



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & TAX DIVISION**  
**COMMERCIAL CASE NO. 282 OF 2017**  
**AFRICAN BANKING CORPORATION**  
**LIMITED.....PLAINTIFF/RESPONDENT**

**VERSUS**

**INTEX CONSTRUCTION LIMITED.....1<sup>ST</sup>**  
**DEFENDANT/APPLICANT**

**KENYA RURAL ROADS AUTHORITY.....2<sup>ND</sup>**  
**DEFENDANT**

**RULING**

1. The brief background of the matter before me is that between 2014 and 2016, the Plaintiff, African Banking Corporation Limited (the Bank) extended to the 1<sup>st</sup> Defendant, Intex Construction Limited (Intex) several loan facilities amounting to Kshs. 753,419,937/= . Intex defaulted in servicing the facilities and upon its request, Kenya Commercial Bank Limited did on 1.7.16, take over Kshs. 400,000,000/= of the outstanding amount leaving a balance of Kshs. 300,000,000/= and an overdraft of Kshs. 30,000,000/= towards which Intex made no payment. On 9.6.16, Intex assigned to the Bank, receivables in its contract with the 2<sup>nd</sup> Defendant, Kenya Rural Roads Authority, for a road construction project. All proceeds were to be paid into Intex's account with the Bank. Following diversion of the funds by Intex, the Court on 8.11.17 directed that the said proceeds be paid into a joint escrow account in the names of the respective advocates for Intex and the Bank. An account was accordingly opened at Stanbic Bank Limited, to which the 2<sup>nd</sup> Defendant deposited the contract receivables. An audit report by Ernst and Young dated 21.8.19 on the joint instructions by Intex and the Bank indicated that Intex owed the Bank the sum of Kshs. 463,455,956.60. In its ruling of 28.7.2020, the Court ordered that the sum of Kshs, 233,200,623.40 held in escrow account no. 01000053411 in Stanbic Bank Limited in the names of Kagwimi Kangethe Advocates and Kimani & Michuki Advocates and any payment made by the 2<sup>nd</sup> Defendant and interest thereon, be released to the Plaintiff. Following an application by Intex, stay of execution was granted for a period of 30 days.

2. Intex then filed the present application dated 25.8.2020, seeking extension of the orders of stay of execution issued on 28.7.2020 pending the hearing and determination of its intended appeal against a ruling of this Court of even date. The Application is supported by the affidavit Samit Ghelot, the managing director of Intex.

3. On 29.7.2020, Intex filed a notice of appeal which was served on the Bank's advocates and the Court of Appeal. On the same date, Intex applied for typed proceedings and a certified copy of the ruling which

were yet to be supplied. Intex attributes the delay in obtaining the proceedings to the disruption of Court operations including closure for 14 days on 30.7.2020 due to the Covid 19 pandemic. According to Intex therefore, the factors causing the delay in filing the intended appeal as well as an application for stay pending appeal were beyond the Intex's control.

4. Intex contends that the dispute between it and the Bank concerns the exact amount due and owing to the Bank under various facilities advanced to Intex, which amount will be determined at the hearing. Intex further contends that the Court's order that all payments made to Intex by the 2<sup>nd</sup> Defendant be released to the Bank was indeterminate and indefinite in nature and will have the effect of paralyzing Intex's operations. To Intex therefore, the release of the Escrow Amount will prejudice its rights, yet maintaining the same in escrow will not prejudice the Bank. Unless the stay order is extended therefore, Intex will not be able to recover the money released to the Bank and will suffer substantial loss and the intended appeal will be rendered nugatory.

5. The Bank opposed the Application by its notice of preliminary objection dated 21.9.2020 and a replying affidavit sworn on 16.9.2020 by Kajuju Marete, its Legal Manager. The Bank averred that Intex filed an application dated 1.9.2020 in the Court of Appeal seeking similar orders of stay of execution of the orders of 28.7.2020 pending the hearing of the intended appeal. The Bank's case is that the Court after considering all the evidence did in its ruling of 28.7.2020 find that Intex was indebted to the Bank and had not settled even the principal sum. The Court also found that the amount in the escrow account was insufficient to settle the principal amount. Intex through its applications seeks to evade its contractual obligations. To the Bank therefore, the filing of similar applications in this Court and in the Court of Appeal amounts to forum shopping, is vexatious, and an abuse of the Court process.

6. The 2<sup>nd</sup> Defendant did not participate in these proceedings.

7. Parties filed their written submissions which I have duly considered. The issue for determination is whether this Court has jurisdiction to deal with the Application in light of the fact that Intex subsequently filed an application in the Court of Appeal seeking the same orders.

8. For Intex, it was submitted that it is erroneous for the Bank to oppose the Application on the ground that Intex has moved the Court of Appeal seeking similar orders. Intex argued that the High Court and the Court of Appeal enjoy concurrent and complementary jurisdiction to grant stay pending appeal. It was contended that the Application was necessitated by the need to preserve the substratum of the appeal, which if the orders are not granted would, render the appeal nugatory. It is Intex's further contention that due to jurisdictional priority, this Court will defer to the Court of Appeal and stay its proceedings. The Bank submitted in opposition that while the 2 Courts have concurrent jurisdiction, that jurisdiction cannot be exercised at the same time. The Bank further submitted that the jurisdiction of this Court had been transferred to the Court of Appeal by Intex's application in that Court seeking similar relief.

9. This Court and the Court of Appeal have been clothed with the jurisdiction to grant stay of execution or proceedings pending appeal. Order 42 Rule 6 of the Civil Procedure Rules provides:

***1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.***

2. ...

10. The discretionary power of the Court of Appeal to grant stay orders pending appeal is set out in Rule 5(2)(b) of the Court of Appeal rules as follows.

**(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—**

**(a) ...**

**(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75,**

**order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.**

11. It is clear from the foregoing provisions that both Courts have concurrent jurisdiction to grant stay of execution and proceedings pending appeal.

12. To buttress its submission that the 2 Courts have concurrent jurisdiction, Intex relied on the case of Montague Charles Ruben & 9 others v Peter Charles Nderito & another [1989] eKLR, Intex, the Court of Appeal stated:

***In dealing with rule 5(2)(b) applicants, this Court exercises original jurisdiction and this has been so stated in a long line of cases decided by this Court. Once an applicant has properly come before the Court, the Court has jurisdiction to grant an injunction or make an order for a stay on such terms as the Court may think just. We have to apply our minds denovo (anew) on the propriety or otherwise of granting the relief sought. And as we have always made clear, this exercise does not constitute an appeal from the trial judge's discretion to ours. In such an application, the applicant must show that the intended appeal is not frivolous, or put the other way round, he must satisfy the court that he has an arguable appeal.***

13. With respect, the cited case has no bearing on the present case as there was no application for stay in the High Court. After dismissal of their application for a temporary injunction, the appellants therein moved straight to the Court of Appeal for stay of the order of the High Court. In the present case, Intex has filed an application in both this Court and the Court of Appeal which applications are both pending.

14. Intex further argued that this Court has jurisdiction to hear and determine the Application before it and relied on the case of Heritage Insurance Company Limited v Patrick Kasina Kisilu [2015] eKLR where Mureithi, J stated:

***Even where an application for such stay shall have been granted or refused by the court appealed from, the appellate court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just.***

15. It is not disputed that this Court has jurisdiction to hear and if satisfied that it ought to, grant an order for stay of execution pending appeal. Where stay has been granted or denied by this Court, the Court of Appeal shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just. That is the law.

16. Whereas it is clear from the cited legal provisions that this Court and the Court of Appeal have concurrent jurisdiction to grant stay of execution, that jurisdiction cannot be exercised at the same time. A party who has a pending application for stay in the High Court must await its outcome before moving to the Court of Appeal to seek similar orders. This was the holding in Gathara Chuchu & 473 Others v Gititu Coffee Growers Co-operative Society & Another [2008] eKLR where Nambuye, J (as she then was) stated and I concur:

***In this courts construction of the Court of Appeal case law on concurrent jurisdiction of the superior court and the Court of Appeal, on the granting of the relief of stay pending appeal, it does not mean that both courts can become seized of the matter, handle it simultaneously and***

***rule on it differently at the same time. It simply means that both courts are competent to grant the relief in their respective jurisdictions. And as per the provisions of Order 41 rule 4(1) Civil Procedure Rules, if the superior Court is the one seized of the matter it can grant the stay of execution pending hearing and determination of the appeal. However where the superior court declines to grant the same or gives un favourable terms, the aggrieved party can move to the Court of Appeal and seek the same relief.***

17. In the present case, Intex ought to have waited for this Court's decision on his application before moving to the Court of Appeal seeking the same relief. Order 42 Rule 6 is clear on the procedure to follow when seeking stay in the Court appealed from and the Court Appealed to. There is no provision for simultaneous applications.

18. Parties must not in their pursuit of justice subvert the hierarchy of our Courts that is set out in Chapter Ten of the Constitution of Kenya, 2010. A party seeking justice must do so within the set down legal parameters. Such party may only approach one Court at a time and then move on to the Court in the next level. In Michael Mungai v Housing Finance Co. (K) Ltd & 5 other [2017] eKLR the Supreme Court had this to say on the hierarchy of the Courts:

***Justice has to be sought within the justice system, which has rules and regulations that govern how one pursues his cause of action. It is not enough for a person to plead pursuit of justice and approach a court of law. Before one approaches a court in pursuit of justice, he or she must be cognizant that he has a justiciable cause of action. Even with such a cause of action, one has to follow the legal regime that informs him as to which court to approach, and in which manner: hence the rules of procedure in our statute books.***

19. To file similar applications in 2 Courts and of different hierarchical levels, as Intex has done, is an abuse of the Court process. It is vexatious to the Bank and is also an abuse of the judicial process. In Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others [2009] eKLR, the Court of Appeal had this to say on abuse of the Court process:

***Again the Court of Appeal in Abuja, Nigeria in the case of ATTAHIRO v BAGUDO 1998 3 NWLL pt 545 page 656, stated that the term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it.***

20. Respect of the hierarchy of our judicial system is not only required of litigants but of Courts as well. Accordingly, this Court cannot purport to consider and determine a matter that is pending before the Court of Appeal.

21. In the result and for the reasons stated, my finding is that the Application herein is an abuse of the Court process and the same is hereby struck out. The Plaintiff shall have costs.

**DATED, SIGNED and DELIVERED in NAIROBI this 16<sup>th</sup> day of April 2021**

**M. THANDE**

**JUDGE**

**In the presence of: -**

..... **for the Plaintiff**

..... **for the 1<sup>st</sup> Defendant**

..... for the 2<sup>nd</sup> Defendant

..... Court Assistant