



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KWACH, BOSIRE & OWUOR, J.J.A.

CIVIL APPLICATION NO. NAI. 201 OF 2001

PAMELA MARY KIKUMU.....APPLICANT

AND

FRANCIS MWANZA MULWA RESPONDENT

(An application for stay of execution from the judgment and decree of the

High Court of Kenya at Machakos (Mr. Justice Mwera)

dated 14th March 2001

in

H.C.C.C. NO. 23 OF 1990)

RULING OF THE COURT

This Notice of Motion was taken out by Pamela Mary Kikumu (the defendant) under **rule 5(2)(b)** of the Court of Appeal Rules. She seeks an order of stay of execution of the judgment and decree of Mwera J given at Machakos on 14th March, 2001 pending the determination of an intended appeal.

Francis Mwanza Mulwa (the plaintiff) filed a suit in the superior court in February 1990 against the defendant to recover Shs 239,000/= together with interest at court rates from the date of filing suit to the date of judgment. The plaintiff claimed to have paid that amount to the defendant for the purchase of shares in a company run by the defendant called African Entertainments Limited. In her written statement of defence filed on 31st May, 1990, the defendant denied the plaintiff's claim and put him to strict proof.

The case was heard by Mwera J and he gave judgment for the plaintiff for Shs 200,000/= together with interest at bank rates levied at the time of the agreement. The plaint was filed on 12th February, 1990 and judgment was given eleven years later on 14th March, 2001. Under the decree issued on 23rd May, 2001 the defendant was ordered to pay Shs 4,296,000/= , which by now must have risen beyond that sum. Interest has been charged at the rate of 19% p.a. and backdated to 7th March, 1984, a period of 17 years.

Mr Nyakundi, for the defendant, submitted that the defendant has an arguable appeal with good prospects of success. He pointed out that the learned Judge awarded the plaintiff interest at a rate of (19% p.a.) which was not prayed for in the plaint. In prayer (b) the plaintiff asked for general damages for loss of profits from 7th March, 1984 but the learned Judge did not make any award under this head.

What the learned Judge ordered to be paid was the principal sum of Shs 200,000/= which the plaintiff had asked for in prayer (a) **with interest at court rates from the date of filing suit to the date of judgment.** For some inexplicable reason the learned Judge ordered interest to be paid on this amount:-

"..... at bank rates levied at the time of the subject agreement."

We have carefully perused the pleadings and the evidence given at the trial but because there was no specific prayer for it in the plaint, an issue arises as to whether interest could properly be awarded at bank rates, whatever that means. We think there is merit in this complaint and the defendant should be allowed to canvass it on appeal.

In the face of all this, Mr Mwangangi, for the plaintiff, maintains that the defendant has no arguable appeal. All we can say at this stage is that on the material before us we cannot agree with him. In view of what we have said about the way the decree was drawn, and what appears to us to be a serious misdirection on the part of the learned Judge, we cannot allow the plaintiff to take immediate benefit of the decree. That apart, we doubt whether the plaintiff would be in a position to refund the decretal amount if we denied the defendant a stay. Mr Mwangangi told us that the plaintiff has a profitable legal practice at Machakos but that alone is not enough.

For these reasons, we allow this application and order that the execution of the judgment and decree of Mwera J given on 14th March, 2001 be and is hereby stayed pending the determination of the intended appeal. Costs of the motion to be in the appeal.

Dated and delivered at Nairobi this 1st day of March, 2002.

R. O. KWACH

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JUDGE OF APPEAL

S.E.O. BOSIRE

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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