



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAKURU**

Civil Appli. Nai. 292 of 2006 (164/2006 UR)

JOHN ELLOY O. NYASORO APPLICANT

AND

NATIONAL BANK OF KENYA LIMITED..... RESPONDENT

(Application for stay of execution of the decree and judgment of the High Court of Kenya at Nakuru (Mr. Justice Luka Kimaru) dated 15th June, 2006

in

H.C.C.C. NO. 374 OF 1995)

RULING OF THE COURT

The applicant seeks an order under *Rule 5(2)(b)* of the Court of Appeal Rules that there be a stay of execution of the decree of the superior court in Nakuru H.C.C.C. NO. 374 of 1993 pending the hearing and determination of Nakuru Civil Appeal No. 19 of 2006.

The applicant on 15th June, 2006 appealed against the judgment and decree of the superior court in Nakuru H.C.C.C NO. 374 of 1993 whereby the superior court entered judgment against the applicant for Shs.14,104,129/60 together with interest at 21% *p.a.*

The principles upon which this Court exercises its unfettered discretion to grant a stay of execution, among other things, are well settled. The discretion must be exercised judicially and before the court can exercise its discretion in favour of an applicant, the applicant must show both that the intended appeal or the appeal is arguable, that is to say, that it is not frivolous, and, secondly, that, unless the application for stay of execution is granted the intended appeal or appeal will be rendered nugatory.

The application is supported by the affidavit of *John Elloy Nyasoro*, the applicant herein.

The applicant states that he has an arguable appeal with very good prospects of success for the reasons that, the court awarded Shs.14,104,129/60 which sum was not pleaded; the court awarded interest at the rate of 21% *p.a.* which was never pleaded in the plaint and that the amount awarded by the court was not supported by any evidence.

We have considered the application. We are satisfied that the applicant has shown on *prima facie* basis that the appeal is indeed arguable.

The applicant further states that if the respondent is not restrained from executing the decree the applicant will suffer unnecessary hardship as the respondent is holding his title documents. The respondent is a bank. The applicant has not said that the respondent will not be able to refund the decretal amount if the appeal succeeds. Indeed, the applicant's counsel concedes that the respondent, being a bank, will be in a position to refund the decretal amount if the appeal succeeds. In the circumstances, the applicant has not shown that the appeal would be rendered nugatory if the application is not allowed.

In the result, the application has no merit. We dismiss it with costs to the respondent.

Dated and delivered at Nakuru this 2nd day of March, 2007.

P. K. TUNOI

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JUDGE OF APPEAL

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. M. GITHINJI

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR