



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**(MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)**

**ENVIRONMENTAL & LAND CASE 139 OF 2008**

**MINT HOLDINGS LIMITED.....PLAINTIFF  
VERSUS**

**KENYA RAILWAYS CORPORATION.....1<sup>ST</sup> DEFENDANT**

**HAMPSTEAD HOLDINGS LIMITED.....2<sup>ND</sup> DEFENDANT**

**SENTARA DEVELOPERS LIMITED**

**(Originally Sentara Holdings Limite.....3<sup>RD</sup> DEFENDANT**

**MUKESH JAMNADA GOHIL.....4<sup>TH</sup> DEFENDANT**

**JAMES KIMUTAI CHERONO.....5<sup>TH</sup> DEFENDANT**

**LAXMANBHAI CONSTRUCTION LIMITED.....6<sup>TH</sup> DEFENDANT**

**TAARIFA GARENS (HOLDINGS) LIMITED.....7<sup>TH</sup> DEFENDANT**

**SINGTON INVESTMENTS HOLDINGS LIMITED.....8<sup>TH</sup> DEFENDANT**

**RULING**

This Ruling is delivered in the Notice of Motion dated 23<sup>rd</sup> April 2011, filed by the Plaintiff in H.C.C.C. No. 139 of 2008 (struck out and dismissed) on 1<sup>st</sup> July 2010) and appellant in Civil Appeal No. 11 of 2011, seeking orders, inter alia as follows:-

**1. That this honourable court be pleased to stay any further proceedings pending the hearing and determination of Civil Appeal No. 11 of 2011 – Mint Holdings Ltd –vs- Kenya Railways Corporation and others.**

**2. That costs be in the cause.**

The application is said to have been brought under Order 42 Rule 6(1) of the Civil Procedure Rules which provides as follows:-

**“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 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 seem to it just, and any person aggrieved by an order of stay made by the court whose decision the appeal is preferred may apply to the appellate court to have such order set aside”**

Subrule 2 of Rule 6 provides the prerequisites for granting a stay. The applicant’s appeal challenges the dismissal with costs, of its suit as against the 1<sup>st</sup> 2<sup>nd</sup> 4<sup>th</sup> 6<sup>th</sup> and 7<sup>th</sup> Defendant/Respondents.

The Notice of Motion is opposed by the various respondents who; save for the 5<sup>th</sup> and 8<sup>th</sup> Defendant/Respondents chose to file either Grounds of Opposition or Replying Affidavits, followed by written submissions. Brief oral highlights on the 7<sup>th</sup> Respondent’s submissions were made in court by Mr. Oraro, Advocate and adopted by counsel for the 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> and 6<sup>th</sup> Defendant/Respondents. All the submissions, including those filed for the applicant and the reply thereto, by its counsel, have been carefully considered and analysed.

The Notice of Motion is founded on the ground that the stay is necessary to ensure that the applicant’s appeal is not prejudiced or rendered nugatory. It is supported by an 8 paragraph Supporting Affidavit of Samson Keengu Nyamweya in which he depones, inter alia, that the subject matter of the suit (L.R. No. 209/12938) is of a considerable value and that the 6<sup>th</sup> and 7<sup>th</sup> Respondents are in the process of issuing titles in respect of properties developed on the suit land, despite the applicant having an interest thereon.

The application is opposed on the ground that it is devoid of merit and is seen by the several Respondents as an abuse of the process of the court for reasons that:

- 1. There are no proceedings pending before this court, where the respective Respondents have filed their bills of taxation in respect of the costs awarded upon dismissal of the suit, the taxation of which cannot be considered to be proceedings within the meaning of order 42 Rule 6(1).**
- 2. That the applicant has previously filed a similar application for stay, being the Notice of Motion dated 26<sup>th</sup> April 2011, which was dismissed on 9<sup>th</sup> June 2011, for lack of merit.**
- 3. That subsequent upon the said dismissal, the Applicant filed another application for stay in the Court of Appeal, being Civil Application No. 148 of 2011, which is yet to be heard.**
- 4. That in view of the hearing and determination of the Notice of Motion dated 26<sup>th</sup> April 2011, the present application is res judicata.**
- 5. That the applicant having failed to disclose to this court the existence of the Notice of Motion of 26<sup>th</sup> April 2011, and the application for stay pending before the Court of Appeal, it is guilty of material non disclosure and therefore not entitled to the prayers sought.**
- 6. That in view of the manner in which the applicant moved to fix the present application for hearing, the court must find that the same is merely intended to forestall the pending taxation of the Respondents bills.**

The Respondent has submitted that the present application is neither related to the one of 26<sup>th</sup> April 2011, which was dismissed, nor is it related to the one pending before the Court of Appeal, on the basis that those two applications seek to stay execution of the decree pending appeal while the present one seeks to stay any further proceedings. Counsel for the applicant has singled out the pending taxation as the only proceedings sought to be stayed.

I accept the Respondents' submission that taxation of Bills cannot be stayed under Order 42 of the Civil Procedure Rules since the procedure for taxation falls outside the Rules, being governed by the Advocates Remuneration Order and the Rules thereunder. The same provide the mode for seeking redress by those who may consider themselves aggrieved by taxation. Moreover, this application having been filed much earlier than the Bills of costs themselves, the court finds it odd that counsel for the applicant would expect it would uphold his submission that the application relates to the same. This court took note of that fact and also and that from the record, the applicant did submit to taxation and was party to a consent order recorded before the taxing officer on 23<sup>rd</sup> November 2011, to the effect that written submissions would be filed in respect of the bills filed and the matter mentioned on 18<sup>th</sup> January 2012 for the purposes of taking a Ruling date.

Prior to the recording of the said consent, counsel for the applicant, Mr. Ashimosi had, on 5<sup>th</sup> October 2011, intimated to the taxing officer his preference that the five bills filed by the respective Defendant/Respondents be heard together. The taxing officer then gave the 23<sup>rd</sup> November 2011 as the date for taxation. Mr. Ashimosi then proceeded to fix the Notice of Motion of 23<sup>rd</sup> April 2011 for hearing. When the same came up for hearing before me he stated that, whereas he was ready to proceed to argue his application, he wished to clarify that **“the proceedings sought to be stayed include (d) the taxation scheduled for 23<sup>rd</sup> November 2011.”** I have already held that the application cannot extend to the taxation and need not to say more on the issue.

Having found and held as above, it follows therefore that there are no proceedings to be stayed since all proceedings in the civil suit concluded with the dismissal, by Muchelule J, of the Notice of Motion dated 26<sup>th</sup> April 2011, which is the subject matter of the application for stay now pending at the Court of Appeal. I accept the submissions by counsel for the 6<sup>th</sup> and 7<sup>th</sup> Defendant/Respondents that the case of **EGYPTIAN ART GALLERY LTD**

**-VS- MODAWAYS INVESTMENTS LIMITED [2009] eKLR**, does apply to the facts of the application before me.

There is clear mischief on the part of the applicant to fail to prosecute the present application earlier, choosing instead to prosecute the one dated 26<sup>th</sup> April 2011 and filing a subsequent one in the Court of Appeal and then deciding, after submitting to taxation, to fix the present application for hearing, probably because the constitution of the bench at the Land & Environmental Division had changed.

I have studied the record including the rulings and orders of my brothers Justices Mbogholi-Msagha J and Muchelule J. Considering the ruling by Muchelule J of 9<sup>th</sup> June 2011, the present application is clearly res judicata under section 7 of the Civil Procedure Act. The same, having had been filed earlier than the one before Muchelule J and on the same grounds as were raised in the one dated on 26<sup>th</sup> April 2011, I am of the considered view that explanation (4) of Section 7 of the Civil Procedure Act does apply. The Court of Appeal decisions of **KANORERO RIVER FARM LTD & 3 OTHERS -VS- NATIONAL BANK OF KENYA LTD [2002] 2KLR 207** and **UHURU HIGHWAY DEVELOPMENT LTD -VS- CENTRAL BANK OF KENYA & 2 OTHERS [1996] eKLR**, cited by counsel for the 6<sup>th</sup> and 7<sup>th</sup> Respondents also apply to this application.

In view of the above, I find that the application dated 23<sup>rd</sup> February 2011 is a gross abuse of the process of the court and has no merit. It has not only hampered the taxation of the Respondents' Bills of Costs but it has also greatly inconvenienced this court, which was forced to peruse the bulky file (for reasons of the material non-disclosure by the applicant already referred to and what I consider to have been an attempt by counsel for the applicant to wood-wink the new bench at the Land and Environmental Division after the departure of the Honourable Justices Mbogholi-Msagha J and Muchelule J). The need to peruse the bulky file and the volume of work in the Family Division where I was suddenly transferred to on 16<sup>th</sup> January 2012, made it impossible to render this ruling on 26<sup>th</sup> January 2012 or during the Easter Term. The delay is regretted and the patience demonstrated by the parties and their advocates appreciated.

I find myself compelled to urge learned counsel, Mr. Ashimoni to heed the warning given by the Court of Appeal at P. 26 of its decision in the case of **UHURU HIGHWAY DEVELOPMENT LTD** (supra).

With the above said, the Notice of Motion dated 23<sup>rd</sup> February 2011, is hereby dismissed with costs. Orders accordingly.

**DATED, SIGNED and DELVIERED at NAIROBI this 19<sup>th</sup> DAY OF April 2012.**

**M.G. MUGO**

**JUDGE**

**In the presence of :**

**No appearance for the plaintiff.**

**No appearance for the 1<sup>st</sup> defendant.**

**Ms. Ajiambo holding brief for Mr. Kibet for the 2<sup>nd</sup> & 3<sup>rd</sup> defendant**

**No appearance for the 4<sup>th</sup> defendant**

**No appearance for the 5<sup>th</sup> t defendant**

**Ms. Ajiambo for the 6<sup>th</sup> & 7<sup>th</sup> defendant**

**No appearance for the 8<sup>th</sup> defendant.**