



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL CASE NO 115 OF 2009

KENYA COMMERCIAL BANK LIMITED.....PLAINTIFF

VERSUS

KENYA PIPELINE COMPANY LIMITED.....DEFENDANT

RULING

[1] The Plaintiff's Notice of Motion dated **5 April 2017** was filed herein under **Sections 1A, 1B and 3A** of the **Civil Procedure Act, Chapter 21 of the Laws of Kenya and Order 51 of the Civil Procedure Rules, 2010** for orders that, pending the hearing and determination of the Plaintiff's Appeal in **Civil Appeal No. 242 of 2016: Kenya Commercial Bank Limited vs. Kenya Pipeline Company Limited**, the Court be pleased to grant an order of stay of proceedings in this suit; and that the costs of the application be provided for. The application is based on the grounds that the Plaintiff has lodged an appeal against the Ruling of the Court delivered herein on **2 September 2016**; and that the substratum of the aforementioned Appeal materially and directly affects the hearing of this suit as shown from the grounds set out at Paragraphs (b)(i) to (b)(xi) of the Grounds in support of the application. It was thus the contention of the Plaintiff that it would only be just and expedient that further proceedings hearing be stayed pending the hearing and determination of the Appeal, to prevent the same from being rendered nugatory.

[2] The application was premised on the Supporting Affidavit annexed thereto, sworn by **Tom Ogola** on **5 April 2017** wherein the grounds aforementioned were reiterated. In particular, the grounds of appeal are restated at Paragraph 7(i) to (xi) of the Affidavit. The Plaintiff also annexed to the affidavit a copy of the Memorandum of Appeal filed by the Plaintiff in **Civil Appeal No. 242 of 2016**, among other documents, for the Court's consideration.

[3] The application was opposed by the Defendant vide the Replying Affidavit sworn by **Gloria Khafafa** on **3 May 2017**. She presented therein, a chronology of events that show the dilatory manner with which the Plaintiff has been prosecuting this case. She averred that more than seven months had elapsed since the Ruling of **2 September 2016** and therefore that the delay in bringing the instant application was not only inordinate, but also telling; that it goes to confirm that the Plaintiff's sole intention is to forestall the expeditious disposal of this suit. It was further posited by the Defendant that the Plaintiff's Appeal cannot be rendered nugatory, as it will be at liberty to re-open its case in the event the Appeal is successful. The Court was accordingly urged to dismiss the application with costs as no prejudice will be suffered by the Plaintiff.

[4] Following the directions given herein on **22 May 2017**, the application was canvassed by way of written submissions. Thus the Plaintiff relied on its written submissions filed herein on **6 June 2017**, while the Defendant's written submissions were filed herein on **7 June 2017**. The Plaintiff's main argument was that it has an arguable appeal. Counsel for the Plaintiff, **Mr. Karungo**, relied on the case of **CFC Stanbic Bank Limited vs. John Kungu Kiarie & Dyer and Another [2016] eKLR** to support his contention that even one arguable ground is sufficient for the purposes of such an application. He then proceeded, at paragraphs 8 to 10 of his written submissions, to demonstrate that the grounds of appeal are all arguable and cited various authorities in support thereof.

[5] It was further the submission of the Plaintiff that the application had been filed expeditiously, as he urged the Court to note that the Notice of Appeal was filed on **8 September 2016**, only six or so days from the date of the Ruling. It was also pointed out that the proceedings were not ready until **22 September 2016**; and that the formal Order was issued on **31 October 2016**; whereupon the Record of Appeal was filed on **1 November 2016**. It was thus urged that the filing of the instant application on **5 April 2017** would not constitute inordinate delay; but that should the Court determine otherwise, then the Plaintiff requests for leniency as the refusal to grant stay would occasion it incredible prejudice. The Court was referred to the persuasive decision of **Aburili, J.** in **Selestica Limited vs. Gold Rock Development Limited [2015] eKLR**, in which, having found that there was inordinate delay in bringing an application for stay of execution, the Court nonetheless granted the order for stay on the premise that the interests of justice demanded it.

[6] On whether the Appeal if successful would be rendered nugatory, Counsel for the Plaintiff urged the Court to weigh the competing interests of the parties and the potential hardships each party might suffer should the Court's discretion be exercised in favour of the opponent. **The cases of Reliance Bank Limited (In Liquidation) vs. Norlake Investments Limited** and **Shantilal Vaghjishah vs. Nyanza Spinning & Weaving Mills Limited [2004] eKLR** were cited in support of the aforementioned argument.

[7] The Defendant's submissions were filed herein on **7 June 2017** and the arguments raised therein are, firstly, that the application was not filed expeditiously. Counsel for the Defendant, **Ms. Wanjiru Ngige**, argued that the overriding objective mandates the expeditious disposal of suits under **Sections 1A(1) and 1B(1) of the Civil Procedure Act**; and that contrary to this overriding objective, the Plaintiff has sought to unnecessarily delay the hearing of its own suit. The Court was urged to note that this application was filed seven months after the date of the Ruling appealed from; and that no cogent reason or excuse had been given for the delay. She urged the Court to note that the application was brought just a few weeks to the hearing date that had been taken by consent; and draw the inference that the Plaintiff, having slept on its rights, is not entitled to the order it seeks.

[8] Secondly, it was the argument of the Defendant that it would not be in the interest of justice to stay the proceedings. She pointed out that the matter is part-heard, and that the Plaintiff's first witness was in the middle of cross-examination; and therefore regardless of whether the Plaintiff has a prima facie arguable appeal, the proceedings herein ought to proceed to conclusion. Counsel relied on the case of **Re Global Tours & Travels Limited: Winding Up Cause No. 43 of 2000** on the sort of matters the Court ought to consider in determining such an application; and that the question of whether an appeal would be rendered nugatory if successful would ultimately depend on the peculiar circumstances of each case (see **Reliance Bank Ltd vs. Norlake Investments Ltd [2002] 1 EA 227**). She posited that in the event that the Plaintiff is successful in its appeal, it may always apply for the recall of its witness and therefore, that with the procedural provisions designed for such eventualities, it is not possible that the appeal will be rendered nugatory.

[9] Although the provisions of **Order 42 Rule 6 of the Civil Procedure Rules**, were not specifically cited or adverted to by the Plaintiff as one of the enabling provisions herein, it is permissible, under that Rule, for a party to apply for stay of proceedings pending the hearing and determination of an interlocutory appeal. **Sub-rule 1** thereof provides that:

"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."

[10] Thus, the only conditions such an applicant would be required to satisfy, as set out in **Rule 6(2) of Order 42** aforementioned, are:

[a] that substantial loss may result to the applicant unless the order is made;

[b] that the application has been made without unreasonable delay, and that such security as the Court may order, has been provided.

[11] Accordingly, although the court has the discretion to grant stay orders on terms, the interests of justice require that the discretion be exercised judiciously and within the aforesaid parameters. That being the case, in determining what the interests of justice require in the instant application, it is imperative to balance the interests of the parties; and in this respect, I find instructive the expressions of **Ringera, J. in Global Tours & Travels Limited WC No. 43 of 2000**, which I entirely agree with, that:

"...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 on whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously."

[12] The Defendant has endeavoured to demonstrate that they have an arguable appeal and, while it is not in my place to determine whether the appeal has good chances of success, it is indubitable that an appeal has been filed being **Nairobi Civil Appeal No. 242 of 2016** and that the Record of Appeal has been duly admitted by the Court of Appeal. It is equally manifest that the typed proceedings were not ready until **22 September 2016**; and that the Order was only drawn and issued on **31 October 2016**. In the premises, the lodgement of the Appeal on **1 November 2016**, was in every sense, done with promptitude.

[13] However, the same cannot be said of the filing of the instant application, noting that the Ruling was delivered on **2 September 2016**; and that the application was not filed until **5 April 2017**. Even if the period between **21 December 2016** and **13 January 2017** were to be excluded in reckoning time, as was proposed by Counsel for the Plaintiff pursuant to **Order 50 Rule 4** of the **Civil Procedure Rules**, still the delay would be inordinate, granted that the case had been fixed for the further cross-examination of the Plaintiff's witness on **22 May 2017**. Moreover, there is absolutely no explanation proffered as to why the delay. I would thus find and hold that the delay in bringing the instant application is not only inordinate, but is also totally unjustified.

[14] As to whether substantial loss may befall the Plaintiff unless the proceedings are stayed, I have considered the competing interests of the parties herein. The proceedings of **30 May 2016** and **31 May 2016** show that **PW1** was in the middle of cross-examination when Counsel for the Plaintiff realized the need for additional documents to be introduced to give the Court a clearer picture. The Plaintiff's application in that regard was opposed by the Defence Counsel, thereby prompting the Ruling of **2 September 2016** that is the subject of appeal. Accordingly, it would be critical, from the Plaintiff's perspective to have the Court of Appeal make a determination on the Appeal before any further proceedings can be had in this matter. Whereas the Defence argued that the case can always be reopened,

there is the likelihood that the case may proceed to hearing and conclusion before the Appeal is heard, and thereby denying the Plaintiff the window of opportunity to avail the additional documents, should it succeed on appeal. In this connection, I find pertinent the expressions of **Azangalala, J.** (as he then was) in **Shantilal Vaghjishah vs. Nyanza Spinning & Weaving Mills Limited [2004] eKLR** that:

"The defendant believes that without discovery and inspection of the documents in question it cannot adequately prepare its defence and further that if the hearing takes place without the said documents it will be hampered in the effective prosecution of the defence. It will therefore suffer if the hearing proceeds and the appeal will be rendered nugatory...I think the defendant's fears are well founded. It says it has an arguable appeal and in my view if it succeeds and the hearing has proceeded the results will be irrelevant. On the other hand if stay is allowed, and the Plaintiffs eventually succeed, all that they will suffer will be that they will have been kept out of their money for a little longer. This consequence is in my view less severe."

[15] I would therefore agree with the Plaintiff that the interests of justice would require that these proceedings be halted pending the hearing and determination of the Appeal. In the premises, the application dated **5 April 2017** is hereby allowed and orders granted in the following terms:

[a] That stay be and is hereby granted of the proceedings herein pending the hearing and determination of the Plaintiff's Appeal in **Civil Appeal No. 242 of 2016: Kenya Commercial Bank Limited vs. Kenya Pipeline Company Limited.**

[b] That the Costs of the application to be in the cause.

Orders accordingly.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF NOVEMBER, 2017

OLGA SEWE

JUDGE