



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 61 OF 2019**

**CO-OPERATIVE BANK OF KENYA LIMITED.....APPELLANT/APPLICANT**

**VERSUS**

**JERIM O. OBURE.....RESPONDENT**

**RULING**

The appellant was the defendant in the lower court in which the respondent was the plaintiff. The lower court gave judgment in favour of the respondent which aggrieved the appellant leading to the present application.

The application is by way of Notice of Motion under Sections 3 and 3 A of the Civil Procedure Act and Order 22 Rule 22 (1), Order 42 Rule 6 and Order 50 rule 9 of the Civil Procedure Rules for the substantive order that there be a stay of execution of the lower court judgment dated 11<sup>th</sup> January, 2019.

Following the judgment of the lower court, the appellant filed a memorandum of appeal dated 7<sup>th</sup> February, 2019. An application for stay of execution filed in the lower court was dismissed on 29<sup>th</sup> May, 2019. This application was filed on 14<sup>th</sup> June, 2019 and therefore was filed timeously. The application is supported by an affidavit sworn by Laurence Karanja the Head of Legal department in the appellant.

The application is opposed and the respondent has filed a Notice of Preliminary Objection to that effect. The thrust of the objection is that the application is *res judicata* and abuse of the court process, because it is identical word for word to the Notice of Motion in the lower court, which I have observed was dismissed. Further, the appellant is accused of non-disclosure of a material fact, that is to say, the application that was filed in the lower court. Both parties have filed submissions to address the application herein which I have noted.

The appellant cannot be accused of non-disclosure because, paragraph 10 of the supporting affidavit to the present application clearly states that the earlier application for stay of execution filed in the lower court was dismissed on 29<sup>th</sup> May, 2019 hence the filing of the present application in this court.

On the issue of whether or not the application is *res judicata*, I am guided by Order 42 Rule 6 (1) and (6) thereof, which clearly confers jurisdiction and power upon this court to address the present application on its merits. The concern by the respondent is not grounded on any law. What the foregoing means is that, the Notice of Preliminary Objection is not only misplaced but has contributed to the delay in addressing the real issues in question. Such practice should be deprecated.

It follows that the Notice of Preliminary Objection is dismissed with costs to the appellant. Parties shall now take an urgent hearing date for the application dated 12<sup>th</sup> June, 2019.

***Dated, signed and delivered at Nairobi this 14<sup>th</sup> Day of November, 2019.***

**A. MBOGHOLI MSAGHA**

**JUDGE**