

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: OMOLO, AKIWUMI & BOSIRE, JJ.A)
CIVIL APPLICATION NO. NAI 314 OF 1999 (122/99 UR)
BETWEEN**

**JOHN KIPKEMBOI KILEL APPLICANT
AND
DIAMOND TRUST BANK (K) LTDRESPONDENT**

**(An application for stay of execution in an intended
appeal from a judgment and decree of the High Court
of Kenya at Nairobi (Khamoni J) dated 2nd November, 1999**

in

H.C.C.C. NO. 44 OF 1998)

RULING OF THE COURT

The applicant seeks the exercise of our discretionary jurisdiction under rule 5 (2) (b) of the Rules of this Court and order a stay of execution of the decree of the superior court (Khamoni J) in its Civil Case No. 44 of 1998. In that case after the applicant was served with summons to enter appearance and the plaint, he filed appearance within time but failed to file his written statement of defence in time. Consequently ex parte judgment in default of defence was entered on the application of the respondent, Diamond Trust Bank Kenya Ltd. Subsequently the applicant moved the superior court for an order vacating the ex parte judgment. In his affidavit in support of the application he deponed, inter alia, that he was neither served with summons to enter appearance and the plaint nor did he have any notice whatsoever of the proceedings in the suit. That was clearly not true as the record of proceedings before the superior court is clear that the applicant filed a memorandum of appearance in person. He would not have done so had he not been served with summons to enter appearance.

Khamoni J after hearing the applicant's counsel, Mr Letangule came to the conclusion, quite properly in our view, that the application before him was unmeritorious and dismissed the same with costs. Before us, the applicant complains that the learned judge was wrong in the manner in which he exercised his discretion but in our view the application before the judge and the one before us are frivolous. The applicant was less than candid, when he stated on oath that he had not been served with summons to enter appearance and the plaint. By saying so he intended to mislead that court. The learned judge was not obliged to consider any other grounds the applicant may have had for seeking exercise of that court's discretion when he came to the view that the applicant was less than candid. The applicant is clearly undeserving of our discretion and we are of the view that his application before us is quite frivolous.

In the result, we dismiss the application with costs to the respondent.

Dated and delivered at Nairobi this 22nd day of November, 1999.

R. S. C. OMOLO

JUDGE OF APPEAL

A. M. AKIWUMI

JUDGE OF APPEAL

S. E. O. BOSIRE

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR