

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 62 OF 2001

NATIONAL BANK OF KENYA LIMITED..... PLAINTIFF

VERSUS

MOMBASA HOMES SERVICES LIMITED DEFENDANT

RULING

The applicant by Notice of Motion filed on 16.4.2002 seeks orders for stay of execution under Order 41 rule 4 Civil Procedure Rules on the grounds that the applicant has filed an appeal against judgement delivered on 8.2.2002 and that the success in the intended appeal shall be rendered nugatory if stay not granted. The application is supported by affidavit of Rajab Khamis Musa which has exhibited Notice of appeal already filed. And a copy of Title deed in respect of Kwale/Diani Complex/768. There is also attached certificate of official search dated 12.7.2001 which discloses that the property was on 23.7.97 charged to the plaintiff. Further that the said property has high value for purposes of security. Further that the applicant's appeal is arguable appeal with a probability of success.

In reply the respondent in replying affidavit says that the application is delayed it was filed on 16.4.2002 while judgement was delivered in February 2002, delay of 2 months and judgement was on admission of the claim. On the issue of the charge the respondent attempted to sell but the auction failed as the highest bid was below reserve price. The respondent further states that because the applicant's admitted the claim the intended appeal is not likely to succeed. However they submit that in case court should grant stay it should be under terms.

Upon consideration of all submissions on both sides and the requirements of order 41 rule 4 I am not satisfied that the defendant has shown a sufficient cause to warrant an order for stay. No substantial loss can be suffered by the applicants if they pay their debt to the respondent the judgement not denied and it was obtained on admission. It is doubtful if the appeal can succeed in the circumstances but this I leave to the appellate court to decide.

The respondent already holds a charge on plot No. Kwale/Diani Complex/768 but it is said that the value of the property is not attracting buyers as an earlier auction failed for lack of substantial bidders. In the circumstances the said property is not sufficient security for the decretal sum that may be found due and payable by the applicant. The delay of about 2½ months before filing this application is also to be taken into consideration. It is unreasonable delay. In any case the respondent is an institution which would be able to repay the money paid if appeal is successful. It has not been alleged otherwise.

For those reasons I decline to grant orders sought. If I was to order the decretal amount be paid to the bank as suggested by the respondent it would amount to an execution of decree. I therefore find no merit in this application and the same is dismissed with costs.

Dated this 28th day of June 2002.

J. KHAMINWA

COMMISSIONER OF ASSIZE

Mr. Songoro for respondent

Mr. Gunga for applicant