



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**(CORAM: AKIWUMI, SHAH & OWUOR, J.J.A)**

**CIVIL APPLICATION NO. NAI. 161 OF 2000 (UR 69/2000)**  
**BETWEEN**  
**GEOFFREY ORAO OBURA ..... APPLICANT**  
**AND**  
**MARTHA KARAMBU KOOME ..... RESPONDENT**

**(Application for stay of execution of the Judgment and  
decree of the High Court of Kenya at Nairobi (Mr.  
Justice Keiwua) dated 30th September, 1998**

**in**

judgment of the superior court and all other consequential orders pending the hearing and determination of an intended appeal (apparently the appeal was in the process of being filed as we heard this application). We note that a final judgment has been entered against the applicant by the superior court emanating from the non-compliance with the order to make good the undertaking.

The principles upon which this Court exercises its jurisdiction under rule 5(2) (b) are now well settled; that is that the intended appeal must be an arguable one or at least not a frivolous one and that the Court must guard against the possibility of the appeal being rendered nugatory when heard and the stay is not granted. See Stanley Munga Githunguri vs. Jimba Credit Corporation Ltd. Civil App. Nai. 161/1998 (unreported).

The question as to whether the applicant has an arguable appeal was considered in a similar application to this Court and the Court found that indeed the applicant's intended appeal was not frivolous on two main grounds; firstly, that counsel for Daima Bank, the respondent herein had admitted that if the money had to be paid to the Bank which was then "vulnerable in the present economic climate" it might not be able to refund the same to the applicant if he succeeded in the appeal and thereby render the appeal nugatory, and secondly that the applicant had not been given a proper opportunity of canvassing his defence, if any.

Miss Karua, Counsel for the respondent, submits that this apprehension has been taken care of in the stay order granted by the superior court namely that the money in question be deposited in an interest earning account in the joint names of both counsel pending the hearing and determination of the intended appeal. The nugatory aspect of this application has therefore been taken care of.

The second ground (as pointed out earlier) upon which the previous application was allowed was on the basis that there were other serious issues to be canvassed in the appeal. For instance, that the applicant was denied a proper hearing in the superior court. The simple answer to this is that if the applicant succeeds in the intended appeal he will be heard before the superior court. But as the situation stands now, there is a judgment against him.

Mr. Khamati now contends further that there is the serious issue of whether or not the defendant/respondent herein had waived her right to proceed and pursue the undertaking by urging and leading the applicant into agreeing to sue his former clients for the money the subject matter of the undertaking in H.C.C.C No. 2361 of 1997 . That suit is still pending before the superior court. We wish to say very little on this point as that will no doubt be canvassed in the appeal. At this interlocutory stage all we can say is that the applicant has clearly in the affidavit before us stated as follows:

"That while it is true I gave a professional undertaking as contained in the letter hereon marked "E" the Respondent herein was fully aware that my then client Halai Developers Ltd did not put me in funds".

We have considered the above admission in the light of the submission made to us, that the respondent had waived her right, and is therefore estopped from pursuing an action against the applicant. We are not saying that there is no arguable appeal. What we say is that if the applicant deposits the sum of Shs.3,000,000/= in an interest bearing account pending the hearing and determination of the appeal the interests of both parties would stand preserved. We therefore grant the stay as sought but on condition that the applicant deposits the sum of Shs.3,000,000/= in a joint banking account in the names of advocates of both parties within thirty (30) days from today's date. In default of such deposit the stay ordered shall stand lapsed and this application shall stand dismissed with costs. The costs of this application will be in the appeal.

Dated and delivered at Nairobi this 30th day of June, 2000.

A.M AKIWUMI

.....

**JUDGE OF APPEAL**

**A.B SHAH**

.....

**JUDGE OF APPEAL**

**E. OWUOR**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**