



**Redland Enterprises Limited v Premier Savings & Finance Limited**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL MISCELLANEOUS APPLICATION NO 10 OF 2002**

**REDLAND ENTERPRISES LIMITED.....APPLICANT**

**VERSUS**

**PREMIER SAVINGS & FINANCE LIMITED.....RESPONDENT**

**RULING**

The application by Notice of Motion dated 12.1.2001 is brought under order 41 rule 4 Civil Procedure Code. The rule contemplates that an appeal must be in being before an application can be entertained. See the authority *Singh v Runda Coffee Estates Ltd.* [1966] EA 263. The order itself clearly shows that an appeal court has jurisdiction to grant stay when the court appealed from rejects such application. See rule 4 (1)-

“.....The court to which such appeal is preferred shall be at liberty, on application being made to consider such an application.”

The wording indicates that it is the court to which an appeal has been filed not to which the appeal shall be preferred. The court is being asked to stay proceedings in the lower court pending the hearing of an appeal in the High Court.

It is admitted by the counsel for the applicant that no appeal has yet been filed in this court. A memorandum of appeal is attached to the application as an exhibit JMM2 referred to as a draft appeal but there is no reason given as to why the appeal is not filed yet.

The order appealed from is not exhibited and the court is unable to tell what is complained of.

The affidavit in support shows that the application for stay has already been made in the court appealed from, but was rejected hence this application. From what can be gathered from the submissions of the counsel for the applicant the proposed appeal is in relation to a preliminary objection which was taken by applicant herein in an application in the lower court as to the validity of some paragraphs in an affidavit. The applicant was of the view that the affidavit does not comply with order 18 Civil Procedure Rules. That is all that can said of the complaint raising the intended appeal. It is also agreed by the parties that the application which is sought to stay is ready for hearing except for this application.

Upon perusing the material before me I see no appeal has come into existence. The draft attached may be filed but when? The respondent complaining of delay of the main dispute regarding the issue of execution of decree. It is now about 4 months delay. A successful litigant should not be kept out of the enjoyment of his fruits of his judgment indefinitely. In the case of *Portritz Maternity vs James Karanga Kabi* HCA No 63 of 1997 (UR) Hon Justice Waki made a very apt comment and I quote (page 4 par 2):

“That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be just cause for depriving him of that right.”

I do agree with that statement. In the present matter I am told judgment has already been decreed in favour of the respondent. To expect him to continue waiting for determination of a proposed appeal which

is not yet filed would be to do injustice. The other aspect is the applicant does not show that he would suffer substantial loss if the application was not granted.

From what I see the respondent would suffer more by being kept out of his judgment indefinitely. The applicant says that his right of appeal would be rendered nugatory and that is substantial loss. In the circumstances of this case I do not agree with him.

On the issue of security the respondent says on oath that the applicant cannot afford any security that may be ordered by the court. Respondent relies on affidavit of P.S Dogra exhibited as "Ama 1" where the applicants Director admits that there are no assets available and that the defendant has ceased to operate. The applicant does not therefore comply with order 41 rule 4(2a) & (2b). In fact I do not find that the refusal to grant the order would injure the applicant. This is not a case for striking off pleadings or affidavits and the applicant will not be denied the right to be heard. I am told the application with all documents is ready. The applicant has another chance to call the deponent of the offending affidavit and cross examine him at the hearing as provided under order 18 rule 2. There would be also a right of appeal in case the application was allowed against the applicant. On the issue of procedure adopted in bringing this application is it provided for to commence suit in High Court by Miscellaneous Notice of Motion? This does not seem to be the procedure. For these reasons I find that the application has no merits and I dismiss the same.

**Dated and delivered at Mombasa this 1st day of February, 2002**

**J.N KHAMINWA**

**JUDGE**