
3. There is a suit pending between the Plaintiff and the 3<sup>rd</sup> Defendant concerning the same subject matter the same being Civil Appeal No. 714 of 2005.

There is also filed a supporting affidavit sworn by the Plaintiff dated 25<sup>th</sup> September, 2007. The gist of the affidavit is that the execution being sought to be stayed arises from the costs awarded in this suit after the suit was dismissed for want of prosecution. The Plaintiff avers that apart from the pending appeal in the Court of Appeal between the parties, the Plaintiff had also filed an application seeking a review of the order of dismissal.

The application is opposed. The Respondent, 3<sup>rd</sup> Defendant has filed a replying affidavit. I have considered the contents of the said affidavit. The gist of the affidavit is that the orders dismissing the suit were made on 3<sup>rd</sup> July, 2005 by consent of both parties. The Respondent avers that he filed a Bill of Costs which was also taxed by Counsel of the parties on 9<sup>th</sup> November, 2006 at Kshs.62,795/=. The

Respondent avers that the pending appeal has no relationship with the dismissal of the suit.

I have considered the application and submissions by Mr. Kaai for the Applicants and Mr. Mwangi for the Respondents. A party cannot stay execution for the recovery of costs awarded to a party in a suit in order to pursue an appeal against the award of costs.

The facts of this case are not in dispute. The parties entered a consent to the effect dismissing the instant suit for want of prosecution with costs. The costs were subsequently assessed by consent and have not been appealed from, varied or set aside. The Applicant instead of paying the costs is now seeking to avoid the payment on the guise he has appealed against the decision in this case.

Even if the Applicant had indeed filed an appeal against the order dismissing his case by consent, that appeal would have no chance of success. Nonetheless the Applicant has not annexed any document to show the nature of the pending appeal. The nature of the appeal is itself contested by the Respondents who have stated on oath that there is no relationship.

The discretion to stay proceedings pending an appeal is a discretionary one. The Applicant must demonstrate it will suffer irreparable loss if the stay is not granted. The Applicant should alternatively show that the appeal will be rendered nugatory if stay is not granted. None of these grounds have been alleged and or demonstrated. Application lacks in merit and is therefore dismissed with costs.

Dated at Nairobi this 28<sup>th</sup> day of November, 2008.

**LESIIT, J.**

**JUDGE**

*Read, signed and delivered in open court:-*

N/A for Mr. Kaai for the Applicant

Mrs. Babu holding brief for Mr. Mwangi for the Respondent s

**LESIIT, J.**

**JUDGE**