



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

Misc Civil Case 307 of 2006

SPIN KNIT DAIRY LTD.....PLAINTIFF

VERSUS

AMOS GICHUKI KABIRU.....DEFENDANT

RULING

The applicant has presented to this Court an application by way of notice of motion under Order 41 rule 4(2) and 6 of the Civil procedure Rules, Section 3A and 63 (3) of the Civil Procedure Act Cap.21 laws of Kenya

3(1) of the High Court practice and procedure rules and all enabling provisions of the law. The prayers being pursued at this stage are prayer 3 and 4. Prayer 3 seeks an order for stay of execution of the decree/order and or judgment and consequential orders of the Chief Magistrates Court at Nairobi (Milimani) delivered on 16th March 2006 in CMCC NO.8492 of 2003 pending the hearing and determination of the intended appeal where as prayer 4 seeks leave to lodge the intended appeal out of time. The grounds in support are set out in the body of the application supporting affidavit and oral submissions in Court.

The major grounds are that the appeal has high chances of success as shown by the grounds raised in the annexed intended memo of appeal.

(2) As for stay that the same should be granted as they are within the ambit of the principles governing the granting of the same.

(3) That they are willing to furnish security for stay of execution by depositing the entire decretal sum in court or in a joint interest earning account in the joint names of counsels of both parties.

(4) That the appeal will be rendered nugatory if stay is not granted.

The Respondent has opposed the application on the grounds set out in the replying affidavit and oral submissions in court. The major ones are that:-

(1) The application for stay should have been presented to the lower court and not in these proceedings.

(2) That the intended appeal is an after thought as the applicant showed willingness to meet the decree and only moved to this court to seek leave to appeal after their goods had been proclaimed.

- (3) That there is no serious intention to appeal and the application is just meant to frustrate the decree holders efforts to execute the decree.
- (4) That the appeal has no chances of success as there is no way an appellate court can apportion liability for the causing of an accident involving a vehicle in which the plaintiff was a passenger.
- (5) No reason has been advanced as to why the appeal was not filed in time.
- (6) They content that the application has no merit and the same should be dismissed with costs as it is just being used as a delaying tactic.

On the courts assessment of the facts herein, it is clear that the applicant seeks stay pending appeal as well as leave to appeal out of time. It is also clear that what this court has before it is a miscellaneous application. In order to succeed on stay the applicant has to come within the ambit of the ingredients for granting stay as set out order 41 (1) of the Civil Procedure Rules. A reading of the provision of order 41 rule 1 of the Civil Procedure Rules shows clearly that an order of stay issues from the court appealed from and the court appealed to. This court is not a court appealed from as it is not the court that issued the decree to be appealed from. As for the second limb this court qualifies to be a court appealed to. However, it acquires that vesture of "Court appealed to" only if there is an appeal duly filed in it. The filing of an appeal gives rise to the existence of own appeal file. What this court is handling is a miscellaneous application file. This is evidence that an appeal, has not been filed. In the absence of an appeal, there is no jurisdiction for this court to grant stay pending appeal. Further there is no jurisdiction under the said provision for granting stay pending the filing of an intended appeal. The right forum for that kind of relief is the lower court. For this reason prayer 3 has no merit.

As for prayer 4, all that the applicant needs to do is to come within the ambit of the ingredients set out in Section 79 G of the Civil Procedure Act by showing sufficient cause why the appeal was not filed in time.

As submitted by Counsel for the respondent, the applicant has not explained why appeal was not filed in time. In addition to, this no mention has been made as to what efforts are being made to process, the appeal. This court has looked at the annexures, annexed by the applicant and has missed to find a letter asking for proceedings for purposes of appeal. The supporting affidavit as well as the grounds in the body of the application are silent on the steps being taken to process the appeal. This being the case there is nothing to counter the respondent's assertion that the application was just filed to frustrate the execution process.

As for existence of an arguable appeal this could only have arisen if there had existed really serious intention to appeal which is lacking herein and so there is no reason to belabour this point.

In conclusion and in view of the reasoning above the application dated 26.4.2006 is refused for the following reasons:-

- (1) A relief of stay orders as envisaged by the provisions of order 41 rule 1 of the Civil Procedure Rules can only be issued by either a court appealed from or a court appealed to. This court is neither the court appealed from as it is not the one that issued the decree, nor the court appealed to as there is no appeal yet.
- (2) Leave to appeal does not arise as the applicant has not satisfied the ingredients in section 79 G of the Civil Procedure Act as they have not shown reasons as to why appeal was not filed in time in the first instance. In the second instance there is no demonstration for existence of a serious intention to appeal as there is silence as to whether even request for proceedings were ever applied for and steps being taken to process the appeal for a speedy disposal.
- (3) Issues of arguability of the intended appeal can only arise where there is a serious intention to appeal. Since no serious intention to appeal was displayed, there is no need to go into whether one exists or not.

The respondent will have costs of the application.

DATED, READ AND DELIVERED AT NAIROBI THIS 27TH DAY OF JULY 2007.

R. NAMBUYE

JUDGE