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

Civil Suit 1100 of 2000

FINA BANK LIMITED…….....…..…….PLAINTIFF

VERSUS

ANIL MOHANLAL CHANDARANA …….....……..1ST DEFENDANT

MIRA ANIL CHANDARANA…….....……..……2ND DEFENDANT

R U L I N G

After full hearing of this case the court dismissed the plaintiff's case against the defendants on 11th November 2004.

The plaintiff by its Notice of Motion dated 25th April 2006 has sought stay of execution pending appeal. The plaintiff has brought the said application under Order 41 Rule 4 (1) of the Civil Procedure Rules.

It is noteworthy that on the day the aforesaid judgment was read out the plaintiff's counsel orally applied for stay of execution of costs until an intended appeal was filed and determined. The court declined to entertain that oral application on the basis that costs had not yet been ascertained and there was therefore no threat of execution.

Taxation of both defendants bills of costs took place on 31st March 2006, where each defendant was granted kshs 1,421, 324. 90. The defendants, after taxation, did send auctioneers to the plaintiff's premises to execute for those costs.

It is due to that execution that the plaintiff came to court with the present application for stay. Plaintiff in support of that application stated that the jurisdiction to grant order of stay is found in Order 41. That that jurisdiction was only exercisable when an appeal had been filed.

One of the conditions necessary for stay to be granted is that the applicant needs to show that if stay is not granted it would suffer substantial loss. The plaintiff to show substantial loss submitted that there was no certainty that the defendants would be in a position to repay the amount back to the plaintiff if the appeal was successful.

The plaintiff argued that the defendants were not of a fixed abode, that it was not clear whether they lived in Kenya or that there was no evidence that they owned assets which could make restitution if the appeal succeeded.

The plaintiff '*poked holes'* into the defendant's contention that they were owners of a company or that they were paying water bills to the city council, saying that that did not sufficiently prove that they were in a position to refund the amount of costs, if paid to them. In any case, plaintiff's counsel said, the water bills were so low, at times were negative, which he said proved that the defendant did not reside in that house fully as claimed.

The plaintiff had alleged in the supporting affidavit that the defendants were foreigners. The defendants in their reply attached their passports, which revealed that the 1st defendant is an Indian citizen and the 2nd defendant is a Kenya citizen. Both defendants are husband and wife. Plaintiff submitted that it is possible that the 1st defendant could leave Kenya, then the plaintiff would had difficulty recovering its money on being successful in its appeal. On the 2nd defendant, the plaintiff submitted that she did not own any property and that with her too there was a risk that money paid to her would not be recovered.

Plaintiff submitted that the present application had been presented without undue delay since execution was only a threat after taxation, which took place on 31st March 2006.

Plaintiff stated that it is a reputable financial institution, which is solvent and able to meet any costs if the appeal was unsuccessful. That the court should note that banks such as plaintiff are regularly supervised by the Central Bank of Kenya and that accordingly it was a sound bank.

The application was opposed. The 1st defendant contended that the present application was res judicata. That the plaintiff filed an application dated 20th June 2005, which application sought to stay taxation of the defendants costs. That application was dismissed in October 2005 for non attendance of either party. Defence said that the present application and the dismissed application were the same and that accordingly the present application ought to be dismissed for being an abuse of the court's process and was also res judicata. 1st defendant sought dismissal of the application on that basis.

1st defendant submitted that even though he was an Indian citizen, he had lived in Kenya for 30 years under class H – work permit that he had lived for 18 years in his present residence and prior to that he lived in M.P. Shah maisonette. He therefore refuted the allegation that he was no fixed abode.

1st defendant finally stated that the plaintiff cannot have sued the defendants for execs of kshs 62 million and now be heard to argue that the same defendants cannot refund the amount of costs being kshs 2.8 million.

I will begin by considering whether the plaintiff has shown sufficient cause or shown substantial loss, together.

The plaintiff made damning statement about the defendant that they would not be able to repay the amount of the decree if the appeal was successful. Plaintiff questioned whether the defendants were residents in Kenya, whether they owned a company as claimed, whether they indeed resided in the house whose water bills were attached to the replying affidavit.

Faced with the above statement the defendants ought to have known that the evidential burden was thrown to their court to prove the plaintiff wrong in its contention. To my mind the defendants failed to shift that burden. The attaching of water bills did not necessarily prove that the defendants reside in the house they relate to. To make a bare statement that they owned a company did not shift the burden either. When I consider the defendants response to the plaintiff's aforesaid submission I come to a conclusion that it comes short.

Was the plaintiff's application defeated by delay? The plaintiff is on record at the reading of the judgment on 11th November 2004 to have sought stay of execution of costs. Since the costs had not been ascertain and of course since no appeal had been lodged the court directed that such application be made subsequent to the taxation. The plaintiff did not rest there it filed an application to stay taxation of the

costs. That application was dismissed for non attendance.

Thereafter the costs were taxed on 31st March 2006, and on auctioneers being instructed to execute the plaintiff made the present application. I am of the view that when that whole sequence is taken into account as a whole that the plaintiff has not delayed in its application for stay.

Is the dismissal of the application for stay of taxation a bar on account of the doctrine of res judicata to the present application. Res judicata as provided in Section 7 of the Civil Procedure Act requires that the matter be "*heard and finally decided by such court*." The previous dismissed application was not heard on merit or at all. The application in any case was very different to the present application. The previous one sought stoppage of taxation. This one seeks to stay execution pending appeal. I find that the plaintiffs application is not defeated by the doctrine of res judicata.

I do accept the plaintiffs argument that in pursuing its appeal, it is important to ensure status quo is maintained to ensure that the plaintiff does not suffer after succeeding in its appeal, if at all. In this regard reference is made to the case MUKUMA – V – ABUOGA [1988] KLR 645; that;

"**Where a party is exercising his undoubted right of appeal, the court ought to see that the appeal is not rendered nugatory by preserving the status quo until the appeal is heard**."

Having made the finding I have made herein above I believe in the exercise of the jurisdiction of stay pending appeal the court is required to balance the scales of justice to ensure that protection of the party appealing does not erode that judgment the other has successfully obtained. In that balancing of the sales of justice I find that on one side the plaintiff is entitled to be certain that if it succeeded in its appeal it is not faced with a struggle of recovery of money paid to the defendants. On the other hand the defendants fought a good fight and succeeded to have the plaintiff's suit dismissed they need an assurance that when the appeal does conclude and if in their favour they enjoy the fruits of their judgement. To ensure that that balance is achieved it is necessary, in ordering stay, that the plaintiff does give security to the defendants. The court will require that the amount of taxation be deposited in an interest earning account in joint names of the three advocates representing the parties herein to be opened at the plaintiffs bank, pending appeal.

The orders of this court are as follows:

(1) That an account be opened at any of the plaintiffs branch which shall be in joint names of all three advocates hereof, that is Kipkorir, Titoo & Kiara Advocates, Desia, Sarvia & Pallan Advocates, and Harit Sheth Advocate to deposit kshs 2, 842, 649. 80 in an interest earning account pending the plaintiff's appeal.

(2) That the costs of the Notice of Motion dated 25th April 2006 shall abide with the plaintiffs appeal.

MARY KASANGO

JUDGE

Dated and delivered 16th June 2006.

MARY KASANGO

JUDGE