REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU

CIVIL APPLICATION NO. NAI. 344 OF 1999 (139/99 UR)

BETWEEN
CANELAND LTD MALKIT SINGHPANDHAL

SURJIT SINGH PANDHAL .... APPLICANTS

AND

DELPHIS BANK LTD. .... RESPONDENT

(Application for stay of execution pending the hearing
and determination of an intended appeal from the
judgment of the High Court of Kenya at Kisumu
(Wambilyangah J) dated 14th December, 1998

in

H.C.C.C. NO. 200 OF 1998)
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REASONS FOR THE RULING OF THE COURT

On 22 March 2000 we heard an application by the defendants under **rule 5(2)(b)** of the Rules of this Court seeking a stay of execution pending the hearing and determination of an intended appeal of the decree of the superior court (Wambilyangah, J.) given on 14 December, 1998 whereby he entered judgment for the plaintiff in the sum of KShs.16,496,996.15 together with interest thereon at 33.5% per annum and at court rates of 12% per annum until payment in full. He also ordered the defendants to pay to the plaintiff the costs of the suit as shall be taxed and certified by a taxing officer together with interest thereon at 12% until payment in full. At the conclusion of the hearing of the application, we dismissed the application with costs. We now give our reasons for doing so. The plaintiff's claim against the first defendant was of fifteen million shillings as a loan or advance or a bill discounting facilities. The second and third defendants executed personal guarantees guaranteeing the payment of all the sum of money the first defendant owed to the plaintiff. Despite demand, the defendants failed, neglected and refused to settle the plaintiff's claim. Hence the action.

In their defence, the defendants did not deny that the plaintiff advanced the fifteen million shillings to the first defendant upon the guarantees signed by the second and third defendants. Nor is there any specific averment that the loan has been fully repaid. In these circumstances, when the plaintiff applied for the defence to be struck out on the ground that the defence filed was frivolous and an abuse of the process of court, the learned judge acceded to the application and entered judgment for the plaintiff against the defendants jointly and severally as prayed in the plaint with costs. Dissatisfied by the judgment the defendants intend to file an appeal to this Court having filed a notice of appeal within the prescribed time.

The applicants contend that their intended appeal from the said decision of the superior court is arguable and unless the stay sought is granted, their intended appeal may be rendered nugatory. These are the conditions on which it is now well settled that this court will grant a stay.

We now turn to apply these principles to the facts of the present case. Let us say at once that it was nowhere alleged by the applicants in the supporting affidavits or otherwise that the respondent will be unable to refund to the defendants any sums of money paid in satisfaction of the decree. The onus was on the applicants to satisfy the court on this issue. Upon a careful consideration of all the material available to us we are unfortunately not satisfied that this onus has been discharged. There is nothing to show that the appeal will be rendered nugatory if a stay is not granted. On the contrary, it appears to us that the respondent is not a bank of straw and can meet or refund any sums of money paid to it. That being the case and our view of the matter, we are satisfied, on a balance of probabilities, that if a stay is not granted the appeal will not be rendered nugatory.

The applicants having failed to satisfy us on this condition, their application must fail. It is not necessary for us to consider the first condition, namely, whether the applicants have an arguable appeal.

For the reasons above stated, this application for stay fails and is dismissed with costs.

Dated and delivered at Nairobi this 7th day of April, 2000.

A. M. AKIWUMI

JUDGE OF APPEAL

A. A. LAKHA

JUDGE OF APPEAL

S. E. O. BOSIRE

JUDGE OF APPEAL

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

DEPUTY REGISTRAR