



IN THE HIGH COURT OF KENYA

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

MISC. CIVIL APPLICATION NO. E300 OF 2019

BETWEEN

NATIONAL BANK OF KENYA LIMITED.....CLIENT/APPLICANT

AND

RACHUONYO & RACHUONYO ADVOCATES.....ADVOCATE/RESPONDENT

RULING NO. 2

1. There are two applications for consideration in this ruling. The first application is the Notice of Motion dated 10th June 2021 filed by the Applicant (“the Bank”). It is made under **Order 42 rule 6** of the **Civil Procedure Rules** and in the application the Applicant seeks an order of stay of execution and proceedings of the ruling of the Deputy Registrar dated 28th April 2020. The application is supported by the grounds on its face and the affidavit of Chrispus Maithya, a Legal Officer with the Bank, sworn on 10th June 2021. It is opposed by the Respondent through the replying affidavit of Clifford Owuor Rachuonyo, an advocate and partner in the Respondent law firm (“the Advocates”) sworn on 18th June 2021.

2. The second application is the Notice of Motion dated 18th June 2021 filed by the Advocates made, inter alia, under **section 51(2)** of the **Advocates Act (Chapter 16 of the Laws of Kenya)** in which they seek judgment for KES. 5,297,053.18 being Advocate/Client costs duly certified by the Deputy Registrar together with interest thereon at 14% p.a. from 24th May 2017 until payment in full. The application is supported by the affidavit of Clifford Owuor sworn on 18th June 2021 and opposed by the Bank through the affidavit of Chrispus Maithya sworn on 7th July 2021.

3. Both sides filed written submissions in support of their respective positions which I have considered. The undisputed facts are that on 28th April 2021 the Deputy Registrar delivered a ruling and awarded the Advocates KES. 5,297,053.19. The Bank’s reference from the decision of the Deputy Registrar was dismissed by the ruling dated 31st May 2021. The Bank has evinced its intention to appeal against the said decision by filing the Notice of Appeal dated 9th June 2021.

4. Since the Bank has applied for stay of the execution and proceedings pending the appeal from the decision which the Advocates now seek to enforce, it is my view that it should be considered first.

5. Since execution is not imminent as judgment has not been entered, what the Bank seeks in substance is an order of stay of further proceedings to forestall judgment being entered against it on application of the Advocates and thereafter execution before the its appeal to the Court of Appeal is heard and determined. The general principle governing the grant of stay of proceedings was elucidated by Ringera J., in **Re: Global Tours and Travels Ltd NRB HC Winding Up Cause No. 43 of 2006 (UR)** cited in **Kenya Wildlife Service v James Mutembei MRU HCCA No. 40 of 2018 [2019] eKLR** as follows:

As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.

6. The Bank is entitled to exercise its undoubted right of appeal while the Advocates are entitled to realise the fruits of labour that have crystallised in the certification of costs in their favour. The Bank does not dispute the retainer hence and ultimately any successful appeal will be limited to the quantum of instruction fees which may or may not be reduced on appeal. On its part, the Bank has offered to provide an irrevocable bank guarantee from a reputable institution as security for the taxed amount.

7. For the reasons I have set out and balancing the interests of both parties, I order as follows:

(a) There shall be a stay of further proceedings pending the hearing and determination of the intended appeal from the ruling dated 31st May 2021 on the terms set out hereafter.

(b) The Applicant/Client shall pay the Advocates/Respondent KES. 1,500,000.00 and provide a bank guarantee for the sum of KES 3,797,053.00 from a reputable bank other than the Applicant to be agreed upon by the parties within 45 days from the date hereof.

(c) The stay of execution shall remain in force for a period of one year from the date hereof unless otherwise extended by this court or the Court of Appeal.

(d) In default of any condition of this order, the order of stay shall stand discharged.

(e) The costs of this application shall be in the appeal.

DATED and DELIVERED at NAIROBI this 30th day of JULY 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Amuga instructed by Amuga and Company Advocates for the Advocates/Respondents.

Mr Juma instructed by Mutua-Waweru and Company Advocates for the Client/Applicant.