



REPUBLIC OF KENYA

**IN THE COURT OF APPEAL
AT NAIROBI**

(CORAM: OMOLO, LAKHA, & OWUOR, J.J.A)

CIVIL APPLICATION NO. NAI 315 OF 1998

BETWEEN

NOVA INDUSTRIES LIMITED

JOHN K. MANG'ELI)APPLICANTS

APHPYPLLLIICSA NMT.S MANG'ELI)

AND

FIDELITY COMMERCIAL BANK LIMITEDRESPONDENT

**(Being an application for stay of execution in an
intended appeal from the decision of the High Court
of Kenya at Nairobi (Hon. Justice Ole Keiwa) dated
4th December, 1998**

in

H.C.C.C No. 2 of 1998)

RULING OF THE COURT

This is an application brought by the applicants, defendants in the superior court, under rule 5(2) (b) of the Rules of this Court, seeking an order for a stay of a decree issued against them on 24th of June, 1998, for a sum of Ksh.3T,h1e2 3,d1i2s5p.u6t5e. between the parties in the suit revolved around a hire purchase agreement which had gone sour over a motor vehicle. The respondent's claim in the suit that was filed on 4th February, 1998 was for a sum of Ksh.2,396,260.15, money it had advanced to the 1st applicant for the purchase of a motor vehicle registration No. KAG 854Q Tata DM Tipper and guaranteed by the 2nd & 3rd applicants. The terms of the agreement were inter alia, that the applicants would repay the amount by monthly instalments of Ksh.111,667.00 in 23 months. They breached the agreement by failing to pay as agreed, and the respondent claimed for the principal sum plus interest at 52% per annum.

On 2nd of March, 1998 the applicants filed a defence and counter-claim which according to the respondent amounted to a mere denial. Thereafter, the respondent filed an application on 3rd June 1998 seeking summary judgment to be entered on its behalf for the sum of Ksh.1,426,792.15. This is the

application that came for hearing and was granted on 24th June, 1998 on the ground that:-

"Since the grounds have been filed out of time without leave of the court at that time of filing and even now, the application's hearing will proceed ex-parte.

As the claim is based on a loan whose advancement is admitted and default in repayment is also not denied, the application for judgment is granted as prayed in the plaint with costs of suit and application".

At the time of entering this judgment, it is on record that the applicants had indeed on 23rd June, 1998 filed an application seeking to amend their defence and counter claim.

That application had not been heard. Mrs. Sichale has conceded and, in our view rightly so, that that application should and ought to have been heard before the application for summary judgment, and secondly, as contended by Mr. Mutula for the applicants, the amended defence did raise triable issues that should have gone for trial and enable the applicants to have their day in court.

The principles upon which this Court will grant a stay pending an intended appeal have been stated again and again. The matters to be raised in the intended appeal should be arguable and that if the stay is not granted, the intended appeal would be rendered nugatory.

It has been contended on behalf of the applicants and Mrs. Sichale has conceded that failure to have the applicants' application for amendment of its defence and counter claim heard prior to the entering of the summary judgment was unjust in that they were unable to raise several issues like what exactly was the interest being charged, what vehicle did they contract to buy and whether or not they had over paid for the one vehicle instead of three that they had taken possession of. More important, the apparent non-compliance by the respondent with the provisions of **Order 20 rule 7** of the Civil Procedure Rules with the result that the applicants were denied the chance and their right to consider and approve the decree that they now intend to appeal against. Finally how much money were the applicants liable to pay. In the plaint the applicants claimed the sum of Ksh.2,396,260.15. In the application for summary judgment, the applicants claimed for a lesser sum of Ksh.1,426,792.15. The order granted by the learned judge was for the amount prayed for in the plaint. The decree as drawn by the respondent contained a different figure of Ksh.3,123,125.65. All these to our minds are issues that have satisfied us that the applicants have an arguable appeal. Mrs. Sichale sought to convince us that upon granting the stay, we should order that the decretal amount should be deposited either in court or in an interest-earning account in the joint names of counsel. We are unable to accede to her request for the reason that the decretal amount is uncertain.

We are satisfied that if we do not grant the stay, the intended appeal will be rendered nugatory. We accordingly allow the application and stay the execution of the decree issued on 29th day of September, 1998 pending the hearing and determination of the intended appeal.

Dated and delivered at Nairobi this 26th day of February,

1998.

R.S.C OMOLO

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JUDGE OF APPEAL

A. A. LAKHA

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JUDGE OF APPEAL

E. OWUOR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR