

Kenya Commercial Finance Co Ltd v Nyaana Saw Mills

Court of Appeal, at Nairobi July 30, 1986

Platt Ag JA

Civil Application No NAI 109 of 1986

July 30, 1986, Platt Ag JA

ORDER

This is an application for security, first of all for the decretal sum of shs 148,904.60, and secondly for costs estimated at shs. 55,000. Thirdly I am asked to make provision for the costs of the application and intended appeal.

The applicant bank was the plaintiff in a suit against Nyaana Saw Mills, in which the bank obtained judgment for shs 94,045 with interest at shs 54,859.60. The plaintiff has not yet executed the judgment and there has been no stay of execution. In accordance with order XLI Rule 4 of the Civil Procedure Rules, the plaintiff can either take execution (since the appeal intended does not operate as a stay) or if a stay is ordered, the defendant will have to give security for his due performance of the decree, which may ultimately be binding upon him. In this way the plaintiff can secure himself with regard to the decretal sum. Accordingly I agree with Murithi that the first part of the application is not really consistent with the aim of rule 4 of the Court of Appeal Rules. Rule 4 is in point, because the present application arises out an application by the defendants for leave to appeal out of time. That is Civil Application No 30 of 1986. I have already granted that application, but I gave the present within 30 days. That would seem a very fair offer.

But I should consider that in relation to the second and last factor, whether that would impede the appeal. Murithi took instructions specifically on this point before he made his offer. I think therefore that looking at the reason for the application in relation to the facts of the case and the circumstances of the intending appellant, the offer made is reasonable.

It follows then that I will grant the application on the second prayer. The first prayer I find not appropriate. The third I find would tax the intending appellant too much. The respondent, to this application, namely, the intending appellant will deposit the usual shs 2,000 at the appropriate time in the rules, and the additional shs 8,000 on or before the 30th day from today's date.

The costs of the application will be costs in the cause of the appeal.