



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Suit 464 of 2009**

**RACHEL KOIGI**  
**SOPHIE NJENGA ..... PLAINTIFFS**  
**VERSUS**  
**SHAILA MAULADAD .....1<sup>ST</sup> DEFENDANT**  
**PATRICIA ODINA ..... 2<sup>ND</sup> DEFENDANT**  
**ANILA HINDOCHA ..... 3<sup>RD</sup> DEFENDANT**  
**ARCHANA SANGER..... 4<sup>TH</sup> DEFENDANT**

**RULING**

Coram: Mwera J

Ms Janmohamed for defendant/applicants

Mr K. Mungai for plaintiff/respondents

By a notice of motion dated 19.1.10 brought under Order 41 rule 4 Civil Procedure Rules, Section 1A, 1B, 3, 3A of the Civil Procedure Act the defendants prayed in the main:-

(1) That this court grant a stay of proceedings herein pending the final determination of an intended appeal against a ruling delivered on 16.12.09.

The grounds on which the motion was based were that the applicants had appealed against the said ruling of 16.12.09 which followed their plea by way of preliminary objection as to whether the suit herein was properly before the court. And that if a stay was not granted the applicants would be highly prejudiced as the question of whether the suit was properly before the court was yet to be fully determined. Ms Janmohamed swore a supporting affidavit to the motion which she argued. Mr. K. Mungai opposed it.

Ms Janmohamed told the court that the preliminary point she argued which was followed by the ruling of 16.12.09 was two –pronged: the suit was one of a representative nature yet the plaintiff/respondents had not obtained the court's leave before instituting it and that some paragraphs in a certain affidavit were scurrilous, emotive and scandalous and so they ought to be struck out. That at the end of the arguments the learned Justice Ali- Aroni found that the suit was properly before court and she struck out only two of the 8 grounds that the defendant/applicant thought were scandalous. And so an appeal was intended or had been filed against the entire ruling of 16.12.09 - hence this application under order Order 41 and 4 Civil Procedure Rules.

The thrust of the argument here was that in the event the on-going proceedings are not stayed until the (intended) appeal is finally determined, it will have been a waste of time in the event the Court of Appeal agreed with the applicants that the suit herein was of a representative nature but had been improperly filed without leave of the court and/or that some of the paragraphs claimed to be offensive were indeed offensive and ought to have been expunged. All in all Ms Janmohamed held a firm view that the proceedings herein should be stayed because the very basis on which they were being conducted was being questioned: whether the suit was properly before court. That that constituted sufficient cause warranting the stay. The court heard that in the interests of justice this court should exercise its discretion to order the stay sought (see NRI (MIL) WC No. 43/2000 in the matter of Global Tours and Travels Ltd.) The court was urged to note that out of eleven officials of the Ladies Golf Union only four had been sued – all without explanation. And that the whole membership of the Union was not sued or notified of the suit by the plaintiffs who had not complied with Order 8 CPR regarding instituting representative suits. That the plaintiffs suffered no prejudice at all following the 18-month suspension slapped on them wef 29.6.09 which led to this suit. And they were only barred from playing competitive tournaments – not social ones.

Mr Mungai's position was that Justice Ali-Aroni was not impressed with the objection by the applicants that the suit herein was of a representative nature or that more than two paragraphs alleged to be scandalous deserved to be expunged. After so ruling proceedings commenced to determine the question whether the suspension of the parts was in order. That that being the substratum of the suit herein, in the interests of justice the proceedings in it should go on to the end, for all involved to know their stand. The plaintiffs had served 6 months of the suspension and were anxious to know from the court whether it was proper/legal. In any event the applicant's preliminary objection succeeded in part and so the proceedings should go on. The applicants stand to suffer no prejudice while the plaintiffs' claim will be stalled yet the suspension would continue to run. It may as well run its full course before the intended appeal is determined in which

case if it is lost, the suspension will have been served anyway. That the defendants will still have a chance to appeal in the event the plaintiffs lose this suit. And the applicants have not demonstrated what material, interest or other loss they could suffer if the stay order is not granted and in any case they had not considered/offered to defer the suspension in the meantime because the plaintiffs could still serve the suspension if they lost their case. The suspension will only have been interrupted.

The relevant part of Order 41 rule 4 Civil Procedure Rules under which this application falls reads:

**“ 4. (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 for sufficient cause order stay 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 being made, to consider such application and to make such order thereon as may 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.”**

To this court’s understanding of Order 41 rule 4 (1) Civil Procedure Rules generally an appeal being preferred does not operate as stay of execution of a decree or order in a given cause. It does not also operate as a stay of proceedings in that cause, even as the aggrieved party there moves to appeal against a preliminary/partial decree or order in that cause. The exception is that the court whose decision (decree or order) is being appealed against may on sufficient cause being shown to it by the aggrieved party, order a stay, in our case, of proceedings. We were told here that the hearing of the suit was under way and that is what the applicants moved to stay by this motion, following the ruling on a preliminary point the applicants raised.

In order to consider a stay execution or proceedings the court shall have to be satisfied that:

- a) the applicant stands to suffer substantial loss unless this stay is granted;
- b) the stay application has been made without any unreasonable delay; and
- c) the applicant provides security for due performance of such a decree or order (see Order 41 rule 4 (2) Civil Procedure Rules).

In the present matter the plaintiffs came to court praying it to consider and determine whether the suspension the defendants slapped on them was legal or according to their governing instrument. When the hearing was about to go under way, the defendant /applicants raised the preliminary objection that resulted in the ruling under review in which the learned judge was not convinced that the suit was improperly brought or that more than two paragraphs were scandalous. After so ruling then the suit was back on the track to be heard. But that the defendants want or have appealed against the said ruling, they desire this court to stay proceedings before it. Or it shall be a waste of time to go on with the hearing, as the appeal progresses along, in case it succeeds and yet the suit has been tried and determined.

Considering all the foregoing ie the pleadings, arguments, the law either by statute or cases, the discretion of this court being sought here hinges basically on the interests of justice and they are served or not served when proceedings here are stayed or not.

In this courts' view this application was brought timeously from the date the ruling herein was delivered and the application filed – allowing for the Christmas vacation. In any event the respondent had no quarrel with that.

Now has sufficient cause been advanced to warrant the stay? The court was told that the applicants harboured a reasonable and justifiable apprehension that if the trial was not stopped until their appeal is determined, there may be a waste of judicial time in the event the appeal ultimately succeeds. But it is not demonstrated that a prejudice, loss of a certain interest or matter would befall the applicants. It is not even suggested that the applicants offer to defer the suspension in the midst of all this. They desire the trial proceedings to be stayed ie. the early determination of the validity of the suspension to be delayed BUT the plaintiffs to continue serving the suspension, nonetheless.

In that state of things, this court is inclined to refuse the stay of proceedings sought. It will be unjust to the plaintiffs, to delay the proceedings that will lead to their knowing whether the suspension they are serving was proper or not while at the same time they are serving that suspension. The proceeding should resume as soon as it is possible and in the event the appeal is successful they will be condemned in costs and they will have served their suspension anyway.

However, applicants may only be granted an order of stay of proceedings on condition that they defer the suspension until their intended appeal is finally determined. If it is successful, the plaintiffs may be required to serve the balance of the suspension but if the appeal fails the plaintiffs will be vindicated in that they properly came to court seeking a remedy.

In the result this application is dismissed with costs.

Delivered on 4.2.10

**J. W. MWERA**

**JUDGE**