



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

Civil Case 247 of 2006

MURITHI M'MBUI

JULIA KAGWENE MURIITHI PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY (K) LIMITEDDEFENDANT

R U L I N G

This Motion on Notice brought under Order XLI Rule 3 (1) of the Civil Procedure Rules Sections 3, 3A and 63 of the Civil Procedure Act seeks primarily Stay of proceedings herein pending the hearing and determination of Civil Appeal Number 253 of 2006. The application is by the defendant. The principal reason for the application is that the defendant unlike the plaintiff will suffer substantial harm if this suit is not stayed as its appeal will be rendered nugatory.

The application is supported by an affidavit sworn by one Joseph Kania, the applicant's Manager Legal Services. Annexed to that affidavit is a copy of the Memorandum of Appeal in Civil Appeal Number 253 of 2006 and the ruling against which the appeal has been made.

The application is opposed and there is a replying affidavit sworn by the 1st plaintiff. In a nutshell the main objections to the application are that the defendant's appeal will not be rendered nugatory if the order of stay is declined and that contrary to the defendant's allegation that it will suffer substantial loss it is the plaintiffs who will suffer irreparable loss and damage should there be an indefinite stay of proceedings as their rights will remain in a state of flux for an inordinate period of time.

The application was canvassed before me on 30.4.2007 by Mr. Ahmednasir – learned counsel for the defendant and Mr. Kyalo – learned counsel for the plaintiffs. I have considered the application, the affidavits filed and the submissions of counsel. Having done so, I take the following view of this matter. Guidelines on what is to be considered in an application such as the present one are found in Order XLI Rule 4 of the Civil Procedure Rules. Under that rule the mere filing of an appeal cannot operate as a stay of proceedings. The court however, has an unfettered discretion to grant stay of proceedings. In my view, however, a court considering an application such as the present one would not be exercising its discretion unjudicially if it keeps in mind the conditions set in Rule 4 (1) and (2) of the Civil procedure Rules and of course the overriding consideration that the exercise of the discretion should be in the interests of justice.

I agree with the observations made by Ringera, J. as he then was in **Re Global Tours & Travels Ltd. – W/U Cause No.43 of 2000 (UR)** – that whether to order a stay or not the court should weigh the pros and cons of granting or not granting the order. And in considering the matter the court should bear in mind

such factors as the need for expeditious disposal of cases. This in my view is additional to a consideration of other matters such as whether or not the appeal will be rendered nugatory should the stay be refused and the appeal eventually succeeds.

In the matter at hand, the main consideration should be whether or not the defendant's appeal will be rendered nugatory should stay be refused. In this regard it is important to appreciate the order appealed against. That order was an interlocutory order pending the hearing of the suit. It was made pursuant to an application for a temporary injunction. Orders made at that interlocutory stage are not and were not expected to be conclusive or definitive. The plaintiffs would still have to prove at the trial on a balance of probabilities that they are entitled to those orders. So what will happen if this suit proceeds to hearing and judgment? The plaintiffs' claims will either be allowed or rejected. In which case the losing party will still be at liberty to appeal to the Court of Appeal. The defendant's allegations will also be investigated and if well founded the plaintiff's suit will be dismissed thereby allowing the defendant to realize its security and even seek recovery for any balance from the plaintiffs.

If on the other hand the stay is allowed, the temporary order of injunction granted and against which the appeal has been filed, will operate as a permanent order for the duration of the appeal which appeal was lodged on 19.10.2006 and may take upto 3 years to be determined. So for 3 years the defendants complaint's will remain undetermined and if the appeal eventually is lost the court will have lost valuable time to adjudicate upon the same complaints at a trial which will then have to take place after the 3 years.

If on the other hand the appeal succeeds after the three years, the injunction will be set aside but the suit would still have to be heard and determined. The defendant states that the plaintiffs are preparing the suit for hearing and are going through interrogatories and discovery notwithstanding the appeal filed by the defendant. In my view, that suggests that the plaintiffs are anxious to have their claims including the allegations on the prayer for injunction investigated and determined with dispatch. They may or may not succeed. Indeed, the trial court may very well agree with the defendant's complaints contained in the appeal. In this event the matter would be finalized within about one year and any dissatisfied party as already stated will if so minded be at liberty to appeal.

These circumstances are hugely different from the ones Ochieng, J. dealt with in **Donholm Rahisi Stores vs. Barclays Bank Ltd. and Another – HCCC No.156 of 2004 (UR)**. In that case the learned Judge found that a stay of proceedings was more in consonance with the interim injunction which had been issued by the Court of Appeal. That is not the position in this case.

I am also not persuaded on the material availed to the court that the defendant stands to suffer any loss if this application is declined.

In the premises, I am of the considered view that a stay of these proceedings will not serve the ends of justice. A stay will in all probability delay the cause of justice. The application is therefore declined. The costs shall be in the cause.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 25th day of May 2007.

F. AZANGALALA

JUDGE

Read in the presence of:-

Sagana holding brief for Ahmednasir for the applicant and Ms. Kamande holding brief for Kajalo for the plaintiff/respondent.

F. AZANGALALA

JUDGE

25/5/07