



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 374 OF 2012**

**ANDERS BRUEL**

**T/A QUEENSCROSS AVIATION.....PLAINTIFF**

**Versus**

**NYABURAMUSYIMI.....1<sup>ST</sup> DEFENDANT**

**ANNE N. MBUGUA.....2<sup>ND</sup> DEFENDANT**

**LEAH KIGUATHAMUTERU.....3<sup>RD</sup> DEFENDANT**

**RULING**

**Stay of proceedings**

[1] This application is for stay of proceedings pending appeal. The decision to stay proceedings is a matter of judicial discretion which must be exercised in the interest of justice. The exercise of that discretion is guided by defined principles which were expounded upon in a masterly fashion by **Ringera J (as he then was) in Daniel Walter RasuguNbiHccc No 15 of 2006 ; Global Tours & Travel Limited; Nairobi HC Winding Up Cause No.43 of 2000**to be:-

**“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 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.**

[2] For further illumination on the threshold consider the following passages in **Halsbury’s Law of England, 4th Edition. Vol. 37** page 330 and 332, 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 proceeding beyond all reasonable doubt ought not to be allowed to continue.”**

**“This is a power which, it has been emphasized, ought 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.”**

[3] Now let me examine whether the Plaintiff has given sufficient reasons for this court to impose a stay of proceedings.

### **Plaintiff's case**

[4] The Plaintiff says that he has filed appeal No 96 of 2015 on the decision of this court that I delivered on 13<sup>th</sup> October 2014 which rejected joinder of KCAA as a defendant. He argues that his appeal has raised weighty grounds with high probability of success. The prospects of success lie in three major issues, namely; (1) the fact that KCAA cancelled the licences in issue ought to have been joined as a party in order to enable the court to adjudicate the issues in controversy effectively and completely; (2) should this case proceed in the absence of KCAA, he may never recover damages and huge losses it has suffered from the said KCAA because post judgment joinder is not feasible in law; and (3) res judicata did not apply in this case. They however, submitted that the decision by Mumbi J in Petition No 243 of 2012 is subject of Appeal No 78 of 2015. They also urged that the stay will prevent the possibility of the Court of Appeal and this court from reaching two conflicting decisions on the same issue. Therefore, according to the Plaintiff, the said appeal will be rendered nugatory unless this suit is stayed. He cited the case of **Global Tours, Kenya Power & Lighting Company Limited vs. Esther Wanjiru Wokabi, Alliance Media Kenya Ltd vs. World Duty Free Co. Complex Ltd, Purshotam Ramji vs. Narandas, and Kenline Agencies vs Barclays Bank of Kenya Ltd.**

### **Defendants opposed stay**

[5] The Defendants argued that the application is defective for citing sections 1A, 1B and 3A of the Civil Procedure Rules where there is clear provision for such application, i.e. Order 42 rule 6 of the CPR. They also pointed out to court that the decision in Kenya Power was in error for stating that order 42 rule 6 of CPR relates only to stay of execution. They also stated that the application herein was filed after 7 months from the date of ruling. It is therefore caught up by lashes. The point of reference in calculating delay is not the filing of the Record of Appeal but the delivery of the decision appealed from. Again, the Defendants stated that this application was filed after the plaintiff realized that the Defendants were trying to fix this matter for hearing.

[6] The Defendants further contended that the cause of action against KCAA is distinct and should be pursued against the said KCAA independent of this case and that is why the Plaintiff filed two distinct cases. It was submitted that the claim for cancellation of the licence by KCAA is still in the appeal against the decision by Mumbi J. They argued further that the Plaintiff has not even shown the prejudice he will suffer if this suit proceeds especially due to the fact that there is a pending suit against KCAA. Therefore, there is no sufficient cause shown why the suit should be stayed. They submitted that, indeed it is the defendants who will suffer prejudice if this suit is stayed as that would cause delay and increase costs. The suit is already 3 years old and will continue to hang over their heads if it is stayed for a long time- which will continue to have adverse impact on the Defendants' professional reputation and business. For those reasons, they sought the dismissal of the application.

### **DETERMINATION**

[7] I have laid down the applicable test on application for stay of proceedings under Order 42 rule 6 of the CPR. Does the application satisfy the following test?

- i) **The need for expeditious disposal of cases and the impediment the stay would place on the right of the Respondent to have the case determined expeditiously;**
- ii) **The interest of justice in the case; the pros and cons of granting or not granting the order;**
- iii) **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,**
- IV) **The scarcity and optimum utilization of judicial time and**
- V) **Whether the application has been brought expeditiously.**

### **Application not brought without delay**

[8] I will begin by stating that the application herein has been brought after seven months from the time I delivered the ruling herein. That delay has not been explained. But, despite the delay, is there any sufficient cause shown why I should stay these proceedings?

### **Pros and cons of appeal**

[9] The Applicant put much effort in showing that he has arguable appeal with high probability of success. The points he has raised may be arguable but he has failed to show how continuing of these proceedings will prejudice him or his appeal. He has stated in generalized manner that unless stay of proceedings is granted the appeal will be rendered nugatory, and a possibility of the Court of Appeal and this Court making two different decisions. There is one fact that the Plaintiff will not run away from in these entire scenario; that cancellation of licences by KCAA is a live issue in Appeal No. 78 of 2015. The Plaintiff should consider what that portends in law. Without saying much, my thinking is that the possibility of the Appellate Court and this Court reaching conflicting decisions on cancellation of licences by KCAA will be more apparent if the said cause of action is introduced in this case when it is the subject of appeal in Appeal No 78 of 2015. But, none will arise as things are now. Therefore, the argument advanced by the Plaintiff toward that end may not yield much in this application. In the circumstances, the prejudice the Plaintiff claims he will suffer, especially that he will be shut from recovering damages from KCAA, may be perceived and not real.

### **Prejudice to parties**

[10] The court must also consider the right of the Defendants to have this dispute disposed of within reasonable time. Having proceedings hovering over persons' head for a long time is a prejudice on that right. That is why stay of proceedings is viewed as a serious, grave and fundamental interruption of the right of a party to have the trial of a case completed within reasonable time. And as such, 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. In this case, there is real possibility of prejudice to the Defendants if these proceedings are stayed in the absence of sufficient cause to do so.

[11] Accordingly; based on the need for expeditious disposal of cases and the impediment the stay would place on the right of the Defendants to have the case determined expeditiously; the principle on scarcity and optimum utilization of judicial time; the principle of laches; and the dictates of justice in the case; the only order that commends itself to the court is to dismiss the request for stay of proceedings. The upshot is that the application dated 15<sup>th</sup> May 2015 is dismissed with costs to the Defendants. It is so ordered.

**Dated, signed and delivered in court at Nairobi this 28<sup>th</sup> day of August 2015.**

**F. GIKONYO**

**JUDGE**