



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 896 OF 2009**

**GARDEN CHAMBERS LIMITED ..... PLAINTIFF**

**VERSUS**

**RAMABEN PATANI ..... 1<sup>ST</sup> DEFENDANT**

**ASHIT PATANI ..... 2<sup>ND</sup> DEFENDANT**

**SELINE PATANI ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The Defendants herein have brought a Notice of Motion before this Court dated 9th May 2013. The same seeks a stay of any further proceedings herein pending the hearing and determination of an intended appeal. The Application is brought under the provisions of **Order 42 rule 6** of the *Civil Procedure Rules, 2010* as well as **section 3A** of the *Civil Procedure Act*. The Defendants maintained that a decision (Ruling) was made on 3rd November 2011 which had aggrieved them and against which they had lodged a Notice of Appeal within the required period. The Defendants had also applied for certified copies of the said Ruling and proceedings but, as at the date of the Application before Court, they had not been provided with the same. In the Defendants' view, it was prudent to have any further proceedings in this matter stayed to enable them to pursue their Appeal. The Application was supported by the Affidavit of the second Defendant sworn on 9th May 2013. The same was basically a repeat of the grounds put forward in support of the Application.
2. The Replying Affidavit of the Managing Director of the Plaintiff Company, **Dhirajlal V. Patani** was sworn on 27th June 2013. The salient paragraph thereof was paragraph 5 in which the deponent detailed that he had been informed by the advocates on record for the Plaintiff that the Defendants had not instituted an appeal as against this Court's Ruling of 3rd November 2011 within the prescribed time. He maintained that the Notice of Appeal, together with the Application before Court was simply intended to delay the hearing and disposal of the suit. The Application had been filed after the suit had been certified as ready for trial on 30th April 2013. The Defendants had not made any offer for security for costs. The deponent also noted that the copy of the proceedings were ready for collection as early as 21st December 2011. Further, there was a clear implication from the Defendants' Advocates' letter dated 29th March 2012 that copies of the proceedings had been received by them. Finally, Mr. Patani detailed that he was an elderly man of 76 years and he was very keen to have the pending legal issues between the parties sorted out at

- the earliest opportunity, so that he could enjoy his retirement in peace. He was of the view that if this Court allowed the Defendants' said Application, the Plaintiff would be greatly prejudiced.
3. With the leave of the Court, the second Defendant swore a Supplementary Affidavit on 25th November 2013. The deponent maintained that the proceedings were not ready as at December 2011 but that they had been ready for collection on 16th August 2013. The Defendants' advocates on record had received the Certificate of Delay and had proceeded to file the substantive appeal which was now pending before the Court of Appeal being Appeal Case No. 257 of 2013. The second Defendant repeated the Defendants' prayer for a stay of further proceedings herein pending Appeal as the same would be rendered nugatory.
  4. The Defendants' submissions as regards their Application before Court were filed herein on 14th January 2014. After setting out the prayers of the Notice of Motion dated 9th May 2013, the Defendants noted that the Ruling to be appealed was contrary to the clear statutory provisions relating to the plea in bar of *res judicata*. The Defendants had not only lodged the Appeal but had served the Memorandum and Record of Appeal upon the Plaintiff. They noted that the time taken for the preparation and collection of the copies of the proceedings had been certified as at 665 days as the Certificate of Delay had been issued on 16th August 2013. The Defendants requested that the Application before Court be allowed on the basis that the Appeal was arguable and, unless the Court granted an order for stay of proceedings, the Appeal, if successful, would be rendered nugatory. The Defendants also believed that, if the Appeal was to be overtaken by events, such would be disrespectful to the Court of Appeal. The proceedings herein should be stayed because if the Appeal was successful, it would in essence terminate this suit once and for all. The Defendant relied upon the authorities of **Kenya Commercial Bank Ltd v Nicholas Ombija (2009) eKLR, Donholm Rahisi Stores v Barclays Bank of Kenya Ltd & Anor. (2006) eKLR** as well as **Karuturi Networks Ltd & Anor. v Daly & Figgis Advocates (2009) eKLR**.
  5. The Plaintiff's written submissions were filed herein on 16th January 2014 and commenced by setting out the prayers of the Defendants' said Notice of Motion before Court dated 9th May 2013. The Plaintiff outlined what it considered to be the points in issue as follows:

**“1. Whether the intended Appeal to be lodged by the defendants is arguable and has chances of success.**

**2. Whether or not unless the court grants the Applicant an injunction order for stay of proceedings, success of the intended Appeal will be rendered nugatory.”**

As regards the second point in issue, the Plaintiff maintained that the Appeal would be nugatory anyway as the Memorandum had not been lodged within the statutory stipulated timeframe. After setting out the provisions of **rule 81 (1)** of the *Court of Appeal Rules*, the Plaintiff noted that the Defendants' Notice of Appeal was dated 16th November 2011, but only filed in the Appeal Court on 20th December 2011. The Defendants had applied to the Deputy Registrar of this Court to be issued with certified copies of the proceedings. They had been issued with the same vide letter dated 21st December 2012 addressed to their advocates by the Deputy Registrar, indicating that the proceedings were ready for collection. The Plaintiff then submitted that upon realising that the intended appeal had limited chances of success, the Defendants adversely and intentionally ignored picking up copies of the proceedings, even after having been notified by the Deputy Registrar. The Plaintiff went on to say that he was an elderly person aged 76 years, he should be resting and not being subjected to the psychological stress of the Court process. He submitted that the Defendants had in mind his age factor and tactically lodged their Appeal as a delaying tactic to bar the expeditious conclusion of this suit. In the Plaintiff's opinion, the Defendants had a role to ensure that their Appeal be proceeded with expeditiously.

6. The Plaintiff went on to say that this Court had discretionary powers to disallow any application aimed at obstructing justice and which offended the overriding objectives of the *Appellate Jurisdiction Act (sections 3A and 3B)*. To this end, the Plaintiff referred this Court to the finding in the case of **City Chemist (Nairobi) & Anor. v Oriental Commercial Bank Ltd Civil Appl**

- No. NAI 302 of 2008 (unreported).** The Defendant maintained that it was trite law that for an injunction or stay order against proceedings to be issued, pending the hearing and determination of an appeal, the Defendants had to sufficiently demonstrate to the court that the absence of such an order would render the intended appeal nugatory. To this end, the Plaintiff relied upon the authorities of **Republic v Corruption Commission & 2Ors (2009) KLR 31, Ishmael K. Thande v Housing Finance Company of Kenya Ltd Civil Appl. No. NAI 157 of 2006 (unreported) and Hellen Makone v Brenda Michieka Civil Appl. No NAI 118 of 2012 (unreported).**
7. The gist of the Plaintiff's submissions, as I understood them, was that the Defendants had been guilty of inordinate delay as regards their proposed appeal to the Court of Appeal as against this Court's Ruling dated 3<sup>rd</sup> November 2011. I have perused the Court file in this connection. Messrs. Gachie Mwanza & Co., the Advocates on record for the Defendants, wrote to the Deputy Registrar of this Division on 16th November 2011 requesting certified true copies of the entire proceedings leading to the said Ruling. On 22nd November 2011, the Deputy Registrar acknowledged receipt of the advocates' said letter detailing that they would be notified when the copies were ready for collection. Thereafter, on the 21st December 2011, the Deputy Registrar wrote a second time to the said Advocates informing them that the copies requested under cover of their letter dated 16th November 2011 were now ready for collection upon payment of Shs. 1380/- for a certified copy and Shs. 690/- for an uncertified copy. It is possible that the Deputy Registrar's said letter of 21st December 2011 was not received by the Defendants' advocates because on 18th April 2012, they wrote again to the Deputy Registrar referring to her letter of 22nd November 2011 and stating that they had not received any notice from her that the copies were ready for collection.
  8. However, the advocates acknowledged that they had received a letter from the advocates for the Plaintiff dated 23rd March 2012 to the effect that the copies had been ready for collection way back on 21st December 2011. The advocates followed up with another letter to the Deputy Registrar dated 20th June 2012 and the note thereon from the Registry was that the typed copy of proceedings had gone for correction. Thereafter, there was a second letter sent to the Advocates for the Defendant by the Deputy Registrar dated 3rd September 2012 again notifying them that copies of the proceedings were ready for collection. For reasons best known to themselves, the advocates did not pick up the copy of the proceedings until 12th August 2013, 11½ months later. The Certificate of Delay herein, bearing that date, details that the Application for certified copies of the proceedings was made on 16th November 2011 and that the Defendants' advocates were notified by letter dated 22nd November 2011 as to when the certified proceedings would be ready for collection upon payment of the requisite court fees. The Certificate then details that the Defendants' advocates paid the requisite fees on 8th August 2013 and the certified proceedings were collected 12th August 2013. The time taken for preparation and delivery of the said copies totalled 665 days.
  9. I have considered the authorities cited to court by both the Plaintiff and the Defendants herein. It is to be noted that almost all the authorities submitted involved applications for stay made in the Court of Appeal rather than this Court. However, I got most assistance in this regard out of the **Donholm Rahisi Stores** case in which my learned brother **Ochieng J.** quoted from the finding of **Ringera J.** (as he then was) in the case of **Global Tours & Travels Ltd (2000) LLR 1061** 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 interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion it should be exercised rationally and not capriciously or whimsically. 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.”**

10. So far as the appeal to the Court of Appeal was concerned, Notice of Appeal was dated and filed herein on 16th November 2011. However the Court's stamp of the Court of Appeal bears the date 20th December 2011. **Rule 75** of the *Court of Appeal's Rules 2010* reads:

**“75. Notice of appeal**

1. **Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.**
2. **Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.**
3. **Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision and where it is intended to appeal against a part only of the decision, shall specify the part complained of, shall state the address for service of the appellant and shall state the names and addresses of all persons intended to be served with copies of the notice.**
4. **When an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal.**
5. **Where it is intended to appeal against a decree or order it shall not be necessary that the decree or order be extracted before lodging notice of appeal.**
6. **A notice of appeal shall be substantially in the Form D in the First Schedule and shall be signed by or on behalf of the appellant”. (Underlining mine).**

In my view, the Notice of Appeal was filed in the Court of Appeal well out of time and there is no evidence before this Court that the time for such filing has been extended either by this Court or indeed the Court of Appeal. It may well be that the Defendants have now filed their Memorandum of Appeal but such may be to no avail where the time for the filing of the Notice of Appeal has not been extended. **Order 42 rule 6 (4)** of the *Civil Procedure Rules* under which provisions the Defendants' current Application has been brought, provides:

**“(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.”**

11. In this matter, Notice of Appeal had been given but out of time as detailed above. Accordingly, I endorse the submission of the Plaintiff herein that the intended Appeal is nugatory as it has not been lodged within the statutory stipulated timeframe. Further, I find evidence that the Defendants

herein (or their Advocates) have, inadvertently perhaps, delayed in the prosecution of the Appeal. To wait over 11 months in which to collect from the Registry the certified copies of the said Ruling and the proceedings smacks to me of inordinate delay and goes against the principles expounded in **section 1A** of the *Civil Procedure Act* as regards the need for expeditious disposal of cases.

12. The upshot of all the above is that I find no merit in the Defendants' Notice of Motion dated 9th May 2013. The same is dismissed with costs to the Plaintiff.

**DATED and delivered at Nairobi this 31<sup>st</sup> day of July, 2014.**

**J. B. HAVELOCK**

**JUDGE**