



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Civil Suit 245 of 2011

STEPUP HOLDINGS (K) LIMITED.....PLAINTIFF

VERSUS

MT. KENYA UNIVERSITY.....DEFENDANT

RULING

In this court's ruling delivered on 27th January, 2012, it was held that the applicant herein having entered appearance in this matter lost the right to rely on the arbitration clause. Consequently, the court dismissed the applicant's chamber summons for stay of proceedings pending arbitration.

Before me is another application by the applicant for orders that proceedings in this matter be stayed pending determination of an appeal preferred against the aforesaid ruling. The application is brought pursuant to the provisions of **order 42 rule 6(1)** of the **Civil Procedure Rules** and premised on the grounds that the applicant has filed a notice of appeal and that if an order of stay of these proceedings is not granted, the appeal will be rendered nugatory and the applicant will be forced to defend the suit thereby waiving its right to refer the dispute to arbitration.

Replying to these averments, the respondent through Bernard Gikundi Mwarania, described as the chairman of the respondent's Board of Directors, has deposed that the applicant has not demonstrated that there will be substantial loss if the orders of stay is not granted; that the applicant has not given security for the due performance of such decree or order as may ultimately be binding on it; that the applicant has never shown interest in the expeditious determination of this dispute but has instead engaged in activities intended to undermine the operations of the respondent

It is further averred that the applicant has not established sufficient cause to enable this court grant the relief sought. Because the intended appeal may take several years to determine, the respondent will suffer great prejudice and the interest of justice will be defeated.

I have considered these arguments and the authorities cited by both learned counsel. Some of those authorities relate to the provisions of **Rule 5(2)(b)** of the **Court of Appeal rules**, whose considerations are different from those under **Order 42 rule 6**. It is now settled that in an application for stay of proceedings, as opposed to that for stay of execution, the court exercises unfettered discretion. Indeed the words used in **Order 42 rule 6(1)** are that:

“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.....”

(Emphasis supplied).

Judicial discretion must be exercised in order to meet the interest of justice; exercised rationally, on sound principles of law and not arbitrarily or capriciously.

I must emphasise again that the usual strictures that sufficient cause be shown and that no order of stay should be made unless there would be substantial loss, that the application has been made without unreasonable delay and that the applicant must provide security, are, on a plain reading of **rule 6(1)**, applicable only to applications for stay of execution. But the submissions by counsel and the authorities cited suggest some of these strictures apply also to applications for stay of proceedings. See **Re Global Tours & Travel Limited** Cause No.13/2000.

The applicant wishes to challenge the ruling in question dealing not with the substance or merit of the dispute but on a preliminary point, i.e. whether by entering the appearance in this matter, the right to refer the dispute to arbitration was lost.

The effect of this court dismissing this application would be to allow the matter to proceed before the court and the applicant to participate when they have challenged that participation. It is indeed a question of jurisdiction which in my view must be determined by the outcome of the appeal. What purpose will it serve to hear the parties and render a judgment only for the Court of Appeal to overturn the ruling and order the parties to go for arbitration? Just as there is likelihood that the appeal may take long to determine, there will also be wastage of judicial time to proceed with the hearing before the determination of the appeal.

I share the sentiments of the Justices of Appeal in **Shashic Patel** V. **Damayantina Vin Shah**, Civil Appeal No.236 of 2006 when they granted a stay of proceedings saying:

“It might be difficult if not impossible to get the matter to arbitration once it is heard by the superior court as there will remain nothing to go to arbitration by then. Common sense commands that as the question of whether to refer the matter to arbitration or not is still to be subject of an appeal or intended appeal in this court, the hearing in the superior court must be stayed to abide the outcome of this court’s decision on the intended appeal.”

In the result, I grant a stay of these proceedings in terms of paragraph 3 of the motion dated 15th February, 2012.

Costs to be costs in the appeal.

Dated, Signed and Delivered at Nakuru this 3rd day of May, 2012.

**W. OUKO
JUDGE**