



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 428 OF 2012**

**BAI LIN (K) LTD. .... 1<sup>ST</sup> PLAINTIFF**

**YANTAI GOLDEN STAR LEATHER CO. LTD. .... 2<sup>ND</sup> PLAINTIFF**

**DONG LIN LU ..... 3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**ZINGO INVESTMENTS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**ROBERT NJOKA MUTHARA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Application before Court is a Notice of Motion dated 29th October 2013 brought by the Plaintiffs under the provisions of **Order 42 rule 6, Order 22 rule 22 and Order 50 rule 1** of the *Civil Procedure Rules* as well as **sections 1A, 1B and 3A** of the *Civil Procedure Act*. The Application seeks an order staying execution in this matter pending the hearing and determination of firstly the Application before Court and secondly, pending the hearing and final determination of the Plaintiffs'/Appellants' intended Appeal. The Application is brought upon the following grounds:

**“a) The Plaintiffs intend to appeal against the whole decision of this court made on 25<sup>th</sup> September 2013 and have already lodged a Notice of Appeal and are awaiting certified proceedings from the court in order to lodge the substantive appeal.**

**b) This Court has dismissed the Plaintiff/Applicants' application seeking to set aside the interlocutory judgment and to file their Reply to Defence & Defence to Counterclaim, they risk being executed for the decree emanating from the said interlocutory judgment.**

**c) Such execution may be levied against them anytime now, the reason this application is urgent.**

**d) The Plaintiffs/Applicants will suffer substantial loss if stay is refused and the appeal eventually succeeds.**

**e) This application has been made without un-reasonable delay.**

- f) The Plaintiffs/Applicants' are willing and ready to give security for the due performance of the decree/order as the court may ultimately determine.**
  - g) The Plaintiffs/Applicants' Appeal raises weighty issues and has high chances of success as can be gleaned from the draft Memorandum of Appeal annexed to this application.**
  - h) If execution proceeds in this matter, the said Appeal will be rendered nugatory.**
  - i) The Defendants/Respondents will not suffer any prejudice or loss if the orders sought herein are granted and the Appeal fails.**
  - j) It is only fair and just that the Plaintiffs/Applicant be granted orders staying execution pending the determination of the appeal”.**
2. The Plaintiffs' Application arose as a result of this Court's Ruling dated 25th September 2013 in which the Plaintiffs' Notice of Motion seeking to set-aside the interlocutory judgement entered against them on 25th January 2013 was dismissed. The Plaintiffs' Application was supported by the Affidavit of the third Plaintiff **Dong Lin Lu** who had been authorised to swear the same on behalf of the first and second Plaintiffs as well as himself. The Supporting Affidavit more or less repeated the aforementioned Grounds in support of the Application but also attached copies of the request for a certified copy of the proceedings herein as well as the Notice of Appeal lodged in the Court of Appeal on 9th October 2013. The deponent also attached to his said Affidavit a copy of the proposed Memorandum of Appeal. He indicated that the Plaintiffs were ready and willing to give security for the due performance of the Decree herein and noted that if the execution proceeds in this matter, the Plaintiffs' proposed Appeal would be rendered nugatory.
3. The Supporting Affidavit of the third Plaintiff was responded to by the second Defendant who swore a Replying Affidavit on 12th November 2013. The deponent commenced his affidavit by detailing that he had been advised by his advocate on record that there was a serious issue of representation in this matter as regards the Plaintiffs in that three different firms seem to be representing them. The deponent annexed a number of documents to support his allegation as follows:

**“i) The Notice of Change of Advocates by Kiplenge & Kurgat Advocates dated 10<sup>th</sup> July 2013 – marked RNM1.**

**ii) Notice to Act in Person by DONG LIN LU dated 8<sup>th</sup> October 2013 – marked RNM2.**

**iii) Notice of Appeal By Kiplenge & Kurgat Advocates dated 8<sup>th</sup> October 2013 – marked RNM3.**

**iv) Notice of Appeal by Thomas K'Bahati, Lumumba Mumma & Kaluma Advocates dated 9<sup>th</sup> October 2013 – marked RNM4.**

**v) Notice of Appointment by Thomas K'Bahati, Lumumba Mumma & Kaluma Advocates dated 9<sup>th</sup> October 2013 – marked RNM5.**

The second Defendant maintained that he had been advised by his advocates on record that **Thomas K'Bahati** of the firm of **Lumumba Mumma & Kaluma Advocates** was improperly on record. Further the second Defendant maintained that the third Plaintiff as per his Supporting Affidavit, had conveniently and deliberately failed to disclose who had perused this Court's file to establish the delivery of this Court's said Ruling on 25th September 2013 and which of the said firms of advocates had failed to inform him of the said Ruling. The deponent went on to say that there was inordinate and unexplained delay in bringing the instant Application before the Court. Finally, the second Defendant

believed, again upon the advice of his advocate, that the Plaintiffs had not demonstrated and laid down grounds to warrant a stay of execution of a monetary decree. The Defendants were quite capable of refunding any money to the Plaintiffs should the latter succeed in their appeal. In the alternative, the second Defendant suggested that the decretal sum herein should be deposited into an interest earning account in the names of both advocates for the parties, as a condition for the stay.

4. Before Court on 5th December 2013, the Plaintiffs were given leave to file a Supplementary Affidavit which was so filed on 15th January 2014. The Supplementary Affidavit was again sworn by the third Plaintiff on even date and filed by the said **Thomas K'Bahati, Lumumba Mumma & Kaluma Advocates**. The deponent clarified that Mr. K'Bahati was the Plaintiffs' current advocate and that the matter had been previously handled by **B. Mwenesi & Associates, Advocates** who had mishandled the matter and had to be replaced. The deponent had no idea how the firm of **Kiplenge & Kurgat, Advocates** had appeared on the record for the Plaintiffs other than a discussion that had been had with the deponent's daughter Miss Lu, who had sought an opinion with regard to the matter but did not have authority to appoint any law firm and, according to the deponent, had not done so. The deponent went on to say that he had personally visited the Court Registry on 8th October 2013 along with his daughter, and they were shocked to learn that the Ruling dated 25th September 2013 had been delivered. The deponent then went on to say that the stay application before this Court was filed:

**“promptly 29th October 2013; which was about 10 days after learning of the ruling.”**

This Court observes that this cannot possibly be true as it was clear from the Supplementary Affidavit that the deponent and his daughter had learnt of the Ruling on 8th October 2013. No explanation was forthcoming as to why it had taken 21 days to file this Application before Court. However, in winding up his Supplementary Affidavit the third Plaintiff attached to the same a bank guarantee from the Diamond Trust Bank in the amount of US\$ 23,033.00 to remain in force for a period of one year (renewable) from the date of issue being 10th January 2014.

5. The Plaintiffs' submissions were filed herein on 15th January 2014. They commenced by detailing the substance of the Application before Court as well as citing **Order 42 rule 6** of the *Civil Procedure Rules, 2010*. Under **rule 6** the Plaintiffs noted that the Court could dire a stay of its Orders for *sufficient cause*. In the Plaintiffs' view “sufficient cause” was a discretionary power of the Court granted under **Order 42**. The Plaintiffs considered that there were special/particular circumstances in this case which would make the exercise of discretion in favour of the Plaintiffs necessary. The Plaintiffs detailed before court the authorities of **HCCC No. 44 of 2008 University of Nairobi & Anor. v Peter K. Tum, Butt v The Rent Restriction Tribunal Civil Appeal No. 6 of 1979, HCCC No. 1158 of 2002 Mohammed & Muigai Advocates v Samuel K.Macharia & Anor** and **Pepco Construction Company Ltd v Carters and Sons Ltd Civil Appeal No. Nai 97 of 1997**. The Plaintiffs maintained that the special/particular circumstances pertaining to the Application was that they had an undoubted right of appeal and that this Court ought to allow them to pursue that right. Secondly, in order to secure the Defendants' rights to enjoy the fruits of their judgement, the Plaintiffs had offered security for the same and the Defendants would not be prejudiced or put into difficulty in the event that the Plaintiffs' intended Appeal failed. Thirdly, the Plaintiffs maintained that it was in the interests of justice that the stay be granted pending appeal. Finally, the Plaintiffs submitted that natural justice demands that a party should be heard. They noted that the Decree herein sought to be stayed emanated from an interlocutory judgement and not a final judgement made after a full hearing of the parties. The Plaintiffs maintained that the case was not heard on merit and no evidence was adduced. Further, the Decree sought to be stayed emanated from a Counterclaim and the veracity of that counterclaim had not been tested. The documents upon which the Counterclaim was/is based had not been authenticated or questioned. In conclusion, the circumstances leading to the entry of the interlocutory judgement was as a result of faults attributed to the Advocates on record for the Plaintiffs not the Plaintiffs themselves.
6. As regards questions of substantial loss, unreasonable delay and security, the Plaintiffs noted that under the provisions of **Order 42 rule 6**, the Court had to be satisfied that substantial loss may

result to the Plaintiffs unless the stay Order is made. The Plaintiffs referred to the case of **Pelican Investment Ltd & Anor. v National Bank of Kenya Ltd HCCC No 570 of 1998 (unreported)** which they maintained that even if this Court was not satisfied that the applicant therein would suffer any substantial loss it could nevertheless grant the stay sought. The Plaintiffs also referred to the cases of **Daima Bank v Samuel K. Macharia HCCC No. 628 of 1998 (unreported)** and **Nation Media Group Ltd v Mwakwere Civil Appeal No. Nai 353 of 2009 (unreported)** quoting from the authority of **Reliance Bank Ltd v Norlake Investment Ltd (2002) 1 EA 227:**

**“.. .the fact that a respondent has the financial means to refund the decretal sum should the appeal succeed is not invariably decisive.”**

The Plaintiffs maintained that their application was brought without unreasonable delay as explained in both the Supporting Affidavit and the Supplementary Affidavit sworn by the third Plaintiff as above. The Plaintiffs submitted that the period from 8th October 2013 to 29th October 2013 cannot be said to unreasonable delay when one took into account weekends! Finally, the Plaintiffs submitted that they were only required under the law to be willing to comply with an order for security but, in good faith, they had gone ahead and secured the decretal sum of the Counterclaim herein in the form of a bank guarantee. The Plaintiffs maintained that the courts had normally granted a stay of execution as a matter of course where an applicant had provided the security in advance as this demonstrated good faith and seriousness with the proposed appeal.

7. The Defendants’ submissions as regards the Plaintiffs’ Notice of Motion dated 29th October 2013 were filed herein on 21st January 2014. The Defendants noted that there is a judgement in their favour on the Counterclaim and that the Plaintiffs’ Application to set aside the same had been dismissed by this Court on 29th September 2013. The Defendants submitted that the Plaintiffs’ Application should be dismissed with costs due to the following reasons:

(A) The firm of **Thomas K’Bahati, Lumumba Mumma & Kaluma Advocates** was improperly on record and the Application was therefore incompetent.

(B) The Applicants had not demonstrated that:

(i) The appeal was arguable, meritorious and had a high chance of success.

(ii) What loss the Plaintiffs were likely to suffer should the stay Orders not be granted.

(iii) There was any security offered as a condition for stay?

(iv) Whether the Plaintiffs’ appeal be rendered nugatory?

Under this heading, the Defendants relied upon the authority of **Pamela Awinyo v Tom Sindani (2011) eKLR** in which **Muchemi J.** had stated:

**“In my considered opinion the Applicant ought to have demonstrated the kind of loss that she is likely to suffer as required by Order XLI which she has failed to do in her application. It is not enough as stated in the affidavit that she is likely to suffer substantial loss. It must be clearly shown what loss is likely to be suffered.”**

(C) The Plaintiffs had not offered any security as a condition for stay. The Defendants noted that a Bank Guarantee had been offered as issued by the Diamond Trust Bank dated 10th January 2014 but they had issues with the same to the extent that it was only the third Plaintiff who was the applicant on that Guarantee with no mention of the first and second Plaintiffs. This would mean that only the third Plaintiff could enforce the Guarantee with the said Bank. The Defendants would have no say in the same. Further, the Guarantee was only valid for one year whilst the Plaintiffs’ Application for a stay was pending the hearing and determination of the intended appeal. The Defendants maintained that the Guarantee

as offered would expire before the intended appeal was heard. In the Defendants' opinion which would not prejudice any of the parties, the decretal sum should be deposited in a joint interest earning account in the names of the advocates on record for the parties.

(D) The Plaintiffs' intended appeal will not be rendered nugatory

(E) The stay should only be granted on a balance of convenience and taking into account public policy.

(F) There had been inordinate and inexcusable delay in the Plaintiffs' filing of the Application before Court.

Finally, the Defendants maintained that from the evidence on record, the conduct of the Plaintiffs in this matter and contradictory evidence as displayed in the Affidavits confirmed that they were not credible parties and did not deserve the Orders sought.

8. **Onyango Otieno J.** (as he then was) in the case cited by the Plaintiffs being the **University of Nairobi** suit (supra) summed up what he saw as the principles to be taken into account by the Court in determining an application for stay before it. The learned Judge detailed as follows:

**“As far as I’m concerned, I need to see whether sufficient cause has been shown to warrant my granting the order for stay. I would also need to see if the Applicant would suffer substantial loss if I decline to grant the order, to see if the application has been made without unreasonable delay and finally, to see if the Applicant has offered security should I decide to order for the same.”**

Of course, the *locus classicus* authority in relation to stay applications before this Court is the finding of **Madan JA** (as he then was) in the case of **Butt v The Rent Restriction Tribunal** (supra). The learned Judge found as follows:

**“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful, from being nugatory, per Brett, L.J. in Wilson v. Church (No. 2), 12 Ch.D. (1879), 454 at p. 459. In the same case, Cotton, L.J. said, at p. 458:**

**‘I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory’.**

**Megarry J., as he then was, followed Wilson (supra) in Erinford Properties Limited v. Cheshire County Council, (1974) 2 All. E.R. 448 at p.454, and also held that there was no inconsistency in granting such an injunction after dismissing the motion, for the purpose of the order is to prevent the Court of Appeal’s decision being rendered nugatory should that court reverse the judge’s decision. The court will grant a stay where special circumstances of the case so require, per Lopes, L.J., in the Attorney General v Emerson and Others 24 Q.B.D. (1889) 56 at p.59.”**

Of the two cases cited by the Defendants herein, the holding of **Kuloba J.** in the case of **Machira v East African Standard** (No. 2) (2002) 2 KLR 63 proved useful to this Court in five of the findings:

**“2. In handling applications for stay of further proceedings or execution, one of the fundamental procedural values is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him a success at any stage.....**

**4. In order for an unsuccessful party to obtain a suspension of further proceedings or execution, he must satisfy the court on affidavits or other evidential material that substantial loss may result.**

**5. In this kind of application for stay, it is not enough for the applicant merely to state that substantial loss will result. He must provide specific details and particulars.**

**6. Where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay.....**

**8. In granting a stay of proceedings the court may consider the delay in making the application and the requirement of security for the due performance.”**

9. I have carefully perused both the Affidavit in support of the Plaintiffs’ Application for stay of execution pending appeal as well as the Supplementary Affidavit both sworn by the third Plaintiff. I have also take into account the Plaintiffs’ submissions in this matter. Certainly, the Supplementary Affidavit sworn on 15th January 2014 concentrates in the area of representation of the Plaintiffs before Court and makes no mention of any loss that they will suffer should the stay be not allowed. Further, in the Supporting Affidavit sworn on 29th October 2013, paragraph 17 merely states as follows:

**“We will suffer substantial loss if stay is refused and the appeal eventually succeeds.”**

The Deponent makes no attempt to detail what loss the Plaintiffs will suffer should their stay Application be disallowed. Further, and as I have commented above, no explanation is given by the deponent of the two Affidavits as to why, after he and his daughter had discovered 8th October 2013 as to the delivery of the Ruling of this Court on 25th September 2013, this Application before Court was not filed for a period of 21 days. I note that there was no problem in the Plaintiffs filing the Notice of Appeal on 9th October 2013 but why wait a further 20 days before filing their Application for stay? I note from this Court’s said Ruling dated 25th September 2013 that not only did this Court find that the Plaintiffs’ Defence to the first Defendant’s counterclaim was a sham but also that they had been dilatory in bringing the application to set aside the interlocutory judgement before this Court. As a result, I would tend to agree with the Defendants’ counsel herein that such delay was inordinate. Although I note that the Plaintiffs, as per the annexure to the Supplementary Affidavit of the third Plaintiff, were prepared to put up security in the form of a Bond from the Diamond Trust Bank dated 10th January 2014, such cannot be sufficient reason to allow the Plaintiffs’ Application before Court as such would amount to denying the first Defendant the fruits of its judgement even though such was entered on an interlocutory basis.

10. Before I leave this Ruling, there is good reason to comment upon the Defendants’ counsel’s submissions as regards the representation of the Plaintiffs in this matter. Counsel had pointed out the apparent confusion as to which firm of advocates was representing the Plaintiffs or whether the third Plaintiff was on record as acting for himself. This confusion became even more apparent to this Court upon perusing the Notice of Motion dated 29th October 2013. In the heading to that Application, reference is made to the same having been put before Court by **“Counsel for the Defendants”** and in signing off the Application on the second page thereof, I note that **Messrs. Thomas K’Bahati Lumumba, Mumma & Kaluma** describe themselves as the advocates for the Defendants. It is a little disconcerting for this Court to note that the advocates concerned do not seem to know whom they are representing. Consequently and in conclusion, I find no merit in the Plaintiffs’ Notice of Motion dated 29th October 2013 and accordingly I dismiss the same with costs to the Defendants.

**DATED and delivered at Nairobi this 1<sup>st</sup> day of April, 2014.**

**J. B. HAVELOCK**

**JUDGE**