



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 185 OF 2001**

**TRUST BANK LTD. .... PLAINTIFF**

**VERSUS**

**AJAY SHAH ..... 1<sup>ST</sup> DEFENDANT**  
**PRAFUL SHAH ..... 2<sup>ND</sup> DEFENDANT**  
**NITIN CHANDARIA ..... 3<sup>RD</sup> DEFENDANT**  
**VINOD CHAUDRY ..... 4<sup>TH</sup> DEFENDANT**  
**ARUN JAIN ..... 5<sup>TH</sup> DEFENDANT**  
**JIGNESH DESAI ..... 6<sup>TH</sup> DEFENDANT**  
**RENUKA SHAH ..... 7<sup>TH</sup> DEFENDANT**  
**PRAVIN MALKAN ..... 8<sup>TH</sup> DEFENDANT**  
**AZIM JAMAL VIRJEE ..... 9<sup>TH</sup> DEFENDANT**  
**SAMVIR TRUSTEES LIMITED ..... 10<sup>TH</sup> DEFENDANT**

**RULING**

1. Before this Court is the Plaintiff's Notice of Motion dated 6 November 2012 brought under the provisions of **Order 42 Rule 6** and **Order 51 Rule 1**, *Civil Procedure Rules, 2010*. The relief sought in the Application is for stay of proceedings in this case pending the hearing and

determination of the intended Appeal against the Ruling and Order of this Court made on 19 April 2012. That Ruling had dismissed an application for review of an earlier Order made on 16 February 2012 in which this Court had dismissed the Plaintiff's case because it had failed to adduce evidence on the date of the hearing. The Plaintiff noted that that the next proceedings, as far as this case is concerned before Court, would relate to the taxation of the Defendants' Bills of Costs. The grounds upon which the Application is based are as follows:

**“a) the Plaintiff intends to exercise its statutory rights of appeal against the ruling and order and has duly filed a Notice of Appeal against the said ruling and Order.**

**b) if the Stay is not granted the defendants will take further proceedings in the suit to recover costs awarded and the total costs for all the concerned defendants in the suit may exceed Kshs. 120 Million.**

**c) the Plaintiff which is in liquidation will suffer substantial loss if it is to pay the said substantial costs before the determination of the intended Appeal.**

**d) it is in the interest of justice that Order of stay be granted pending the hearing and determination of the Appeal when the final rights of the parties will be determined”.**

2. The Plaintiff's Application was supported by the Affidavit of **Adam Boru** sworn on 6 November 2012 in which he noted that the Plaintiff Applicant Company is in liquidation and that the Deposit Protection Fund Board is the Liquidator. The deponent recited the proceedings before this Court on the 16<sup>th</sup> February 2012 when Kimondo J. dismissed the Plaintiff's suit with costs to the first, second, fourth and sixth Defendants. He also noted the application for the Review of the dismissal was again dismissed by Kimondo J. in his Ruling delivered on the 19 April 2012. The deponent further noted that the Plaintiff, being aggrieved by the Ruling of the 19<sup>th</sup> of April 2012, had exercised its right of appeal by initially filing a Notice of Appeal, a copy of which he annexed to the Supporting Affidavit. He maintained that there was good chance that the Plaintiff's intended appeal would be successful as the grounds therefore were arguable. He also noted that he had been informed by the advocates on record for the Plaintiff that it was estimated that the total costs for the four participating Defendants' advocates would be about Shs. 120 million.
3. The Plaintiff's said Application is opposed and the advocates for the first Defendant filed Grounds of Opposition on 21 November 2012. They maintained that the application was an abuse of the Court process and had been made in bad faith in order to subvert the Orders of the Taxing Officer made on 5 October 2012. It also maintained that the Plaintiff was trying to commit fraud on the face of this Court's record and that its Application was bad in law and misconceived. The first Defendant also filed a Replying Affidavit sworn by its advocate M. Billing on 20 November 2012. In that affidavit, the deponent noted that no evidence had been attached to the Affidavit in support of the Plaintiff's Application. He annexed a copy of his Affidavit dated 7 March 2012 in opposition to the Plaintiff's said application for Review which, he maintained, clearly set out the sequence of events before this suit was dismissed. He further maintained that the Application before court was premature in that the Taxing Officer had ordered, on 5 October 2012, that the Plaintiff do file and serve its written submissions in opposition to the first Defendant's Bill of Costs filed on 4 September 2012. He stated that the Plaintiff, instead of complying with the Orders of the Taxing Officer, filed this Application in order to subvert the course of justice by trying to stop the taxation of the first Defendant's said Bill of Costs.
4. The Court noted that the Plaintiff's said Application was opposed by the first, second and fourth Defendants, who all filed written submissions in respect thereof. In the Plaintiff's submissions filed on 16 April 2013, it submitted that the Application disclosed sufficient cause for stay of further proceedings and the taxation of the Defendants' Bills of Costs. It relied upon the facts disclosed in the Supporting Affidavit of the said **Adam Boru**. It maintained that the facts as stated in the said Supporting Affidavit established the following:

**“a) that the Plaintiff/Applicant has strong arguable grounds of Appeal in the intended appeal.**

**b) based on the Bill of Costs that has been filed so far by the 1<sup>st</sup> Defendant alone, the quantum of Costs therefor is Kshs. 44,705,721.22.**

**c) the remaining two Defendants will follow suit and claim similar amounts.**

**d) if the said order is not granted, and the above proceedings or taxation take place, then the Plaintiff may be called upon to pay over Kshs.75 million to the Defendants as costs before the hearing and determination of the said.**

**e) taking into account that the Plaintiff is in liquidation, the above sums or claims will cause substantial loss to the Plaintiff, and to a large extent render the intended Appeal futile”.**

The Plaintiff followed up this reasoning by submitting that should this Court find it necessary to grant a conditional Order for stay of proceedings then that the condition should provide for the Central Bank of Kenya as the Plaintiff’s banker, to provide a guarantee from the deposits held on behalf of the Plaintiff for the payment of such reasonable sum as this Court do determine.

5. The First Defendant’s submissions were filed herein on 30 April 2013. It pointed to its Bill of Costs dated 4 September 2012 which had come for taxation before the Taxing Officer on 5 October 2012. The Plaintiff had been ordered by the said Taxing Officer to file its written submissions in relation thereto. Instead, it had filed the current Application before Court and the First Defendant submitted that the same was not tenable in law. Stay of proceedings is a discretionary remedy rarely granted by Court and referred the Court to **Civil Application No. Nai 189 of 2001 Silverstein v Atsango Chesoni**. The first Defendant further submitted that the Application was premature because no Bill of Costs had been taxed and that the same was made in bad faith as it was filed one day before the time given by the Taxing Officer for the Plaintiff to file its written submissions in respect of the first Defendant’s Bill of Costs. The first Defendant urged the Court to dismiss the Plaintiff’s said Application with costs to be paid personally by the Liquidator of the Plaintiff Company, the said **Mr. Adam Boru**. Finally, the first Defendant noted that if this Court was inclined to stay further proceedings, then it should be on condition. Bearing in mind that the suit dismissed claimed an amount of Kenya shillings 326,436,589.00 plus interest at 25% per annum from 1 February 2001, a reasonable sum should be deposited in a joint interest earning account in the name of the Plaintiff’s advocates and the First Defendant’s advocates.
6. The second Defendant’s submissions were filed herein on 22 April 2013. They opened with the bald statement: **“Litigation must come to an end.”** The second Defendant noted that the suit had been dismissed on 16 February, 2012 as the Plaintiff had failed to adduce any evidence. The unavailability of learned counsel for the Plaintiff in Court on that day was not the reason why the suit was dismissed. There were no witnesses available on behalf of the Plaintiff to adduce evidence. In the second Defendant’s opinion, there was no material relevant placed before this Court in the Application to warrant a review. In its view, it is only fair that assessment for costs is undertaken and that the quantum of such costs cannot be advanced to warrant a stay of proceedings. Costs are an expected outcome of litigation. It would not be prejudicial to the Plaintiff and it did not in any way place the Plaintiff at a disadvantage.
7. The fourth Defendant’s submissions were filed herein on 23<sup>rd</sup> April 2013. Having set out the purpose of the Application before Court, the fourth Defendant noted that **Order 42 rule 6 (1)** stated:

**“the court appealed from may for sufficient cause order stay of execution of such decree or Order.”**

The fourth Defendant maintained that nowhere was it stated that the court appealed from can stay further proceedings. The Plaintiff had relied solely on the provisions of **Order 42 Rule 6 (1)** and no

other provisions of the law. As the Defendants herein had not taxed their bills, the process was far away from execution and accordingly, in the fourth Defendant's opinion, the Plaintiff's Application before Court is premature. The fourth Defendant also requested the Court to examine the behaviour of the Plaintiff in filing this Application having not complied with the Orders of the Taxing Officer in the first place. Secondly, this Court's Order of 20th March 2013 gave the Plaintiff until the 4th April 2013 to file and serve its submissions in relation to this Application, upon the Defendants. In fact, it had filed the same on 16th April 2013, 12 days late. No explanation had been advanced by the Plaintiff as to its lateness in filing its said submissions. In the fourth Defendant's opinion, it seemed that the Plaintiff was taking this Court for granted. It should realise that litigation must come to an end and staying further proceedings herein would not serve any purpose but to delay the conclusion of the case which was already 12 years old. The fourth Defendant also maintained that it was apparent from the Application that the Plaintiff had not asked for certified copies of the proceedings to date to be provided to it, further proof that the Plaintiff was not serious in pursuing an appeal but merely was attempting to delay the taxation process. It concluded that the Plaintiff had handled its case with a lack of dispatch and did not deserve the exercise of any discretion by this Court.

8. The fourth Defendant is not quite right in its submissions that **Order 42 rule 6** does not provide for a stay of proceedings quite apart from a stay of execution. It reads:

**“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 appeal from may order.....”** (Underlining mine).

The first Defendant referred the Court to the finding of the Court of Appeal in the **Silverstein** case as above but this Court is minded that such was determined upon different principles as to those upon which this Court may or may not grant a stay of proceedings under **Order 42 rule 6**. In **Mediratta v Kenya Commercial Bank & Others [2006] 2 E.A 194**, Emukule, J held that the rules and principles under **Order 5 (2) (b)** of the *Court of Appeal Rules (2010)* shall not apply to the High Court in an application for stay of proceedings and/or execution. The principles to which the learned judge was referring to were that the intended appeal is arguable and would be rendered nugatory should the stay order not be issued. These were the grounds that the applicant therein predicated his application upon. Whether the issues raised in the intended appeal are arguable are beyond the scope and jurisdiction of the Superior Court. It is only for the Court of Appeal to determine whether the issues raised have merit and indeed if argued, may render the intended appeal nugatory.

9. The principles under which this Court may grant stay of execution pending an appeal from it to the Court on the Appeal are encapsulated in **Order 42 rule 6 (2)** as follows:

**“(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.”**

However, and as pointed out by the fourth Defendant these principles apply to stays of execution not to stays of proceedings. The Plaintiff has attempted to demonstrate to this Court that it will suffer substantial loss unless an order for stay of proceedings is granted. At the moment, such loss cannot be quantified for the principle reason that the Defendants' Bills of Costs have yet to be taxed.

Accordingly, I agree with the first Defendant in its submissions that the Application before this Court is premature. To my mind, it has been brought purely to delay and, as such cannot be sanctioned. As per the second Defendant's submission: "litigation must come to an end". As I view the Plaintiff's application what it really amounts to is that this Court is being asked to sit on appeal of the two 2012 Rulings of **Kimondo J.** the first dismissing the suit and the second dismissing the Plaintiff's Application for Review of the dismissal Order.

10. Accordingly, and in accordance with the discretion vested in this Court, I dismiss the Plaintiff's Notice of Motion dated 6th November 2012 with costs to the first, second and fourth Defendants.

**DATED and delivered at Nairobi this 15<sup>th</sup> day of July, 2013.**

**J. B. HAVELOCK**

**JUDGE**