



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL 146 OF 2008

*(Being an appeal from the ruling of the Ag. Principal Magistrate dated the 19<sup>th</sup> day of August, 2008 in Nakuru Chief Magistrate's Court Civil Case No. 1266 of 2001)*

NAKURU INDUSTRIES LIMITED.....APPELLANT

VERSUS

SOLOMON WANJALA MABONGA.....RESPONDENT

***Civil Procedure & Practice - stay of proceedings - pending hearing and determination of intended appeal - on grounds that the appeal would be rendered nugatory if stay is not granted - exercise of discretion by the court - factors to be taken into account.***

RULING

This Ruling relates to an application by way of a Notice of Motion dated 23<sup>rd</sup> November 2009 in which the Applicant, Nakuru Industries Ltd seeks a stay of proceedings pending its appeal against the lower court's ruling dismissing its application for dismissal of suit for want of prosecution. The Motion was supported by the affidavit of Lydia Kemunto Manyoni sworn on 23<sup>rd</sup> January 2009 and the grounds on the face of it.

The Motion was opposed by Counsel for the Respondent who filed the following grounds of opposition -

- (a) *that the application is bad in law, incompetent and abuse of the court process;*
- (b) *that the application has no merit at all;*
- (c) *that the applicant has not established any prejudice that it will suffer if proceedings are taken in the subject suit;*
- (d) *that the appeal would not be rendered nugatory or affected in any way.*

**Mr. Mahinda** and **Mr. Kisila** who respectively appeared for the Applicant and Respondent reiterated their respective grounds. I have taken consideration of their arguments and tender my opinion in the paragraphs following.

The right to apply for stay of proceedings is prescribed by **Order XLI rule 4(1)** of the **Civil Procedure Rules** which give similar power to the trial court, the High Court and Court of Appeal (*within their appellate jurisdiction*) the discretion to

stay proceedings or execution of their orders. The grounds for stay of execution are prescribed in **rule 4(2)** of the said Order - that an applicant will suffer substantial loss if a stay of execution is not granted, that the application has been made without unreasonable delay, and the Applicant is ready and willing to give security for the due performance of the order or decree which may ultimately be binding upon him.

The consideration for granting stay of proceedings are purely discretionary. **Rule 4(1)** says that the court appealed from may make such order thereon as may to it seem just, and if the Applicant is not satisfied, it may appeal to the next appellate court.

**Mr. Mahinda** learned counsel for the Applicant urged that no prejudice would be caused to the Respondent if an order for stay of proceedings is made. In any event, one Rita Thatthi has sworn that the Tausi Assurance Co. Ltd. is ready to give security for any eventual orders made and binding upon the Applicant.

I find these strange arguments. *Firstly* a Plaintiff's suit filed in the year 2001 threatened with dismissal if not prosecuted will obviously be prejudiced if there is further delay in the prosecution thereof. *Secondly* there is no basis in law upon which this or any court would make an order for security to bind the Applicant in a suit which has not been determined. Were the suit to be decided in the Applicant's favour who would bear the cost of the security? Would the Respondent be burdened with such cost? Security is determined by reference to a sum determined or other order made, and cannot be made in expectation.

I am unable to say that the intended appeal would be rendered nugatory. The power to dismiss a suit under either **rule 5** or **6** of **Order XVI** of the **Civil Procedure Rules** is purely discretionary and there is no ground or material demonstrating that that discretion has not been exercised in accordance with those provisions. The Applicant has been careful not to attach copies of the application for dismissal of the Respondent's suit in Nakuru Chief Magistrate's Civil Case No. 1266 of 2001. For this court to make an informed decision at this stage, all such material should have been shown to the court.

In its Ruling dismissing the Applicant's application for dismissal of suit for want of prosecution, the learned magistrate said -

***"Basically on 19.08.2008 this court dismissed the application dated 25.07.2005 filed by the Defendant/Applicant herein seeking to dismiss the suit for want of prosecution. The court in that application found that the delay in fixing the case for hearing was partly contributed by the court's diary that was full by the end of the year 2006. The court therefore found that the delay from January 2007 to 23.07.2007 where that application was filed was not inordinate to warrant dismissal of the suit."***

It is thus clear that the lower court did not find the Respondent responsible for the lack of taking steps to fix the case for hearing in order to give rise to its dismissal under either **rule 5** or **6** of **Order XVI** of the **Civil Procedure Rules**.

I am therefore unable to say that the trial court took into account any irrelevant matter or took into account a matter which it ought not to have taken into account. I have no cause for interfering with that finding.

I am satisfied that the Applicant will suffer neither loss or prejudice by having the Respondents' case heard and determined. I find no merit in this application and the same is dismissed with costs to the Respondent.

I direct that the Nakuru Chief Magistrate's Court Civil Case No. 1266 of 2001 be fixed for hearing on priority.

**Dated, delivered and signed at Nakuru this 14<sup>th</sup> day of May 2010**

**M. J. ANYARA EMUKULE**

**JUDGE**