



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**MILIMANI LAW COURTS**  
**CIVIL CASE NO. 74 OF 2011**

**CHRISTOPHER NDOLO MUTUKU.....1<sup>ST</sup> PLAINTIFF**

**CAROLINE NJOKI MUTUKU.....2<sup>ND</sup> PLAINTIFF**

**VS**

**CFC STANBIC BANK LIMITED..... DEFENDANT**

**RULING**

**Stay of proceedings**

[1] I have been called upon to determine the Defendant's Application dated 15<sup>th</sup> July 2014. The substantive question is whether these proceedings should be stayed pending hearing of Civil Appeal No.243 of 2013 in the Court of Appeal. I will set out the legal dimensions applicable in this type of application.

**The Plaintiff says the application fits the bill**

[2] The Defendant says the application fits the legal thresholds. It argues that it has filed an appeal against the Order of this Court made on the 15<sup>th</sup> of February 2013. According to them, the thrust of the appeal is that the Court determined the applicable rates of interest for the financial facilities that the Plaintiffs had obtained from the Defendant. The Defendant contends its appeal is arguable. And even if it raises one point, the question before the Judge is not whether the appeal will succeed but rather whether it is arguable. The Defendant argues that the decision appealed against was inter alia, erroneous, as the Defendants General Terms and Conditions that apply to all facilities were unduly subordinated to the instrument of charge that the Plaintiffs executed in favour of the Defendant. They referred to the record which they claim show that counsel for the Defendant submitted on the 29<sup>th</sup> November 2011 that the issue for consideration, in the first instance, was whether the rates of interest in the charge could be varied when consideration was given to the General Terms and Conditions. And, whereas parties agreed that the rate of interest be determined, there were two steps and faces for it. First was to determine the priority of terms between the General Terms and Conditions of the Defendant vis-a-vis the instrument of charge and thereafter evidence would be properly led on the interest applicable. Here, the Defendant is of the view that it was important that relevant documents such as notices, and ascertainment of service would be produced. The Defendant, then, concluded by stating that it would not be

optimal utilization of judicial time to proceed with the taking of accounts before the Deputy Registrar yet the foundation of the taking of those accounts could be entirely taken away if the Court of Appeal makes its final determination in Civil Appeal No. 243 of 2013. On those reasons, the Defendant prayed for the application to be allowed.

### **What the Plaintiff says**

[3] The Plaintiff filed a Replying affidavit and submissions. The Plaintiff avers that the entire application and the affidavit in support are wanton and reckless abuse of the process of law as are calculated at enabling the Defendant to continue retaining and trading with the Plaintiffs' money. The intended appeal has absolutely no chance of success and looking at the grounds and record of appeal, the appeal is a candidate for summary rejection. The Plaintiff was categorical and thrust out what he sees as a clear contradiction between the memorandum of appeal and the record of appeal. According to the Plaintiff, the appeal alleges that the learned judge determined the rate of interest prematurely as the main issue before the judge and which ought to have been determined first, was whether the General Terms and Conditions were applicable in determining the rate of interest applicable on the facility in question. Yet the record at page 24 has this recording; **“By consent the question of the rate of interest applicable to the loan facility in issue be determined as a preliminary issue in respect of the motion dated 12/2/2012”**. The recordings of the judge at page 85 confirm the consent that rate of interest was to be determined as a preliminary issue. In any event, the Plaintiffs are in a position of refunding whatever monies the Defendant will have paid should they succeed in their appeal. Any further delay of this case will only injure the Plaintiffs and benefit the Defendant who has over five years unlawfully retained and used it to trade at the expense of the Plaintiffs. The application should be denied.

### **THE DETERMINATION**

[4] As a follow-up of the last argument by the Plaintiffs that, should the appeal succeed, they are in a position to refund any money which the Defendant may have paid out as a result of the accounts herein, I feel obligated to state that such argument befits an application for stay of execution pending appeal rather than an application for stay of proceedings pending appeal. Doubtless, there is a whole world of difference between stay of execution pending appeal and stay of proceedings pending appeal, and that distinction is also made out in Order 42 rule 6 of the CPR. By the very nature of each of the two reliefs, the principles applicable in both reliefs are different. With regard to stay of proceeding, there are a variety of factors which should guide the exercise of discretion by the court in deciding whether or not it should order a stay of proceedings and I will discuss them shortly. But what matters in an application of stay of proceedings pending appeal is the overall impression the court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice. But let me restate the legal dimensions which should guide exercise of discretion by the Court in this matter.

#### **Stay of proceedings: the threshold**

[5] The legal considerations in an application for stay of proceedings have been enunciated in a host of judicial decisions which I need not multiply. Except I can cite some few, say, ***Daniel Walter Rasugu Nbi Hccc No 15 of 2006 ; Global Tours & Travel Limited; Nairobi HC Winding Up Cause No.43 of 2000; and Kenya Power & Lighting Company Limited vs. Esther Wanjiru Wokabi [2014] eKLR***. The guiding legal principles gathered from these cases may be summarized as follows:-

- a. ***The decision 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.***
- b. ***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.***

- c. *In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order.*
- d. *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 Court is aware the Defendant has unfettered right of appeal which it has sought to exercise. But that right has to be balanced against the right of the Plaintiff to equal treatment in law and to have his case determined without unreasonable delay. That constitutional desire demands that proceedings should not be hindered without just and sufficient cause. That position of the law is informed by the principle of justice in Article 159 of the Constitution which expresses the now commonly principle of law known as the overriding objective of the law; that cases should be disposed of in a just, proportionate, expeditious and affordable manner. That explains why the law on stay of proceedings pending appeal will be concerned with *the sole question of whether it is in the interest of justice to order a stay of proceedings. And in deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. It will also consider 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.*

[7] Applying the foregoing test, I have looked at the appeal and the record. And without considering the prospects of success of the appeal, the following facts are in the plain eye-sight of the court. On one hand, the basis of the appeal is that the judge determined the issue of rate of interest prematurely, that is to say, before determining whether the General Terms and Conditions were applicable in determining the rate of interest to be charged on the loan facility. On the other hand, parties agreed by consent that the rate of interest applicable on the loan facility be determined as a preliminary issue. Fathom, these are the prima facie merits of the appeal. And considering the nature of the appeal which is interlocutory, nothing raises any sort of preemptory or necessary prohibition to the taking of accounts as earlier ordered by the court. Indeed, the taking of accounts will not prejudice the appeal at all or make the Defendant's position in this matter or in the appeal any worse off. Instead, in the circumstances of this case, it will aid the optimal use of the scarce judicial time, thereby; attain the overriding objective of the law to dispose of this case in a just, proportionate, expeditious and affordable manner for all the parties. This is the path of justice this case demands. The upshot is that the application dated 15<sup>th</sup> July 2014 does not fit the legal thresholds and is dismissed with costs to the Plaintiffs.

**Dated, signed and delivered in court at Nairobi this 27<sup>th</sup> day of January 2015**

**F. GIKONYO**

**JUDGE**