



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

Civil Suit 2020 of 1995

CHESILYOT ENTERPRISES LTD.....PLAINTIFF/RESPONDENT

VERSUS

THE CO-OPERATIVE BANK (K) LTD.....DEFENDANT/APPLICANT

AND

KENYA NATIONAL TRADING CORPORATION LTD.....THIRD PARTY

R U L I N G

These are two applications, one filed by the Defendant and the other by the Third Party, seeking to stay this court's ruling of 22nd June, 2007. The Third Party's application is the one dated 19th November, 2007 and is expressed to be brought under **Order XLI Rule 4** and **Order L rule 1** of the **Civil Procedure Rules**. On the face of the application, the Applicant/Third Party has relied on five grounds in support of the application. The first ground is that it has lodged a Notice of Appeal in the Court of Appeal; secondly, that if the suit is heard, the appeal will be rendered nugatory; thirdly the intended appeal raises substantive and triable issues of law and of fact and stands a high chance of success; fourthly, the Applicant will be grossly prejudiced, inconvenienced and suffer substantial and irreparable loss unless the orders of stay sought herein are granted and finally that the Applicant is ready and willing to comply with such terms as the court may deem just to impose.

The Defendant's application is the one dated 10th March, 2008 and is expressed to be brought under **Order XLI rule 4** and **Order L rule 1** of the **Civil Procedure Rules**. The Defendant has grounded its application on seven grounds. These grounds are similar to those relied upon by the Third Party in their application except two of them. One that the Defendant is dissatisfied with the ruling made on 22nd June, 2007 re-instating the Plaintiff's suit which had been withdrawn way back in 1998 and secondly the application is timeous.

Both applications are supported by affidavits. Michael Mubea the Legal Officer of the Thirty Party has sworn an affidavit dated 19th November, 2007 setting out the facts of the case and the reason the court's ruling of 22nd June, 2007 is being challenged. I have considered the said affidavit together with all the annexures thereto.

Regina Kajuju Anyike, a Senior Legal Officer in the Defendant Bank has sworn an affidavit dated 10th March, 2008 also stating the facts of the case and the reason the Defendant relies upon, both of fact and of law, to make this application. I have considered the said affidavit together with all the annexures thereto.

The application is opposed.

The Plaintiff filed grounds of opposition against both motions dated 3rd June, 2008 in which six grounds are cited in the following terms:

1. The applications as taken out, drawn and filed are incurably defective bad in law and do not lie.
2. The applications have not satisfied the requirements of Order XLI Rule 4 of the Civil Procedure Rules or at all.
3. No sufficient cause has been shown to warrant a grant of the orders sought or at all.
4. The Ruling by Lady Justice Lesiit rightly reinstated this suit and the Respondent and the Third Party will, to the extent that they will have their day in Court to defend the suit, suffer no conceivable prejudice.
5. To this date, no records of appeal have been lodged at the Appellate Court and no sufficient explanation has been given or at all.
6. The intended appeals have no chances of success.

Mr. Maweu argued the application on behalf of the Third Party in which similar grounds as raised on the face of the application and in Mubea's affidavit are argued. Counsel urges the court to find that the Third Party has shown sufficient cause for stay of the proceedings. Counsel relies on the case of **Nairobi Deluxe Service Limited vs. Erick Ndege, C.A. No. NAI 64 of 1992** for the proposition that the appeal will be rendered nugatory if the stay was not granted. The cited case is distinguishable from the instant case because the application in the cited case was before the Court of Appeal and was for stay of executions of decree pending the appeal. In the instant case, the matter has not been heard and there is no danger of execution of decree in favour of the Plaintiff as yet.

The second case the Third Party relies on is **Unga Limited vs. Amos Kinuthia & Anor CA No. NAI 175 OF 1997** where the Court of Appeal allowed an application for stay of any further proceedings in the Superior Court, pending the hearing and determination of an appeal before it. The appeal before the Court of Appeal sought to direct the Plaintiff to supply further and better particulars requested by the Defendant in the suit but which the Superior Court had disallowed. The Defendant appealed to the Court of Appeal but in the meantime the case before the Superior Court was set for hearing. The Court of Appeal stayed the Superior Court's proceedings on the ground that if the Defendant's appeal succeeded and the appellate court ordered the supply of particulars sought, *ex post facto*, a most undesirable situation would be created. Clearly the cited case does not apply to the facts of this case.

Mr. Mwihi for the Defendant also relied on several authorities. Counsel relies on **Aruwa & Another vs. Amutari High Court Appeal No. 39 of 2006** in which Nambuye, J. granted stay of execution pending appeal to the High Court. The cited case does not apply to the facts of this case since in the cited case, the application before the High Court as an appellate court, was for stay of execution of decree.

Mr. Mwihi also relied on **Ahmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya, Misc. Application No. 751 of 2004** where the Defendant/Applicant was seeking leave to appeal against the decision of the High Court in which the Applicant's reference was dismissed unheard on ground that it had been filed way out of time. The High Court proceeded to order a stay of proceedings pending appeal on condition that the Applicant paid a specified sum to the Respondent which was sum admitted was payable to the Respondent/Applicant as costs.

It is my view that the cited case does not apply to the facts of the instant case since in the cited case,

execution was imminent, while in the instant case, no judgment has been entered. I do agree however that principles set out in the ruling are applicable but only to applications for stay of execution. These principles are set out in the case of **Global Tours & Travels Limited - Winding Up Cause No. 43 of 2000**, where **Ringera, J.** as he then was, expressed them thus:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion it should be exercised rationally and not capriciously or whimsically. The sole question is whether it is in the interest of justice to order a stay of proceedings and, if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting the order. And in considering those matters it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

I have considered the principles set out by Ringera, J. in the **Global Tours & Travels Limited Winding up Cause**, supra. The instant application is however, not for stay of execution and they do not apply.

Mr. Thangei argued the two applications on behalf of the Plaintiff. Mr. Thangei relied on a text from **Halsbury’s Law of England, 4th Edn. Vo. 37** page 330 and 332 where stay under inherent jurisdiction generally and abuse of process are discussed thus:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

Counsel for the Respondent’s has also relied on the case of **Prime Bank Limited vs. Esige High Court and Appeal No. 812 of 2004** where Visram, J. cites principles applicable to an application for stay pending appeal as set out by the Court of Appeal in the **Standard Limited & Others vs. Wilson Kalya & Another t/a Kalya & Co. Advocates Civil application No. Nairobi 369 of 2001** thus:

“The provisions of Rule 5(2) (b) of the Court of Appeal Rules which deals with matters similar to the ones raised in the Appellant’s application does not also provide for any particular way in which the power may be exercised but only says that they should act “on such terms as the court may think just”. Now, the Court of Appeal has developed some principles to guide the exercise of that power so that the same is not left to caprice and those guidelines are simple and direct as follows;

(a) The Appellant must show that his appeal is an arguable one. In other words, he must show that the appeal is not a frivolous one.

(b) The Appellant must also show, in addition, that if the order for stay of proceedings is not granted, his appeal, if it were to succeed, would be rendered nugatory.”

Those principles can only be applied by the Appellate Court hearing the application as the court will hear the appeal. The application before this court is not made to it in its appellate jurisdiction and for that reason I do not think that the principles set out therein apply.

I have considered the submissions by each Counsel in support of their client's position. I remind myself that in applications for stay of proceedings pending appeal, each case depends on its own facts. The Applicants in both applications must establish sufficient cause to satisfy the court that their application for stay is warranted.

Order XLI rule 4(1) of the **Civil Procedure Rules** stipulates as follows:

“(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 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 and to make such order thereon as may to 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”.

The issue before this court is whether sufficient cause is shown by the Applicants to justify the court staying any further proceedings in this matter pending the hearing and outcome of their appeals.

The facts of the present case are that the case has never proceeded to hearing. It is a matter which was filed in 1998. In my view I have to weigh the applications before me on the basis of whether the Applicants have shown that their appeals will be rendered nugatory if the proceedings before this court were to proceed. Was this case to be heard and judgment entered, if the appeal succeeded the Defendant and Third Party can be compensated by an award of costs for the unnecessary hearing before the Superior Court. The trial of the Superior Court would be determined in accordance therewith, however, the appeal would not have been rendered nugatory. If however, the case is heard and the Plaintiff's claim is dismissed, the Defendant and Third Party would have suffered no prejudice and would also be awarded costs on the dismissed suit.

Having considered this application, I am not satisfied that the Defendant and the Third Party have demonstrated to the satisfaction of the court that its appeal would be rendered nugatory if their applications were not allowed. To render an appeal nugatory means to render it useless and of no value. If the proceedings before this court proceeded, that would not render the intended appeals nugatory. I think that the circumstances of this case dictate that a stay of proceedings ought not to be granted given the stage at which the suit has reached. Considering the special circumstances of the case, that it is an old matter filed 10 years ago, that it is yet to be heard, I am satisfied that nothing will be lost to either parties to the suit if the matter proceeds to hearing. On the other hand, given the age of the case, and the fact that the case has not been heard, all parties in this suit stand to suffer prejudice if the proceedings are halted at this stage. Delay of hearing and determining a suit causes prejudice to all parties in terms of loss or lapse of memory of the witnesses and or loss of documents and such like important factors. That prejudice will be made the worse if the appeal before the court of appeal is delayed for some time.

I am persuaded that the proceedings in this case ought not to be stayed since the appeal will not be rendered nugatory in the circumstances and facts of this case. I am fortified in this finding by the Court of Appeal decision in **Kenya Commercial Bank Limited vs. Benjoh Amalgamated Limited & Another C. A. Misc. Appl. No. Nai 50 of 2001** where at page 3 of it's ruling in a similar application for stay of proceedings, the court held:

“We remind ourselves that each case depends on its own facts and we find it difficult to be persuaded that the appeal on the facts of the present case would be rendered nugatory if stay is not granted. The appeal may be heard, if successful, the proceedings in the superior court would be determined in accordance therewith. The hearing in the superior court might have been unnecessary for which appropriate costs can be ordered but the appeal will not have been worthless.”

Having carefully considered the two applications by the Defendant and Third Party in this suit, and having come to the conclusions I have of both applications, I find that both applications are not merited

and should not succeed.

I accordingly dismiss both of these applications with costs to the Respondent/Plaintiff.

Dated at Nairobi, this 23rd day of June, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Thangei for the Plaintiff

Gacheche holding brief Moshe for Applicant/Defendant

Mr. Njuguna holding brief for Mr. Maweu for the Third Party

LESIIT, J.

JUDGE