



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI NO. 271 OF 2008 (UR 176/08)

BARCLAYS BANK OF KENYA LIMITED APPLICANT

AND

EVANS ONDUSA ONZERE RESPONDENT

(Application for stay of execution pending the lodging, hearing and determination of an intended appeal from the decision of the High Court of Kenya at Nairobi (Sitati, J.) dated 26th day of September, 2008

in

H.C.C.C. NO. 1250 OF 2003)

RULING OF THE COURT

The applicant, **BARCLAYS BANK OF KENYA LIMITED**, by this application expressed to be brought under **rule 5(2)(b)** of this Court's Rules seeks an order for stay of execution of the judgment of the superior court made in Nairobi **HCCC No. 1250 of 2003** and delivered on **26th September, 2008** pending the hearing and determination of the applicant's intended appeal. This application is made on the following grounds:-

"1. The applicants (sic) have an arguable appeal with good prospects of success as follows:-

(i) THAT the learned Judge erred in failing to appreciate sufficiently or at all that the pleadings, documents filed in court, evidence and submissions made before her disclosed that the plaintiff's claim as pleaded had been paid to the extent of Kshs.6,000,120.

(ii) THAT the learned Judge made a fundamental error of law and of fact in finding that the respondent was entitled to payment of Kshs.6,104,050 when the same had substantially been settled prior to the filing of the suit.

(iii) THAT the learned Judge erred in law in finding that the Applicant's failure to call evidence was an admission of liability.

(iv) The learned Judge misdirected himself (sic) in finding on the basis of the documents before her that there was owing to the Respondent a sum of Kshs.6,104,050.

The appeal will be rendered nugatory if the stay is not granted as prayed for above for the following reasons:-

(i) The respondent is not prima facie entitled to the decree.

(ii) The judgment sum is of such magnitude that if paid over to the respondent it will not be recoverable should the intended appeal succeed.”

There was a supporting affidavit sworn by David Swao who described himself as the Applicant's Senior Legal Counsel.

The respondent herein ***EVANS ENDUSA ONZERE*** filed a suit in the superior court seeking judgment against the applicant for compensation for loss of office and/or redundancy pay, terminal dues and damages for unfair dismissal. The respondent also asked for the costs of the suit plus interest.

The applicant filed a defence denying what was stated in the plaint and stating that there was re-organization of the bank in which the bank introduced amongst other regulations an Internal Job Advertisement Regulation which were comprehensive and they affected the respondent who was then fully paid pursuant to the new terms of re-organization.

The dispute went for full hearing before the superior court (Sitati, J.) who entered judgment in favour of the respondent in the sum of ***K.Shs.6,104,050/=***.

Being aggrieved by the said judgment the applicant, through its advocates filed a notice of appeal which gave rise to this application which came up for hearing before us on *23rd October, 2008*. Mr. Chacha Odera appeared for the applicant, while Mr. P.S. Kisaka appeared for the respondent.

In a brief submission Mr. Odera, correctly pointed out that it was upon the applicant to show that it had an arguable appeal. His main argument was that the amount for which the respondent sued had been paid to him. It was Mr. Odera's contention that the respondent had no means to repay the decretal amount in the event that a stay is refused and the intended appeal eventually succeeds.

In opposing the application, Mr. Kisaka submitted that his client's claim in the superior court was based on early retirement. As regards payment made by the applicant to his client, Mr. Kisaka pointed out that the respondent did not sign for it. Mr. Kisaka further submitted that the intended appeal was frivolous in that there was no evidence led by the applicant to show that it had settled the respondent's claim.

Although we are not dealing with the appeal it may be necessary to consider what the respondent said when being cross-examined in the superior court. On being cross-examined the respondent is recorded as stating as follows:-

“It is true I did not sign this document. I am not demanding same amounts. I am also claiming for redundancy pay which is 1½ months salary for any completed year of service which amounts to 5,482,224/=.

In the offer of 3/09/2002, the offer was 5,542,968/=. I agree the difference between the two figures is about 60,000/= more than what I have claimed. Yes I was in debt to the bank 1,777,963/15. There was also a house extension loan 235,770/65. Yes there was a personal loan but cannot remember exact amount. I do not dispute the amounts. Yes, the bank was ready to give me 25% discount on the 1,777,963/15 which is 444,491/=.

Yes, I can see the net amount offered by the bank 2,808,999/15. Yes the amount was deposited at my account.

I agree that the only issues outstanding are the leave days for 2002 and the 2 days worked in

September 2002.”

This application, as already stated, was brought under **rule 5(2)(b)** of this Court’s Rules. The jurisdiction exercisable by this Court under that rule is now well settled. It is original and discretionary. For an applicant to succeed, it must satisfy the twin guiding principles, first, that the intended appeal is arguable that is that it is not frivolous and second, that unless a stay is granted, the appeal or as in this case, the intended appeal, if it eventually succeeds, will be rendered nugatory – see **GITHUNGURI V. JIMBA CREDIT CORPORATION LTD. (No.2) (1988) KLR 838** and **RELIANCE BANK LIMITED (In Liquidation) V. NORLAKE INVESTMENTS LIMITED [2002] 1 E.A. 218.**

The issue now is whether the applicant has satisfied the twin principles governing an application of this nature. The facts as already demonstrated are not seriously disputed. The respondent has obtained a judgment in the sum of about **Shs.6 million**. He is, of course entitled to the fruits of that judgment. The applicant on the other hand is challenging the findings of the learned Judge and intends to file an appeal against that judgment. But in the meantime, the applicant fears that if this money is paid over to the respondent it might be beyond its reach in event that the intended appeal succeeds. The respondent has, in a replying affidavit, attempted to show that he is not a poor man. He has a residential house in Ngong valued at more that **Shs.12,000,000/=** and a piece of land described as **Nyangori/Hamisi B/915** valued at **K.Shs.2,500,000/=**. Mr. Odera complained that apart from mere statements that the respondent has these assets there were no valuation reports to support what the respondent asserts in his replying affidavit.

Having considered the respective positions of the parties to this dispute, we are of the view that the intended appeal is arguable, and we also think that the fear expressed by the applicant is reasonable.

In the result we grant the application as prayed. There shall be a stay of execution of the judgment and the decree of the superior court dated **26th September, 2008** and all other consequential orders thereto until the determination of the intended appeal. The costs of this motion shall be in the intended appeal.

Dated and delivered at NAIROBI this 21st day of November, 2008.

E.O. O’KUBASU

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

J. ALUOCH

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR