IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KWACH, LAKHA & KEIWUA, JJ.A.)

CIVIL APPLICATION NO. NAI. 76 OF 2003

BETWEEN

SASINI TEA & COFFEE LTD…….....……. APPLICANT

AND

SAMUEL OBWOGI ……..……. RESPONDENT

(Application for stay of execution pending the lodging and hearing of an intended appeal from the ruling and order of the High Court of Kenya at Kisii (Hon. Justice Wambilyanga) given on the 18th day of March, 2003

in

H.C.C.C. No. 180 of 2001)

****

RULING OF THE COURT

This Notice of Motion was taken out by Sasini Tea & Coffee Ltd (hereinafter called "the defendant") under *rule 5(2)(b)* of the Court of Appeal Rules (the Rules). The defendant seeks, among other orders, a stay of execution of the order of Wambilyangah J given on 18th March, 2003 dismissing an appeal lodged by the defendant in the superior court at Kisii (Civil Appeal No. 180 of 2001) and for a stay of execution of the decree in Kisii CMCCC No. 1540 of 1995 given on *27th August, 2001.*

Samwel Obwogi the respondent in this application (hereinafter called "the plaintiff") sued the defendant in the Chief Magistrate's Court at Kisii to recover damages for personal injuries he sustained on *22nd December 1990* when he was working in the defendant's timber plant at Kipkebe Tea Estate as a timber roller. The claim was based on alleged breach of statutory duty and negligence on the part of the defendant. The defendant did not file a defence although it was alleged by the plaintiff that it had been served with process. The suit therefore proceeded ex parte and on *9th July 1997*, judgment was entered in favour of the plaintiff for Shs.491,500/= together with interest and costs.

On *25th August, 1997* the defendant applied to set aside the default judgment claiming that it had not been served with the summons and the plaint. That application was heard by Nora Owino SRM on *4th*

September 2000 and ruling was reserved to be delivered on *21st September 2000* . She did not deliver her ruling on that date but apparently did so on *20th November 2000* in the presence of the Advocate for the plaintiff. She set aside the default judgment and gave the defendant 15 days to file a defence. The defendant's advocate was not in court when the ruling was delivered but at some stage long after the expiry of 15 days purported to file a defence without seeking extension of time for that purpose. Subsequent upon that default, proceedings for execution of the decree commenced.

The record shows that on *25th July, 2001* the defendant applied for stay of execution of the decree and extension of time to file a defence. This application was heard by Ombonya, C.M. who in a ruling dated *27th August, 2001* dismissed it with costs. In the course of his ruling the learned Chief Magistrate said –

"Even though there may have been no notice of the judgment to the applicant it was indolent of him not to bother to find out about the result of the case for a period of one year. At least the applicant could have made enquiries about the resul t of the case. The fact that the applicant waited for a whole year before he bothered to find out the result of his suit was clearly indolent of him. He was not vigilant in pursuing his right."

It should be noted that that application was brought under *Order XLIX rule 5* (extension of time) and *Order XXI rule 22* of the Civil Procedure Rules (stay of execution). After the dismissal of its application by the Chief Magistrate, the defendant appealed to the superior court (Civil Appeal No. 180 of 2001) on 6th September, 2001 . On *27th January, 2003* , Wambilyangah J dismissed the appeal for want of prosecution. The defendant did not appeal against that order but on 6th March, 2003 filed yet another application for stay of execution and review of the order of *27th January, 2003* . That is the application which came before Wambilyangah, J on 18th March, 2003 , and which he dismissed peremptorily on the ground that the defendant had failed to comply with an order made on *25th September, 2001* directing the defendant to pay the decretal amount into a joint account in the names of the Advocates for the parties. It is against the dismissal of the defendant's application for review on *18th March, 2003* that the defendant intends to appeal to this Court and in relation to which he has already lodged a notice of appeal.

The grounds set out in support of the application for review do not in our judgment satisfy the criteria specified under Order XLIV rule 1 of the Civil Procedure Rules. They are clearly grounds for an appeal proper. So even if the learned Judge had heard the application on the merits it is doubtful whether he would have allowed the application. The defendant would have been on a much firmer ground had it been advised to appeal against the order of dismissal of the appeal.

We have set out all these matters at length in order to highlight what we see as a serious weakness of the defendant's intended appeal. On appeal the defendant will have limited room for manouvre. It will have to show that the application was a proper one for review under *Order XLIV rule 1* of the Civil Procedure Rules. The defendant will not be able to argue that the learned Judge improperly dismissed its appeal for want of prosecution. This avenue is closed to it because it chose not to appeal against the order of dismissal. In the final analysis, we do not see what arguable appeal the defendant has in this Court in the circumstances of this case.

Even if the defendant's application to the Judge is treated as one for stay of execution, in which case leave was necessary to appeal to this Court, we are satisfied that once an application for leave to appeal has been made in terms of rule 39(b) of the Rules of this Court, and a notice of appeal has been lodged in accordance with *rule 74* of the Rules, this Court has jurisdiction under *rule 5(2)(b)* of the Rules to entertain an application for stay of execution notwithstanding the fact that at the time the application

for stay reaches this Court, the application for leave to appeal is still pending in the superior court. A problem would only arise if the appellant purported to file an appeal before actually obtaining the requisite leave.

For the reasons we have given, this application fails and it is dismissed with costs to the plaintiff.

Dated and delivered at Nairobi this 11th day of April, 2003.

R.O. KWACH

.....

JUDGE OF APPEAL

A.A. LAKHA

.....

JUDGE OF APPEAL

M. Ole KEIWUA

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR