



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NUMBER 20 OF 2019

NCBA BANK KENYA LIMITED

(Formerly NIC Bank Limited).....PLAINTIFF/APPLICANT

VERSUS

SEAMAN BUILDING &

CIVIL ENGINEERING LIMITED.....1ST DEFENDANT/RESPONDENT

FRANCIS MACHARIA MBUGUA.....2ND DEFENDANT/RESPONDENT

SCHOLASTIC WANGU MACHARIA.....3RD DEFENDANT/RESPONDENT

MARGARET MUTHONI MACHARIA.....4TH DEFENDANT/RESPONDENT

RULING

1. The Notice of Motion before me is brought under **Section 1A, 1B, 3A of the Civil Procedure Act and Order 42 rule 6 and Order 52 rule 1 of the Civil Procedure Rules, and all other enabling provisions of the law.**
2. The application seeks an interim order of stay of taxation proceedings before the Deputy Registrar, pending the hearing and determination of the applicant's appeal.
3. What happened is that on 13th July 2020, this court delivered a Ruling in which it struck out the applicant's suit in its entirety. The applicant was dissatisfied with that Ruling and has filed, **CCA No. E024 of 2020 NCBA Bank Kenya Limited vs Seaman Building & Civil Engineering & 3 Others.**
4. The respondent filed its party and party bill of costs and this was scheduled for hearing on 16th November 2020.
5. The application for stay is supported by the affidavit of one Stephen Atenya.
6. The respondents filed grounds of opposition, mainly that the applicant had not demonstrated that it would suffer any irreparable damage and or that the respondent would be unable to repay the costs in the event that the appeal was successful, and that no offer of security had been made.
7. Parties, through their respective counsel proceeded by way of Written Submissions.
8. I have carefully considered the application and the submissions by each party. The only issue is whether the application has any merits.
9. The applicant relied on order 42 rule 6 of the Civil Procedure Rules, the cases of **Moses Wachira vs Niels Bruel & 2 others [2016] eKLR, and Gichuki King'ara & Co. Advocates vs Mugoya Construction & Engineering Limited [2010] eKLR.**
10. The applicant's key argument is that it has filed an appeal in the Court of Appeal, a Memorandum of Appeal has been filed, and that the applicant has complied with the requirements of the law, and precedent with respect to grant of stay orders pending appeal. The applicant went on to limit its submissions to the taxation proceedings, arguing that allowing the proceedings to proceed would render the appeal nugatory, that in the event that the appeal succeeded, precious judicial time would have been wasted on the taxation proceedings, that the respondents would not suffer any prejudice if the proceedings were held in abeyance. That allowing the taxation to proceed would also lead

to a multitude of litigations in one suit, and it would serve the interests of justice to curb piecemeal taxation.

11. The respondents on their part began by pointing out that they deserved the costs and cited *Kuloba* in **Judicial Hints on Civil procedure 2nd Edition (Nairobi: Law Africa, 2011) page 94** and ***Joseph Oduor Anode vs Kenya Redcross Society* Nairobi High Court Civil Case Number 66 of 2009 [2012] eKLR.**

12. With respect to the applicant the respondents argued that the applicant had not established the requirements of the law, sufficient cause, substantial loss, and security. They relied on;

- ***Vishram Ravji Halai vs Thornton & Turpin* [1990] KLR 365**
- ***Suleiman vs Amboseli Resort Ltd* [2004] KLR 589, *Samvir Trustee Limited vs Guardian Bank Ltd (Milimani)* HCC 795 of 1997**
- ***James Wangalwa & Another vs Agnes Naliaka Cheseto Bungoma* HC Miscellaneous Application No. 42 of 2011**
- ***Kenya Shell Limited vs Kibiru* [1986] KLR 410.**
- ***Machira T/A Machira & Co. Advocates vs East African Standard (No. 2)* [2002] KLR 63.**

13. The respondent argued that the application was premature, as the applicant had no idea what the total costs would be, and therefore could not even offer security.

14. **Order 42 rule 6 (1)** states *inter alia*, that no appeal or 2nd appeal shall operate as a stay of execution on proceedings under a decree or order appealed from unless by order of the court appealed from and for sufficient cause. At **Rule 6(2)** the conditions for stay of execution are set out.

15. The first thing to note here is that there is a big difference between stay of proceedings and stay of execution. In this I find consonance in the words of *Gikonyo J* in ***Kenya Wildlife Service vs James Mutembei* [2019] eKLR**, citing from **Halsbury's Law of England, 4th Edition vol. 37 page 330 of 332**, he pointed out that stay of proceedings is a serious, grave and fundamental interruption of the right of a party to conduct litigation, it impinges on access of justice, expeditious trial and the right to fair trial.

16. The question is whether this is applicable to proceedings related to taxation? The applicant seems to suggest that these proceedings are different from any other proceedings. I would not agree. These are proceedings in which the respondent who was the successful party in this case, seeks to have his costs assessed. Hence, all these factors apply; expeditious disposal of the matters, access to justice and the right to be heard and to have the issue determined.

17. The test applicable in determining whether the proceedings can be stayed was set out in **Nairobi High Court Winding Up Cause Number 43 of 2000 Global Tours & Travel Limited**, where *Ringera J* as he then was in his oft quoted dictum stated;

“As I understand the law, whether or not to grant a stay of proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice.”

The learned Judge went on to state that the;

“...sole question is whether it is in the interests of justice to order a stay of proceedings, and if it is, on what terms it should be granted... the court should essentially weigh the pros and cons of granting or not granting the order... bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal... whether it is arguable... the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

18. I have considered the application in light of the foregoing illuminating authorities, and those cited by the parties. It is evident that the prosecution of the taxation proceedings, is not piecemeal litigation, it is not as if the respondent is taxing costs of an interim application, the proceedings relate to a final order of this court, hence, the argument that proceedings would amount to piecemeal litigation does not stand.

19. What about the pros and cons? The application is premature, as the applicant does not stand to suffer any prejudice by the mere fact of the taxing of the costs. Those proceedings in my view will not in any way violate the applicant's right of appeal neither will they in any way render the appeal nugatory. The outcome of taxation proceedings can be dealt with, but by themselves they are not prejudicial to the applicant and in any event no sufficient cause has been placed before me to show how the proceedings will render the appeal nugatory. It is in my view not in the interests of justice to allow the application for stay of proceedings.

20. Accordingly, I find the application is without merit. The same is dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED VIA EMAIL THIS 18TH DAY OF JANUARY 2022.

MUMBUA T. MATHEKA,

JUDGE.

IN THE PRESENCE Of:

EDNA C/A

MWANIKI GACHOKA ADVOCATES

N. IKUA & COMPANY ADVOCATES

WILLY MAINA & COMPANY ADVOCATES