



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI HIGH COURT
COMMERCIAL & ADMIRALTY DIVISIONS
CIVIL CASE NO. 28 OF 2012

NYANZA SPINNING & WEAVING MILLS LIMITED.....PLAINTIFF

VERSUS

CREDIT BANK LIMITED.....1ST DEFENDANT/APPLICANT

VIPUL SHAH.....2ND DEFENDANT

KAMAL SHAH.....3RD DEFENDANT

RULING

1. By a Notice of Motion dated 24.2.2016 the first Defendant /applicant seeks the following orders:
 - i. *Spent*
 - ii. *Spent*
 - iii. There be a stay of proceedings in HCCC No.28 of the 2012, the present case, pending the hearing and determination of Civil Appeal No.233 of 2011 between Credit Bank Limited & 2 others Vs. Nyanza Spinning and Weaving Mills Ltd.
 - iv. Costs of this application be in the cause.
2. The application is predicated on the provisions of sections 1A, 1B, 3, 3A and 63(e) CPA Cap 21 and Order 51(1) of the CPR.
3. The application is supported by the Affidavit of Francis Wainaina sworn on 24.2.2016 and on the grounds that the instant suit has a genesis from HCC No. 407/2005 between Plaintiff and Defendant No.1 and 2 others culminating in a ruling of 7.12.2010 by Apondi J. The same ruling found the Applicant with the other Defendants liable of the vandalism of the Plaintiff's Plant and Machinery and ordered the Plaintiff to take such steps it deems fit to recover the loss arising from the said vandalism.
4. The aforesaid ruling prompted the filing of the Civil appeal No. 233/2011. The Applicant avers that

the subject matter is the same as the one in the instant suit and thus the determination will have impact and direction in the instant case. Thus the applicant seeks the stay of the instant case pending the hearing and the determination of the appeal No.233 of 2011. The Applicant avers this will stave of confusion which might arise in determination from the both courts.

5. The Applicant avers that there will be no prejudice to be afflicted on the Respondent by staying the instant proceedings pending hearing and the determination of the appeal aforesaid. The supporting affidavit reiterates the same grounds of the appeal.

6. The Respondents has opposed the same application via replying affidavit sworn by Mitesh Fulchand Shah on 2.3.2016. The Plaintiff briefly oppose the application on premises that the instant suit was ready for hearing way back in 2013 and been fixed for hearing dates in 3 occasions namely 18.2.2015, then continuous dates of 18th, 19th and 23rd November, 2015 and eventually 8th, 9th and 10th March, 2016.

7. The instant application was not filed until 24.2.2016. On 24.5.2012 the Defendant filed applications for security of costs against the Plaintiff which failed. The Applicant filed submissions in appeal outside timelines and thus a display of delaying tactics and preventing expeditious disposal of the dispute in appeal.

8. The Plaintiff avers that the issue in the appeal is different from the subject of the suit in that the Applicant dispute the finding lacked care towards Plaintiff's assets lowing same to be ruined and in the instant suit the Plaintiff seeks damages suffered due to the negligence of the Defendant while they had possession of the Plaintiff's assets.

9. The suit was filed over 4 years ago and it is yet to be heard and so is the appeal which was filed before the instant suit. The parties agreed to canvass the appeal via written submissions which they filed and exchanged save for Defendant no.2 and 3.

10. The court has gone through the pleadings, affidavits and submissions on records and finds the only one issue for determination; namely; Whether the Applicant has met the thresh hold for grant of stay of proceedings pending appeal.

When confronted by a similar application in the case of *Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000*, Ringera J 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” (emphasis added)

11. Further in the case of *KPLC Ltd Vs. Esther Wanjiru Wokabi CA No.326/2013* relying on **GLOBAL TOURS** Case set out 3 principles to be considered in applications for Stay of Proceedings pending appeal namely;

a) Whether applicant has established prima facie arguable case.

b) Whether application was file expeditiously and

c) Whether applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.

12. In the HALS BURY'S LAW OF ENGLAND 4TH EDITION Volume 37 at pages 330 and 332; it is opined that "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 proceedings beyond all reasonable doubt ought not be allowed to continue. This is the power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases".

13. As to whether applicant has established a prima facie arguable case, the court notes that the grounds set out in the appeal have not been attached to the application. The parties have attempted to argue for and against the merit of the Opondi J. ruling impugned in the appeal. The court does not find sufficient material to enable it determine the status of whether there is a prima facie case arguable appeal.

14. On whether the application was filed expeditiously, the court makes the following findings.

15. The instant suit was filed in January 2012. The appeal No 233/2011 was filed in 2011. The instant application was filed on 24.2.2016 four years after the lodge of the instant suit. No explanation has been offered as to the delay of 4 years or there about. The suit had come for hearing previously in 2 occasions without stay of proceedings being raised. The appeal pre exist the instant suit. There is no explanation as to why the appeal which arose from an interlocutory application has not been disposed off.

16. The applicant has not rebutted the accusation that it failed to comply with time lines of filing written submissions thus delaying the hearing of the appeal. The aforesaid facts point to a party inclined to delay the determination of the suit and the application. Nothing indicates that the instant application was filed expeditiously.

17. Has the applicant established sufficient cause to satisfy the court that interest of justice will be served by grant of the orders sought? The Plaintiff seeks to be heard on the case of damages arising from the neglect of care by the Defendant while in possession of Plaintiff's assets. The applicant has failed to expeditiously to have its appeal determined. The Plaintiff cannot be stopped from proceeding with its suit unless in exceptional circumstances which the applicant has failed to demonstrate.

18. The court thus arrives to conclusion that the Applicant has not met the threshold of grant of Stay of Proceedings order. The Court therefore makes the following orders;

1. Application dated 24.2.2016 is dismissed.

2. Costs to the Plaintiff.

Dated, signed and delivered in court at Nairobi this 27th day of May, 2016.

C. KARIUKI

JUDGE