



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
HCCC NO.392 OF 2016

IMPERIAL BANK LIMITED (IN RECEIVERSHIP).....1ST PLAINTIFF

KENYA DEPOSIT INSURANCE CORPORATION.....2ND PLAINTIFF

CENTRAL BANK OF KENYA3RD PLAINTIFF

VS

ALNASHIR POPAT.....1ST DEFENDANT

ANWAR HAJEE.....2ND DEFENDANT

JINIT SHAH3RD DEFENDANT

HANIF MOHAMED AMIRALISOMJI.....4TH DEFENDANT

MUKESH KUMAR PATEL.....5TH DEFENDANT

VISHN DHUTIA.....6TH DEFENDANT

ESTATE OF ADULMALEK JANMOHAMED.....7TH DEFENDANT

ERIC BENGI GITONGA.....8TH DEFENDANT

OMUREMBE IYADI.....9TH DEFENDANT

CHRISTOPHER ANGELO DIAZ.....10TH DEFENDANT

IMARAN LIMITED.....11TH DEFENDANT

JANCO INVESTMENTS LIMITED.....12TH DEFENDANT

REYNOLDS & COMPANY LIMITED.....13TH DEFENDANT

EAST AFRICAN MOTOR INDUSTRIES

(SALES & SERVICES) LIMITED.....	14TH DEFENDANT
MOMENTUM HOLDINGS LIMITED.....	15TH DEFENDANT
ABDULMAL INVESTMENTS LIMITED.....	16TH DEFENDANT
KENBLEST LIMITED.....	17TH DEFENDANT
REX MOTORS LIMITED	18TH DEFENDANT

RULING

1. On 17th January 2016 this Court dismissed an Application dated 26th October 2016 by the 1st Plaintiff (hereinafter the Applicant). The application had sought to bar Mr. Njoroge Nani Mungai and the firms of Ahmednasir Abdikadir & Co. Advocates and Coulson Harney Advocates from acting for certain parties in this matter.
2. The 1st Plaintiff is aggrieved by that outcome and on 15th January 2017 lodged a Notice of Appeal against the said Ruling at the High Court Registry. In the meantime the Applicant has filed a Notice of Motion dated 10th February 2017 seeking to stay these proceedings pending the hearing and determination of the said Appeal. The Application is supported by the 2nd and 3rd Plaintiffs and the 3rd to 8th Defendants to the Counterclaim. It is contested by all the Defendants to the main suit save for the 18th Defendant. The 18th Defendant and some proposed Interested Parties take no position and left the matter to Court.
3. In an Affidavit sworn on 10th February 2017 by Mohamud Ahmed the Applicant asserts that it is of utmost importance and proper utilization of Judicial time and resources that the issues of representation by Njoroge Nani Mungai and the firms of Ahmednasir Abdikadir & Co. Advocates and Coulson Harney Advocates and regarding conflict of interest be resolved before any other aspects of this suit is heard and determined.
4. The Applicant informs Court that it has taken steps towards processing the Appeal and has requested for supply of handwritten copies of the Court proceedings for typing, proof reading and certification.
5. The Applicant is confident about the prospects of the Appeal and states that it is meritorious with a high probability of success. Paragraph 8 of the Affidavit sets out some of the grounds that the Applicant shall be taking up before the Appellate Court.
6. It is the position of the Applicant that it would suffer substantial prejudice if the suit were allowed to proceed and the Court of Appeal overturned the impugned Ruling. Lastly the Applicant states that it has brought the Application without unreasonable delay.
7. In opposing the Application, the 1st to 6th and 8th to 10th Defendants filed Grounds of Opposition dated 27th February 2017 even after filing another set of Grounds on 23rd February 2017. The 3rd Defendant filed Grounds of Objection on 1st March 2017 and a Replying Affidavit sworn by one Salim Janmohamed on 2nd March 2017. The 12th Defendant, similarly filed Grounds of Objection and a Replying Affidavit on 1st March 2017 and 3rd March 2017 respectively. The 11th and 13-17th Defendants (who are the 1st to 6th Plaintiffs in the Counterclaim) filed Grounds of Opposition dated 2nd March, 2017.
8. Taken together, the Application is opposed on the following grounds;-
 - (i) That the Application is expressed to be brought under Order 42 Rule 6 of The Civil Procedure Rules which provision is inapplicable.

(ii) The Applicant has not demonstrated that it will suffer substantial loss if the order is not granted.

(iii) The intended Appeal is unarguable, baseless and stands no chance of success.

(iv) In any event, the merit or otherwise of an Appeal is extraneous to in an application under order 42 Rule 6.

(v) The instant suit having commenced under certificate of urgency should not be stayed as that would be contrary to the dictates of Article 159(2)(b) of The Constitution and Section 1A of the Civil Procedure Act which requires that there be just, expeditious, proportionate and affordable resolution of Civil disputes.

(vi) The Counterclaim herein being a different suit should not be affected by any stay that may be granted.

9. The Court has heard Counsel and read the submissions filed herein.

10. It is true that the Application is brought under the auspices of Order 42 Rule 6 of the Civil Procedure Rules. Order 42 Rule 6(1) reads as follows:-

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from 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”.*(my emphasis)*

While sub Rules (2), (3) and (5) of Order 42 specifically make reference to stay of execution, subrule (i), notably, is on both stay of execution or proceedings. The instant application which is for stay of proceedings is properly domiciled under the provisions of Order 42 Rule 6(1) and the objection by some of the Defendants that it is brought under the wrong provisions of the Law is without merit.

11. The numerous authorities cited by Counsel herein demonstrate that the Principles applicable when the High Court is determining an application for Stay of proceedings are well settled. I find it necessary to cite one or two for purposes of reworking the applicable principles.

12. Ringera J. in **GLOBAL TOURS & TRAVELS LIMITED, Nairobi HCC WINDING UP CAUSE NO. 43** stated 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”

13. And that a Court will grant Stay of proceedings as an exception rather than the Rule is observed by the writers of Halsburys Laws of England 4th Edition in the following passage;

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue...This is a power which, it has been emphasized, allowed to be exercised sparingly, and only in exceptional cases...it will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case”.

Clearly, a suitor for Stay of proceedings must firmly establish that it will suffer substantial loss if stay is not granted to deserve this exceptional relief.

14. When the High Court considers an application to Stay proceedings in its Trial jurisdiction its discretion is fettered by two important conditions. That there is sufficient cause to order Stay, that is, that substantial loss would ensue from a refusal to grant stay. Secondly that the Application is brought without delay. As the Trial Court, the High Court need not consider whether or not the Appeal against its decision is arguable. Indeed it is a most embarrassing prospect for the Court to re-evaluate and comment on the correctness or otherwise of a Decision it has made and is the subject of Appeal. This Court therefore agrees with the argument that, at least, when it sits as the Trial Court resolving an application for Stay of Execution or Proceedings pending Appeal, the merit or otherwise of an intended Appeal is an extraneous consideration.

15. As substantial loss is the linchpin of an application for Stay under Order 42 Rule 6, this court will say a little more on it. Ogoola J. in the Ugandan case of **TROPICAL COMMODITIES SUPPLIES LTD AND OTHERS Vs. INTERNTIONAL CREDIT BANK LTD(in liquidation)** observed,

“Substantial loss does not represent any particular amount or size. It cannot be quantified by any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value, as distinguished from a loss without value or a loss that is merely nominal”.

The likelihood that substantial loss may result must be real as opposed to it being a mere apprehension or speculation. And a substantial loss is a loss that is ‘**real and tangible rather than imaginary**’ (12th Edition Concise Oxford English Dictionary).

16. Simultaneously with the filing of the Plaint herein the Applicant filed an application under certificate of urgency for the following Prayers:-

1. THAT this application be certified as urgent.

2. THAT owing to the urgency of the matter this Honourable Court be pleased to grant an early inter parties hearing date.

3. THAT pending the hearing and determination of this suit the 1st to 7th Defendants by themselves, their servants, agents or any other persons claiming through them, be restrained as a matter of urgency from removing from the jurisdiction of the Court, mortgaging, (and or further mortgaging) charging (and or further charging), assigning, diminishing, transferring, disposing, alienating, operating, pledging and or otherwise interfering and or dealing with in any manner howsoever with their shares in some companies named therein.

4. THAT pending the hearing and determination of this suit this Honorable Court be pleased to grant an order to audit, track, trace and freeze of all shares and assets transferred by the Defendants and connected with the 1st Plaintiff after 15th September

2015.

5. THAT pending the hearing and determination of this application this Honorable Court be pleased to grant the 1st Applicant an order to advertise, and request individuals with information as to the whereabouts of the Defendants/Respondents, properties to provide the said information for purposes of tracing and recovery of the said assets.

6. THAT pending the hearing and determination of this suit this Honorable Court be pleased to grant an order for the lifting of the veil in the 11th to 18th Defendant Respondents.

7. THAT the Plaintiffs/applicants be at liberty to apply for such further or other orders and/or directions as the Honourable Court may deem fit to grant in the circumstances.

16. An impression created by the manner in which the Court was moved was that so as to prevent the real possibility of the dissipation and/or dispersal of Assets fraudulently obtained, substantially from Depositor funds, the Court needed to urgently, and without delay, issue certain Freezing and preservative Orders. It would therefore have been expected that the 1st and 2nd Plaintiffs would press for a quick resolution of that Application.

17. That did not happen because, once the Defendants had appointed Counsel to act for them, the Applicant formed the view that the representation of some of the Defendants by the firms of Ahmednasir Abdkadir & Co. And Coulson Harney Advocates and Mr. Nani Mungai would irreparably prejudice them. The Applicant further formed the view that the issue of representation and conflict needed to be dealt with in priority and requested for an early determination of the Motion of 26th October 2016 in respect to the issues that were now vexing it.

18. And this Court observes that although the Applicant has been criticized for purportedly abandoning the substantive issues, it was within the Applicants' right to take up this issue at the earliest opportunity. Indeed in the Ruling that determined the Said motion I stated,

“If a party objects to the participation of an Advocate on the other side then the objection should be brought to the attention of that side at the earliest opportunity. An application seeking to bar Counsel should be made at the beginning of proceedings or as soon as the circumstances giving rise to the objection are known to the Applying Party (see Geveran Trading co. Ltd Vs. Skjevesland [2002] ALL ER 1)”.

The Applicant still makes the point that the issue of conflict of interest needs to be dealt with before this matter is heard any further otherwise it will suffer substantial loss.

19. No doubt, it is the expectation of The Constitution (Article 159 (2)b) and an overriding objective of the Civil Procedure Act (Section 1A), read together, that there shall be just, expeditious, proportionate and affordable resolution to Civil disputes. And the Courts, just like all parties to a Civil Dispute, are under a duty to promote and protect this objective. All Civil disputes, and not less a matter brought under Certificate of Urgency, should be resolved expeditiously. It is for that reason that the argument made by the opposing Defendants that an order for Stay may stifle this objective is not without worth.

20. While there are no orders made against the Defendants herein, the pendency of a 48 Billion shilling suit alone may have some adverse effects on the Defendants. It is argued that the pendency of the suit may have a negative impact on the Annual Statements of some of the Defendants which are Limited Liability Companies and that their business may be affected by any delay in determining this much publicized litigation.

21. The prejudice that the Defendants may suffer must be put on a scale against any loss that may rest

with the Applicant if Stay is refused. However, if the loss to be suffered by the Applicant is substantial then the scale will tip in its favour.

22. One reason why a question involving representation and possible conflict of interest of Advocates on record must be resolved early in the proceedings is that these are issues, if left unresolved, could impact on the administration of justice or result in a procedural irregularity **“such as would lead to an Order made at Trial being set aside on Appeal” (GEVERAN TRADING CO. LTD(SUPRA))**. It is therefore possible that if Stay were not to be granted but the Appeal were to succeed, then any proceedings that the impugned firms and Counsel will have participated could be set aside. There would have been a tremendous waste of judicial time and energy. In addition, the harm and damage that could have been caused to the Applicant’s case by litigating against Counsels who will have been found to be reposed with confidential information may be far-reaching and irreversible. It is for this reason that the Court is unable to agree with the argument by Mr. Ahmednasir that as the Appeal is simply on an interlocutory matter, then it should not be allowed to distract the substantive matters. The issue of representation and conflict has the potential of affecting or impacting the entire proceedings and in that sense may not be peripheral.

23. While this Court is not prepared to go as far as saying that Stay of proceedings should be granted as a matter of course pending the hearing and determination of an Appeal which involves representation by Counsel and conflict of Interest, there is another factor that sways my discretion towards grant of the relief sought.

24. It is common ground that there is a public interest element in the litigation before Court. The suit against the Defendant is that through negligence, gross negligence, breach of fidelity, breach of fiduciary duty and fraud, there has been a loss, inter alia, of Kshs.38 Billion of the Applicant’s Assets and Depositors funds. The Depositors and the General Public would be keen about the outcome of this litigation. Indeed some 130 Depositors have been waiting on the wings to join these proceedings and there is a pending Application dated 3rd October 2016 for their joinder herein as Interested Parties. On the other hand, the Defendants who hold out themselves as successful and renowned businessmen and entities have a reputation to protect and keep and would be just as keen about the outcome.

25. The nature of the Plaintiffs cause of Action is that some of the Defendants took advantage of their Dominant and Fiduciary positions to defraud and bleed the public. And although this Court did not agree with the Applicant that the impugned Law Firms and Counsel are conflicted or could be called as witnesses, to allow this action to proceed before the Court of Appeal has had its say on the matter could give an impression that the Defendants are being permitted to gain further advantage and dominance from the Representation of firms and Counsel whose continued participation herein has not been resolved with the finality that a Court of Appeal decision could bring to the matter. It is little wonder that the Depositors support the Motion for stay. Heed must be paid to the adage, “justice should not only be done but must be seen to be done”.

26. I take the view that the Plaintiff has established that it may suffer substantial loss if stay is not granted. A loss that outweighs the inconvenience and damage that the Defendant may suffer and a loss that is substantial enough to justify stopping the proceedings for now. And also because the Application was brought promptly, then it should be allowed.

27. Should the of Stay extend to the counterclaim? There is a Counterclaim by the 11th to 17th Defendants against Central Bank of Kenya, Kenya Deposit Insurance Corporation, Rueben Cheres, Peter Gatere, Alex Nandi, Simon Githuhi, Mediline Njeri Kihara and Matu Mugo. The 11th to 17th Defendants are shareholders and Depositors of the Applicant while the 3rd to 8th Defendants to the Counterclaim are said to be, at all material times, officers, servants, agents and/or employees of the Central Bank of Kenya.

28. At its barest, the claim by the 11th to 17th Defendants is that the Defendants to the Counterclaim are jointly and severally partly responsible for the loss suffered by them as a result of long running and systematic fraud perpetrated by one Mr. Janmohamed and Senior Managers of the Applicant Bank. The Defendants are accused of breaching their statutory duty of Supervision, misfeasance, conspiracy, deceit

and negligence. The Breaches and failures allegedly committed by the Defendants are set out in a particularly lengthy statement of Counterclaim comprising of 123 paragraphs.

29. Whilst a Counterclaim is often a separate and distinct claim from the main suit, this Court observes that the common thread between the Claim and Counterclaim is the allegation that there has been a loss of the Assets of the Applicant bank and of Depositors money. While the Plaintiffs to the main suit blame that loss to the actions or conduct of some of the Defendants, the Plaintiffs to the Counterclaim assert that culpability lies with the Defendants in the Counterclaim. The question as to whether there was a loss and who bears responsibility is a matter that the Trial Court will have to determine. What seems clear is that the matters raised in the Claim and Counterclaim are intertwined and it will avoid replication of issues, evidence and proceedings if the matters were heard and determined together.

30. Ultimately, I allow the Notice of Motion of 20th February, 2017 as prayed.

Dated, Signed and Delivered in Court at Nairobi this 26th day of April, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Murgor for 1st & 2nd Plaintiff

Chege for 3rd Plaintiff

Kolonya h/b for Nani for 1st – 6th & 8th – 10th Defendant

Wandabwa for 11th, 13th, 17th Defendants

Hannan h/b for Ahmednasir for 7th & 12th Defendants

Obuya h/b for Ochieng Oduol for 3rd – 8th Defendants

Njage for 18th Defendant

Kogweno for proposed Interested Parties

Alex - Court Clerk