



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL DIVISION, MILIMANI**

**Civil Suit 293 of 2001**

**NATIONAL INDUSTRIAL CREDIT BANK LTD.....PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED.....1ST DEFENDANT**

**NANCY WAIRIMU MURIITHI.....2ND DEFENDANT**

**RULING**

The plaintiff has come by way of a Notice of motion dated 1st July 2005, seeking an order for stay of execution pending appeal. The application is made under Order 41 rule 4 of the Civil Procedure Rules. When this suit came up for hearing on 20-th July 2004, the then plaintiff's advocate walked out of court. On the application of the 2nd defendant the plaintiff's suit was dismissed and the 2nd defendant proceeded by way of formal proof, to prove her counter claim.

The plaintiff by its application dated 6th January 2005 sought to set aside that ex parte judgment but by a ruling of 27th June 2005 that application was dismissed. The plaintiff by the present application seek to stay execution pending appeal, against the ruling of 27th June 2005. The plaintiff's counsel submitted that the plaintiff appeal has good chances of success, that the draft memorandum of appeal was annexed to the application, and if stay is not granted the intended appeal would be rendered nugatory, since the 2nd defendant would not be able to repay back the decretal amount if the appeal succeeded. He further submitted that the plaintiff is ready, and is willing to abide by any order for security.

The application was opposed, 2nd defendant's counsel said that the power to grant stay was discretionary and the order 41 rule 4 required that an applicant do show sufficient cause why stay should be granted. Although the 2nd defendant counsel was of the impression that the plaintiff had not filed a notice of appeal, and hence not qualified to make the present application, on being shown a copy of the notice of appeal, counsel stated that he had not been served with the same. He went on to argue that by virtue of Rule 74 of the Court of Appeal Rules a notice of appeal had to be served upon the respondent within 14 days. Since the 2nd defendant had not been served the applicant had failed to satisfy the pre requisite of the present application. Counsel also argued that there is no sufficient cause shown to warrant a stay being granted, and in this regard counsel requested the court to pay regard to the facts of this case, that the plaintiff was itself guilty of conduct that would not allow the court to exercise its discretion in its favour.

I have considered counsel's argument and the affidavit in support of the application and in reply. I do not think it necessary, to go through the facts that have this matter to where it is; suffice it to say that as I consider my ruling I will bear the same in mind.

The cornerstone of Order XLI Rule 4 is that the applicant, ought to show that it will suffer substantial loss, if stay is not granted. And the application ought to be made without delay. The plaintiff satisfied the latter requirement. In regard to the first requirement, the plaintiff displayed its fear that if the 2nd defendant is paid the amount of the judgment she may not be able to refund the same. That to my mind does not sufficiently prove that the plaintiff will suffer substantial loss. I will however take judicial notice that the plaintiff is reputed to be a 'solid' bank in Kenya whereas the 2nd defendant is an individual.

The decree herein, however being a money decree I find that the 2nd defendant should not be

entirely prevented from enjoying the fruits of some of it.

Accordingly going by the figures in the execution application and bearing in mind that the same has by now attracted interest I will order as follows: -

**(1) That the plaintiff will within 14 days from this date hereof pay to the 2nd defendant kshs 400, 000/-.**

**(2) That the plaintiff will within 14 days from the date hereof release to the 2nd defendant's counsel kshs 2 million which money shall be deposited in an interest earning account in the names of the plaintiff's advocates and in the name of the 2nd defendant advocate which money shall be held in the said account pending appeal.**

**(3) That the costs of the application dated 1st July 2005 shall abide with the appeal.**

Dated and delivered this 17th day of August 2005.

**MARY KASANGO**

**JUDGE**