



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

Civil Case 938 of 2000

ROSALINE NJERI MACHARIAPLAINTIFF

V E R S U S

GUARDIAN BANK LIMITED.....1ST DEFENDANT

KINGSWAY MOTORS (K) LTD2ND DEFENDANT

And by way of counter-claim by the first defendant

MANISH SHAH3RD DEFENDANT

R U L I N G

There has been considerable delay in the preparation and delivery of this ruling. The same was occasioned by my serious illness in 2006 and the long attendant recuperation. The delay is regretted.

By order made herein on 24th June 2004 (Emukule, J), this present case and **Milimani HCCC. No. 1927 of 2000** were consolidated and ordered to be heard together.

The Plaintiff has now come back to court by notice of motion dated 31st May, 2006 seeking the main order that there be an order staying further proceedings in both consolidated suits pending hearing and determination of an appeal against the aforesaid order. The application is brought under Order 41, rule 4 of the Civil Procedure Rules (the Rules). Section 3A of the Civil Procedure Act, Cap. 21 (the Act) is also invoked.

The grounds for the application as they appear on the face thereof are *inter alia*:-

1. That the requisite notice of appeal was duly lodged.
2. That the Plaintiff is desirous of pursuing the appeal and is only waiting for typed proceedings from court.
3. That unless stay is granted the appeal will be rendered nugatory.
4. That the Plaintiff stands to suffer irreparably if stay is not granted.

5. That the Plaintiff has a good appeal with probability of success.

There is a supporting affidavit annexed to the application. It is sworn by the Plaintiff. I have read the same.

The 1st Defendant has opposed the application upon the following grounds (see grounds of opposition dated and filed on 16th June, 2006):-

1. That the time for filing the intended appeal has lapsed in that the letter requesting proceedings of 7th July, 2004 was not copied to the opposite party as required by the proviso to rule 81(1) of the Court of Appeal Rules; the time for filing the record of appeal therefore expired on 3rd September, 2004, and there is thus no appeal pending.
2. That there has been unreasonable delay in making the application and the same is not made *bona fide*.
3. That there will be no harm or damage to the Plaintiff if the cases as consolidated proceed to hearing.

There is no replying affidavit filed. The other parties concerned, being the 2nd and 3rd Defendants in the present suit and the defendants in HCCC No. 1927 of 2000 have not opposed the application.

I have considered the submissions of the learned counsels appearing, including the cases cited. With regard to the first ground of opposition, whether or not the Plaintiffs will be able to lodge a competent record of appeal before the Court of Appeal is a matter for interpretation of the relevant Court of Appeal Rules. That will be the function of the Court of Appeal, not of this court. All this court is concerned with is that there is a notice of appeal duly lodged; there is no dispute that there is one such. For the purposes of rule 4 of Order 41 of the Rules, under which the present application is brought, an appeal to the Court of Appeal is deemed to have been filed.

Despite the rather imprecise wording of sub-rule (1) of rule 4 aforesaid, the court has jurisdiction to grant stay of proceedings for sufficient cause. The discretion of the court in this regard is not further fettered by sub-rule (2) of the same rule which is applicable only to applications for stay of execution of decree or order appealed from.

Is there sufficient cause demonstrated in the present case to warrant grant of stay of further proceedings? The order of consolidation was granted after the application therefor was heard *inter partes*. It was a considered ruling running to some thirteen typed pages. An order of consolidation is ultimately geared towards expedient disposal of the suits concerned. Consolidation does not mean that each and every issue raised in the suits concerned will not be determined; indeed the court must consider and determine each and every such issue.

When I heard the present application, the suits herein had already been set down for hearing. On the other hand, the record of appeal has not yet been lodged in the intended appeal. All things being equal, it is likely that the suits will be heard and determined before the appeal is disposed of if it is pursued to its logical conclusion.

After considering all the matters placed before the court, I am not satisfied that the Plaintiff will suffer any prejudice if stay is not granted. It is true that her appeal may be rendered nugatory if the suits are heard as consolidated; but what prejudice will the Plaintiff have suffered thereby as she will have had her day in court, along with all the other parties concerned?

No sufficient cause has been shown why proceedings in these two suits should be stayed, probably for a number of years. Such stay can only be detrimental to all the parties. In the event, I will refuse the application. It is hereby dismissed with costs to the 1st Defendant. There will be an order accordingly

DATED AT NAIROBI THIS 5TH DAY OF SEPTEMBER, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 7TH DAY OF SEPTEMBER, 2007