



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL CASE NO.1845 OF 2001**

**H.R. TRADING LIMITED..... PLAINTIFF**

**VERSUS**

**ALEAX LIMITED..... DEFENDANT**

**RULING**

The Notice of Motion, dated 24/3/03 under Order 41 rule 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeks stay of the proceedings herein until the intended appeal is heard and determined, and that the costs of the application be in the cause.

The application is supported by an affidavit sworn by Jaafar Al- Beiti on 24/3/03, and is on the grounds that; the appeal process is held back by the wait for certified copies of the proceedings; that the applicant cant exercise its right of appeal unless the proceedings are stayed until the intended appeal is finalized and finally, that the appeal will be rendered nugatory if the proceedings do proceed without the appeal being heard. The applicant also avers that no prejudice will be caused to the Plaintiff/Respondent.

In opposition the Respondent avers that: the application is defective and should be struck out as it violates the mandatory requirements of Order 50 rule 15(2); no security has been offered; the appeal has no merits; no prejudice would be suffered by the defendant if stay is not granted: and finally that the applicant is guilty of laches as no explanation is given as to what was happening between the filing of Notice of Appeal and the filing of this application.

Order 41 rule 4 under which this application is brought categorically stipulates the perimeters within which this court should exercise its discretion in granting or not granting stay pending an appeal. Firstly, is that the court must be satisfied that substantial loss may result to the applicant unless the stay is granted. Secondly the application must have been made without unreasonable delay and thirdly is that the applicant should provide security for due performance of such decree or order as may ultimately be binding on the applicant.

In the present application the facts do not quite fall within the above conditions. What happened was that the defendant's defence, as filed, was found by he court to be vague and evasive, and accordingly struck out with the ruling that formal proof by the Plaintiff should proceed. That that is the Ruling intended to be appealed against.

In my view, under the above circumstances there is no judgment or order or decree that can be appealed against. In any case, until the formal proof by the Plaintiff is completed, the issue of a judgment upon which a decree can be drawn does not arise.

I must state caterogically that whether the defence was vague or otherwise is not for me to pass on. That is for an appellat court, which this one is not. The same goes to the issue as to whether the appeal

has or has no merit.

It was submitted by the Respondent's Counsel that the period of 60 days having lapsed without a formal appeal having been filed, after Notice of appeal, means that the appeal is time barred. Once again, that is for the Court of Appeal to determine, not this court. What is clear from the court records before me is that there is no evidence of any request for proceedings in pursuit of filing the intended appeal. Counsel for the applicant admitted as much.

Hence, if there is any delay in filing a formal appeal, that cannot be attributed to delay in obtaining the typed and certified copy of the proceedings. There is no record of the same having been applied for.

Turning to the issue of security for due performance, that requirement does not apply in an application like this where there is no formal proof of the Plaintiff's claim, and no judgment as to what would be the ultimate liability of the Defendant to the Plaintiff. To make such an order for security is a shot in the dark, and is tantamount to accepting the Plaintiff's claim without formal proof. There is no legal provision to support such an action by this court.

In my view, such an order must await formal proof. The upshot of all the foregoing is that the Applicant has not, and can't demonstrate what loss, substantial or otherwise, he would suffer if the stay of the proceedings is not granted.

Reverting to Order 41 rule 4 of the Civil Procedure Rules, under which the application is brought, the order prayed for is a discretion of this court. After careful perusal of the pleadings herein, and taking into account the submissions by

Counsel for both parties I find no sound basis for granting the stay of the proceedings herein. Counsel for the applicant submitted that the intended appeal would be rendered nugatory should the appeal succeed. I am not sold to that thinking. Should the appeal succeed, the worst that can happen is for the suit to be heard de novo by the court. I see nothing that can lead to the appeal being rendered nugatory.

Accordingly, I dismiss the application herein, with costs against the applicant, and in favour of the Respondent.

The formal proof in this suit should proceed as earlier ruled by this court. It is so ordered.

DATED and delivered at Nairobi, this 13th day of July, 1004.

**O.K. MUTUNGI**

**JUDGE**