



**REPUBLIC OF KENYA**

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

**MISC. CIVIL APPLICATION. NO. 591 OF 2019**

**ABEDAIR AVIATION LIMITED ..... APPLICANT**

**VERSUS**

**SAVANNAH HELICOPTERS (PTY) LIMITED ..... RESPONDENT**

**RULING**

1. The application before me is the Notice of Motion dated 29<sup>th</sup> August 2019 in which the applicant, *Aberdair Aviation Limited* seeks stay of execution of the ruling and order issued by the trial court in CMCC Number 5519 of 2019 and all consequential orders pending the hearing of its purported appeal.

2. The facts leading to the filing of the application are straight forward and undisputed. The applicant was the defendant in the aforesaid suit which was instituted by the respondent. Upon being served with summons to enter appearance and defence, the applicant failed to do so within the time prescribed by the law and consequently, interlocutory judgment in the sum of KShs.11,828,634.48 was entered against it in favour of the respondent.

3. From the material placed before me by both parties, it is apparent that when the applicant discovered that interlocutory judgment had been entered against it, it moved the trial court to set aside the said judgment to give it an opportunity to defend the suit on the basis of a draft amended defence. The trial court acceded to the applicant's request and set aside the default judgement on condition that the amended defence would be served on the respondent and its filing fees paid within 14 days of the date of the ruling and that the respondent would be paid throw away costs in the sum of KShs.10,000 within 10 days thereof.

4. The throw away costs were paid within the time limited by the court but the applicant failed to comply with the condition requiring service of the defence and payment of its filing fees within the time prescribed by the court. Payment was effected seven days late allegedly because the court file was missing. The respondent then moved the trial court to *inter alia* strike out the applicant's amended defence which application was allowed on 14<sup>th</sup> June 2019 with the result that the interlocutory judgment earlier set aside was reinstated.

5. Aggrieved by the trial court's decision, the applicant filed an application seeking review of the orders of the court issued on 14<sup>th</sup> June 2019 which application was dismissed in a ruling delivered on 22<sup>nd</sup> August 2019. This is the ruling that gave rise to the orders sought to be stayed in the application before me and is the subject matter of the applicant's intended appeal.

6. The application is opposed by the respondent through grounds of opposition filed on 23<sup>rd</sup> September 2019 which attacked the competence of the application and urged the court to dismiss it with costs.

By consent of the parties, the application was prosecuted by way of written submissions which both parties duly filed and which I have also considered.

7. The court record shows that upon being dissatisfied with the ruling dated 22<sup>nd</sup> August 2019, the applicant filed a notice of appeal together with the application under consideration as a Miscellaneous Civil Application instead of filing an appeal challenging the validity of the trial court's ruling. The result of this is that as matters now stand, there is no appeal pending determination by this court.

8. *Order 42 Rule 1* of the *Civil Procedure Rules* provides for the procedure of filing appeals to the High Court. Appeals to the High Court can only be filed through a memorandum of appeal and not a notice of appeal like the one which was filed by the applicant. Notices of appeal are only filed in second appeals to the Court of Appeal and cannot be used to institute appeals to the High Court.

9. Given the foregoing, the question that arises is this: Can the court grant orders of stay of execution in a matter where there is no appeal pending hearing?

10. To answer this question, it is important to look at the law which governs the issuance of orders of stay of execution. *Order 42 Rule 6* of

the *Civil Procedure Rules* grants the court jurisdiction to grant stay of execution pending hearing and determination of appeals. This means that for such orders to be issued, there must be a valid appeal in existence which was pending hearing. The implication of this is that stay orders should not normally be issued in matters where there is no pending appeal. The reason for this in my view is simple. It stems from the fact that execution is a lawful process and where a judgment obtained in favour of the respondent has not been challenged on appeal, there would be no justification for denying the respondent immediate enjoyment of fruits of his or her judgement.

11. In view of the foregoing, I find that as there is no appeal pending in this case, there is no basis upon which the orders of stay as sought can be granted. In my opinion, the application as filed is incompetent and ought to be struck out. This does not however mean that the court lacks jurisdiction to grant stay orders pending filing of intended appeals. The court can, in the exercise of its discretion and inherent powers grant such orders in appropriate cases where the ends of justice so require for instance where an applicant is threatened with execution but has applied for leave to file an appeal out of time or has been granted leave to file an intended appeal out of time. I must however hasten to add that each case must be considered on its own merit.

12. The upshot of this ruling is that the Notice of Motion dated 29<sup>th</sup> August 2019 is incompetent and is accordingly struck out with costs to the respondent.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 5<sup>th</sup> day of December 2019.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Mr. Githui holding brief for Mrs. Mwangi for the applicant

No appearance for the respondent

Mr. Salach:            Court Assistant