REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT ELDORET
Civil Suit 115 of 1999

THOMAS OWEN ONDIEK ……..……
PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED ……..……
DEFENDANT

R U L I N G

Order XLI rule 4 of the Civil Procedure Rules stipulates that:

"(1) 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 seem 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.

(2) No order for stay of execution shall be made under subrule (1) unless-

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that court notice of appeal has been given."

National Bank of Kenya Limited ("the applicant") who relies on the above provisions of the law seeks orders inter alia for stay of execution of a decree of the subordinate court whose sum totals to K.Shs.1,708,023.50.

It bases its application on the grounds inter alia that it has already preferred an appeal against the

judgment and decree; that the sum which appears on the proclamation is exaggerated and that there is an error in the decree which ought to be corrected.

It was the submission of Mr. Kuloba, learned Counsel for the applicant that the contentious decree includes an element of interest, which interest is not catered for in the order of the Hon. Judge, but that never the less, his client had already deposited the disputed sum in court, and he urged the court to order that the amount so deposited be held as security pending the hearing and determination of their whose notice was filed on 4/6/2004. It was his view that the appeal would be rendered nugatory, as the respondent may not be able to repay the sum.

Mr. Mbugua was however of the view that though a court can correct mistakes by virtue of powers granted under section 99 of the Civil Procedure Act, the was no appeal on the merits as it is his address which appears on the Notice of Appeal, which thus renders it defective, a fact which I am unable to deal with, as issues of competency of an appeal which arises from this court can only be determined by the Court of Appeal.

It was also his submission that his client who has had to wait for over six years is entitled to the fruits of the judgment, and in which case, the orders which the applicant seeks would not be in the interests of justice. He urged the court to order that his client be paid whatever is due to him.

I have taken the submissions of both counsel into account. I am also well aware of the fact that it is the applicant who should satisfy the conditions of the aforementioned Order XLI rule 4.

I have looked at the judgment on record as well as the decree and it is clear that though my sister Hon. Justice Nambuye did not make an order for the payment by interest, the decree includes the same. Faced with such a situation, the respondent should have moved the court for appropriate orders instead of the Deputy Registrar make additions to the Order, for until such a time when he so moves the court, the element of interest cannot be applied.

The applicant has shown that he has already lodged his Notice of Appeal. It is also not disputed that this application with made with all due haste and further that the applicant has deposited the disputed amount in court. But I have not been convinced that substantial loss may result to the applicant unless the order is made, as the main dispute appears to be the interest, there does not appear to be any dispute with the principal sum I am of the opinion that whatever is not in dispute should be paid to the respondent with immediate effect as the rest of the claim is determined at appeal stage.

In the circumstances, I do order that the sum of K.Shs. 919,034.50 which is already held in the deposit be released to the respondent immediately. Once the above order is complied with, orders will follow in line with prayers 3, 4, and 6. As pointed out earlier I am not aware of the grounds of appeal and I would be very hesitant to grant any other orders, save that the balance which shall remains in the deposit account after payment of the said sum of K.Shs 919,034.50 to the respondent shall be transferred to an interest earning account to be held in the joint names of both counsel, pending the hearing and determination of the intended appeal.

Costs of this application shall however be in the cause.

Dated and delivered at Eldoret this 23rd day of March 2006.

JEANNE GACHECHE

JUDGE

Delivered in the presence of:

Mr. Fundi holding brief for Mr. Kuloba for the applicant

Mr. Kigamwa for the plaintiff/respondent