



**IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: GICHERU, LAKHA & OWUOR, J.J.A.)
CIVIL APPLICATION NO. NAI. 45 OF 2001 (UR. 27/2001)**

BETWEEN

SWANYA LIMITED APPLICANT

AND

DAIMA BANK LIMITED RESPONDENT

**(Application for stay of execution pending the lodging,
hearing and determination of an intended appeal from a
Judgment and Decree of the High Court of Kenya at Nairobi
- Milimani (Justice Onyango-Otieno,) dated 1st December,
2000**

in

H.C.C.C. NO. 1849 OF 1996)

RULING OF THE COURT

The applicant, who was the unsuccessful plaintiff in the superior court, applies for stay of execution, pending the determination of its appeal to this Court, of the Judgment of the superior court (Onyango-Otieno, J.) given on 1 December, 2000 whereby he entered judgment for the defendant on its counter-claim in the sum of K.Shs.17,596,179.06 together with interest at **4% per month** from 31 October, 1997 until payment in full. He also discharged an interim injunction restraining the defendant from exercising its statutory power of sale.

The plaintiff's property given by way of security to the defendant is estimated to value in excess of **K.Shs.30 million** and the defendant holds the title to this property. The actual amount due by the plaintiff has not yet been ascertained as the defendant's charge for interest is punitive. The plaintiff's application for stay before the superior court was granted on condition that it deposited a sum of **K.Shs.7 million** within thirty days. The plaintiff is unable to do so and the thirty days have since elapsed. In these circumstances, the plaintiff has now applied to this Court under **rule 5(2)(b)** of the Rules for a stay. Whilst it is true that this Court does not make a practice of depriving a successful litigant of the fruits of his litigation and locking up funds to which prima facie he is entitled pending an appeal, it is equally true that when a party is appealing, exercising his undoubted right of appeal, this Court will see that the appeal, if successful, is not rendered nugatory. It is, however, in the discretion of the Court to grant or refuse a stay. Normally, a stay will be granted if an intended appeal is arguable and that, if successful, it will be rendered nugatory if a stay is refused. In the instant case, we are satisfied that the intended appeal cannot be said to be frivolous; it is certainly arguable. We are satisfied that if a stay is not granted, and a sale of the property the subject-matter of the intended appeal takes place, the appeal will be rendered nugatory as the substratum of the intended appeal would be destroyed.

Giving the best consideration we can, balancing one thing against another, we have come to the

conclusion on a totality of the material before us that this is a proper case for the exercise of our discretion in favour of the applicant. For the reasons above stated, the application for stay succeeds. Accordingly, we grant the same as prayed.

Dated and delivered at Nairobi this 6th day of April, 2001.

J.E. GICHERU

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR