



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 61 OF 2019**

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

**VERSUS**

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

**RULING**

The application dated 12<sup>th</sup> June, 2019 seeks an order for stay of execution of the lower court judgment dated 11<sup>th</sup> January 2019. Following that application the respondent filed a replying affidavit alongside a notice of preliminary objection stating that the said application was barred by Section 7 of the Civil Procedure Act.

It was then considered appropriate that the preliminary objection raised by the respondent be argued first. Counsel were then asked to file submission. This ruling relates to the preliminary objection only. The thrust of the preliminary objection is that the appellant had filed an identical application in the lower court under the same rules of procedure which application was dismissed. That being the case, the present application is res judicata since the applicant has neither appealed or sought a review or setting aside of the said order.

The respondent further submits that by failing to disclose to this court the result of the application in the lower court, the move by the appellant is an abuse of the court process. Order 42 Rule 6 of the Civil Procedure Rules, provides at rule (1) in part as follows,

***“The court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused be the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose the decision is preferred may apply to the appellate court to have such an order set aside.”***

The above cited provision answers the preliminary objection in that the applicant is properly before this court and therefore the preliminary objection is misconceived in the circumstances. What the preliminary objection has done is to contribute to the delay in determining the main application in that the parties shall now have to take a date for the argument of that application. The preliminary objection is therefore dismissed with costs to the applicant.

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

**A. MBOGHOLI MSAGHA**

**JUDGE**