



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO.335 OF 2011**

**A.S SHEIKH TRANSPORTERS LIMITED.....1<sup>ST</sup> PLAINTIFF**

**ABDI SAID SHEIKH ALI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**JOSEPH G. MUTURI T/A MUGA AUCTIONEERS**

**& GENERAL MERCHANTS .....2<sup>ND</sup> DEFENDANT**

**MARTIN WHITEHEAD.....3<sup>RD</sup> DEFENDANT**

**KURIA MUCHIRU.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. This is a Notice of Motion dated 12<sup>th</sup> April, 2013 by the Defendants seeking stay of proceedings of the suit pending the hearing and determination of an intended Appeal against the Ruling and Order of 10<sup>th</sup> April, 2013.
2. The Application was supported by the Affidavit of Ken Kiurah sworn on 12<sup>th</sup> April, 2013 wherein the Defendants contended that being dissatisfied with the decision to strike out its Defence and Counterclaim, intended to appeal against that decision to the Court of Appeal, that a Notice of Appeal had been filed in that regard. The Defendant contended that there had been no inordinate delay in filing the instant application and that it would suffer substantial loss and prejudice if the Order complained of was not stayed as the Defendant would be deprived of the right to a fair trial. Mr. Mwaniki learned counsel for the Defendants submitted that it would be fair to let the Court of Appeal interpret the provisions of the Constitution relied on and that the intended appeal should be allowed to be heard first in order to safeguard the Defendants' right to a fair hearing.
3. The Plaintiffs opposed the Application by way of a Replying Affidavit sworn on the 12<sup>th</sup> April, 2013 by Abdi Said Sheikh Ali. The Plaintiffs contended that the Defendants had failed to file their Defences and Supporting Documents within the time directed by the Court and that the consequence of such failure

could not be construed as a deprivation of the Defendants' right to a fair trial. The Plaintiffs further contended that whether or not the Defendants Appeal would be rendered nugatory should the orders prayed for be denied, is not a consideration that the High Court takes into account in determining an Application for Stay of Proceedings. Mr. Havi, learned counsel for the Plaintiffs submitted that the Plaintiff's would be prejudiced if the Order of stay of proceedings was granted as this would delay the hearing of the suit, which was predicated on challenging the receivership by the Defendants over the Plaintiffs assets including encumbrances on L.R No. 209/8343/55, I.R No. 34233/1 Garden View Estate, South C. In the premises, the Plaintiffs contended that they would continue to suffer loss of the use of their assets and escalated interest rates and charges should the hearing of the suit be delayed by an order of stay. The Plaintiffs therefore urged the Court to dismiss the Application.

4. I have considered the Affidavits on record and the submissions of Counsel. I have also considered the various authorities relied on by counsel. The application is brought under Order 42 Rule 6 of the Civil Procedure Rules which provides that:-

***“6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.***

***(2) No order for stay of execution shall be made under subrule (1) unless—***

***(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and***

***(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant. “***

5. It would seem that the order to stay proceedings is on the discretion of the court. Like all other discretions however, the same should not be exercised capriciously but judiciously. A close reading of Sub Rule 2 of Rule 6 would show that Ringera J was right in **W.U Cause No. 43 of 2000 in the Matter of Global Tours and Travels Ltd (UR)** when he held that the strictures that sufficient cause be shown and that no order of stay is to be granted unless the court is satisfied that substantial loss will be suffered and the offer of security only apply to applications for stay of execution and not for stay of proceedings. In my view, the test for grant of stay of proceedings is whether it is in the interests of justice that a stay be granted and if it is granted, on what terms. In this regard, the court has to consider the application of Section 1A of the Civil Procedure Act as to expeditious disposition of a case, the hardship or prejudice to be suffered by the respective parties, prima facie merits of the intended appeal and whether the application has been made timeously.

6. It is clear that given the circumstances of this case, the Defendants brought this application without unreasonable delay. The Ruling was delivered on 10<sup>th</sup> April, 2013. The Notice of Appeal was lodged on 11<sup>th</sup> April, 2013, within the prescribed time and the application was filed on 12<sup>th</sup> April, 2013. Therefore I am satisfied that the application was brought promptly.

7. With regard to whether the intended appeal is meritorious or not, I am alive to the fact that I ruled that the grounds put forward for the striking out the Defendants Defence and Counterclaim were laudable, the issues raised by the Defendants in the draft Memorandum of Appeal annexed to the application seem to me to be arguable. This Court however, is not in a position to speculate whether or not the grounds so raised will persuade the Court of Appeal to set aside the Ruling of 10<sup>th</sup> April, 2012. What should be noted however, is that the Defendants are aggrieved by the decision of this Court and have sought redress from the Court of Appeal. They have the undoubted right to do so and this Court should guard against such an

appeal being rendered nugatory.

8. So in the premises, what will happen if the stay is not granted and the Defendants proceed to prosecute their intended appeal? On the one hand if the Appeal fails and the stay was not granted, the matter would have already proceeded for formal proof and judicial time in the High Court would have been saved. On the other hand, if the stay was rejected and the appeal later on succeeds, the Defendants' Defence and Counterclaim would effectively be reinstated, meaning that the matter would have to go for full trial for determination on merit. In the meantime, the matter would have already proceeded for formal proof and any judgment arrived at would have come to naught. In the case of **Silverstein –vs- Chesoni (2002) KLR I** at page 7, whilst deciding on the issue of an appeal being rendered nugatory if proceedings are not stayed the Court of Appeal stated:-

***“What will happen if we do not grant the stay sought is that the appeal in the High Court will be heard and may well be determined. But when the appeal already lodged is heard, determined and if already it succeeded, what would automatically follow is that the proceedings in the High Court would have been rendered unnecessary, but an appropriate order for costs can be made to remedy that. However, the appeal in this court would not have been rendered nugatory.”***

9. I have seen the prayers in the Amended Plaintiff filed on 6<sup>th</sup> December, 2011. I do not see any drastic prayer therein which if granted will be irreversible if the appeal succeeds. On the other hand, the Plaintiff brought this suit in August, 2011. The Defendant delayed in filing its Defence and Counterclaim for over a year after being ordered to file the same. The Plaintiff's business is at a standstill as a result of the receivership that is being challenged by these proceedings. My view is, staying these proceedings will be contrary to the letter and spirit of Article 159 2(c) of the Constitution that proceedings be determined without undue delay thereby burdening the Plaintiffs unnecessarily for no fault of their own.

Accordingly, I am not satisfied that the Defendant's application dated 12<sup>th</sup> April, 2013 is meritorious and the same is hereby dismissed with costs.

**DATED** and **DELIVERED** at Nairobi this 14<sup>th</sup> day of June, 2013.

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**A. MABEYA**

**JUDGE**