



REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION 336 OF 2005

BROOKE BOND KENYA LIMITEDAPPLICANT

AND

JAMES NYABIOSIRESPONDENT

(Application for stay of execution pending the filing, hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya at Kisii (Bauni, J) dated 2nd November, 2005

in

H.C. Misc. Application No. 91 of 2004)

RULING OF THE COURT

Before us is an application under **rule 5(2) (b)** of the Court of Appeal Rules. The applicant, Brooke Bond (K) Ltd, is the judgment debtor in a suit for special and general damages in the Chief Magistrate’s Court at Kisii by James Nyabiosi (the respondent). The applicant being dissatisfied with the decree intends to file an appeal to the superior court.

Pending the entering of the intended appeal, the superior court granted the applicant a conditional stay on terms, that it deposits the entire decretal sum in an interest bearing account in the joint names of Counsel for both parties, within 15 days of the making of the order of stay.

The order of stay was apparently given ex-parte, and by a further order of the superior court upon application by the respondent, the court vacated the order of stay but maintained the order requiring the applicant to deposit the decretal sum in a joint interest bearing account in the joint names of counsel on record for the parties.

The applicant was aggrieved and consequently applied, *inter alia*, for the raising of the stay order. That application was dismissed for want of prosecution as on the date it was listed to come for a hearing, no one appeared on behalf of the applicant to prosecute it. The dismissal order was made on 1st December, 2005.

The notice of appeal filed by the applicant is dated November 14th 2005 and states in pertinent part as follows:

“NOTICE OF APPEAL.

TAKE NOTICE, that the applicant BROOKE-BOND (K) LIMITED hereinabove-named, being aggrieved and/or dissatisfied with the Decision and Order of Hon. Kaburu Bauni, Judge, given at Kisii on the 2nd day of November 2005, intends to Appeal to the Court of Appeal against the whole of the said Decision and Order.”

The applicant has not filed or at least shown that it has filed any other notice of appeal.

In the application before us, which bears the date 15th December, 2005, the main prayer is the first one on the motion. It reads:

“That there be a stay of execution on the ruling of the High Court of Kenya made at Kisii (Hon. Kaburu Bauni Judge) on 2nd November, 2005 pending the hearing of the Defendant/Applicant’s application on the 1st December 2005 to file appeal out of time reinstatement.”

No appeal has been filed against the superior court’s ruling delivered on 2nd November, 2005. It was in that ruling that the superior court made an order lifting the stay of execution order. As we stated earlier, there is no other notice of appeal on record to show the applicant intends to appeal against any other order except that made on 2nd November, 2005.

In the above circumstances, it is doubtful if we are competently seised of this matter. **Rule 5(2) (b)** of the Court of Appeal Rules provides:

“in any Civil proceedings, where a notice of appeal has been lodged in accordance with rule 74, order a stay of execution....”

Rule 74(1) aforesaid, provides, in pertinent part -

“Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.”

When read together, the two provisions above clearly show that this court will only be seised of jurisdiction to entertain an application under **rule 5(2) (b)**, above, if the step intended to be taken is before the Court itself.

We earlier reproduced prayer (1) of the applicant’s application before us, and clearly the step the applicant intends to take, if granted the stay order, is before the superior court.

In the circumstances, the present application is improperly before us. Besides, Mrs. Atieno Otieno conceded that the application was brought merely to buy time to enable her client, the applicant in this matter, to pursue various pending matters before the superior court. If that be so, and since she submitted as much, our view is that this application is mischievous and an abuse of the process of the Court.

We accordingly order that it be and it is hereby dismissed with costs.

Dated and delivered at Kisumu this 31st day of March, 2006.

S.E.O BOSIRE

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR