



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT NAIROBI  
(CORAM: TUNOI, O’KUBASU & AGANYANYA, JJ.A.)  
CIVIL APPLICATION NO. NAI. 25 OF 2011 (UR. 18/2011)

BETWEEN

HARAMBEE SAVINGS & CREDIT SOCIETY LTD.....APPLICANT

AND

BEN PANPHILL SIFUNA.....RESPONDENT

*(An application for stay of execution of the judgment and order of the High Court of Kenya at Nairobi dated 9<sup>th</sup> August, 2010 and further proceedings in H.C.C.C. No. 418 of 2003 pending the hearing and determination of an appeal from the judgment and order of the High Court of Kenya at Nairobi (determination of an appeal from the judgment and orders of the High Court of Kenya at Nairobi (Khaminwa, J.) dated 9<sup>th</sup> August, 2010*

in

H.C.C.C. No. 418 of 2003)

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**RULING OF THE COURT**

This is an application under *rule 5(2)(b)* of the Court of Appeal Rules. It seeks two prayers, namely:-

- “1. THAT pending the lodging, hearing and determination of the intended appeal herein there be a stay of execution of the orders delivered by the superior court on 9<sup>th</sup> August, 2010 in High Court Civil Case No. 418 of 2003 (Hon. Lady Justice Joyce Khaminwa) between the parties herein.***
- 2. THAT pending the lodging, hearing and determination of the intended appeal there be a stay of execution of the judgment and orders delivered by the superior court in H.C.C.C. No. 418 of 2010 and of further proceedings in the same case.***

The application was based on the grounds set out on the face thereof and also on the supporting affidavit.

The grounds on the face of the application were similar to those in the draft memorandum of appeal which outline the merits of the intended appeal. These outline in full the origin of the dispute between the applicant and the respondent. Briefly put the respondent was an employee of the applicant. In the year

2000 he applied for study leave for a post Graduate Diploma in Human Resource Management at the University of Manchester in the United Kingdom. He informed the applicant about it and the latter approved the request. The applicant then informed the Overseas Training Committee of the Industrial Training which duly approved the request and indicated they would reimburse the applicant for monies spent on the respondent's tuition fees, books, study materials, accommodation and meals, amongst others. The applicant did not avail the requisite funds, and this forced the respondent to use his resources and do menial jobs in the foreign country to raise the funds for the purpose aforesaid.

When the respondent returned to Kenya, the parties could not agree on the correct position and he filed a suit in the High Court to claim Kshs.3,780,776/- from the applicant being monies he spent on tuition, books studying materials and subsistence allowance. In a judgment delivered by the superior court on 9<sup>th</sup> August, 2010 *Joyce Khaminwa, J.* awarded to the respondent the amounts sought. This is the judgment which is the subject matter of the intended appeal but pending the lodgment of the appeal, the applicant has filed the application seeking orders as herein before stated.

In a replying affidavit filed by the respondent on 9<sup>th</sup> May, 2011 he deponed that the intended appeal has no chances of success and gives reason in Clause 7 thereof which invokes the collective Bargaining Agreement which allows paid study leave for employees in the respondent's category.

On the nugatory aspect the respondent depones that the superior court delivered the judgment in his favour and that he is entitled to enjoy the fruits of it but that should the intended appeal succeed he had sufficient resources out of which he would refund the money paid to him. He has listed such resources in the replying affidavit.

Considerations for the grant or otherwise of stay of execution are well settled. Firstly the appeal or intended appeal should be seen to be arguable. This does not mean such appeal or intended appeal must succeed but that it should not be frivolous. The second consideration is that if the application is refused and the appeal or intended appeal eventually succeeds, its result will not be rendered nugatory.

On our perusal of the draft memorandum of appeal we are persuaded that the grounds raised therein are substantial and that the applicant should be given an opportunity to present them for determination by this Court. They are not frivolous. As regards the nugatory aspect the applicant has not been able to dislodge the respondent's submissions that if he is paid the amounts awarded in the judgment and the appeal or intended appeal succeeds he will be in a position to refund the amounts paid or refute that the properties exhibited do not belong to him. In view of the circumstances and in the exercise of the discretion bestowed on this Court by **rule 5(2)(b)** of the Court of Appeal Rules, we grant prayers 1 and 2 of the application dated and lodged in Court on 11<sup>th</sup> February, 2011 on condition that ½ of the amount awarded by the superior court is paid to the respondent within 15 days from the date hereof; failing which the application to stand dismissed and the respondent to be at liberty to execute. Costs of the application to abide the result of the appeal.

***Dated and delivered at Nairobi this 8<sup>th</sup> day of July, 2011.***

**P. K. TUNOI**

.....  
**JUDGE OF APPEAL**

**E. O. O'KUBASU**

.....  
**JUDGE OF APPEAL**

**D. K. S. AGANYANYA**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**