IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 199 of 2005

MUTURI INVESTMENTS LTD……..……..……..PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA…….....……DEFENDANT

R U L I N G

The application is a notice of motion dated 22nd November, 2006 in which the Plaintiff seeks a stay of proceedings in the instant suit pending the hearing and determination of an intended appeal against the ruling of Hon. Kasango, J. dated 6th November, 2006. The said ruling is on record. In it my learned sister granted the Defendant's application to consolidate the instant case with HCCC No. 624 of 2005.

The grounds of the application are, inter alia, that the Applicant had filed a notice of appeal being dissatisfied with the said ruling, that if proceedings are not stayed the appeal will be rendered nugatory, that the Applicant shall suffer substantial prejudice if the two suits were consolidated and that the Applicant had a good appeal with a probability of success. The application is also supported by an affidavit sworn by one HARUN MUTURI which I have considered at length together with the annexures.

The application was vehemently opposed by the Respondent. The manager in charge of loan recoveries in the Defendant bank, ZIPPORAH KINANGA MOGAKA swore the replying affidavit in answer to the application.

I have considered the averments in the said application.

It was argued by Mr. Kangethe for the Applicant that under Order XLI, rule 4 of the Civil Procedure Rules this court's discretion to order a stay of proceedings is unlimited and that such discretion should be exercised judicially.

Mr. Kangethe submitted that the Applicant was exercising his right to appeal against the ruing of Hon. Kasango, J. provided under Order XLII, rule 1(1) (j) of the Civil Procedure Rules. Counsel urged the court to give effect to that right by allowing the application in order not to render the appeal nugatory. He relied on **INDAR SINGH GILL LTD** –vs- **NJOROGE GICHARA NAIROBI HCCC 2411/90 (UR)**

The authority is persuasive and at page 3 the learned **Pall Judge,** observed:-

"In a discretionary matter like this the court should take into account all the surrounding circumstances including merits of the intended appeal. But I think the position of a Judge of the High Court whose order or decree is being appealed against on an application for stay of execution under Order 41, rule 4 is different from the Court of Appeal dealing with a similar application under Rule 5(2) (b) of the Court

of Appeal Rules. So far as the High Court is concerned an unsuccessful party has an undoubted right to appeal and Order 41, rule 4 assumes that the decree holder must always recognize that its decree or order may be reversed. In ERINFORD PROPERTIES –vs- CHESHIRE COUNTY COUNCIL (1974) EE.R. 448 MEGARRY J said at page 454:-

"A judge who feels no doubt in dismissing a claim to an interlocutory injunction may perfectly consistently with his decision might be reversed and that the comparative effects of granting or refusing an injunction are such that it would be right to preserve the status quo pending the appeal."

In the cited case, **Pall, J**. proceeded to grant a stay of execution pending appeal after considering the probable merits of the appeal and applying the principle of balance of convenience.

Mr. Rachuonyo for the Respondent submitted that the instant application ought to have been made before the court with the jurisdiction to determine whether the ruling in question ordering consolidation of the two suits was wrong. By that I understand Mr. Rachuonyo to mean that the instant application ought to have been made before the Court of Appeal.

Order XLI, rule 4(1) provides:-

"(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."

It is quite clear from this rule that this curt has jurisdiction to entertain the application and to grant it if it finds it fit to do so.

The Court of Appeal also has power to entertain a similar application. Mr. Rachuonyo's submissions on that point is therefore without merit.

Mr. Kangethe submitted that the position of his client was that the parties were different and that consolidating the two suits disadvantaged the Plaintiffs in both since it will loose the advantage of arguing as a guarantor in HCCC No. 199/05 and a principle borrower in HCCC No. 624/05, therefore giving the Defendant an upper hand. That it meant the Applicant and deponent to supporting affidavit was a potential witness in both cases as Director in both cases and that it would make it difficult to advance the case of both principle borrower and guarantor in the witness stand. Mr. Kangethe urged me to find judicial time will be saved if stay is granted. Mr. Rachuonyo in opposing the application urged the court to consider the averments in Mrs. Mogalla's affidavit in which the historical background of the two cases are given.

I have perused the said affidavit as I said earlier. The Defendant is saying that the potential embarrassment to the Applicant is not a valid ground for subjecting the Defendant to a legal disadvantage by staying these proceedings. I agree that the possibility that the Applicant, who is a Director of the Plaintiff's Companies in both cases, may suffer embarrassment is not a good ground upon which to grant this application.

In my view, it is for the reason advanced why the Plaintiff may be embarrassed that precisely should dictate against granting the stay of proceedings sought. There is a mischief intended and which comes out quite clearly from counsel's submissions that the same potential witness wishes to advance two different versions in each of the cases he has filed in different capacities. The court that will try the case will consider the two sides of the case for the Plaintiff in both cases and definitely will come up with a considered view of the matter. It is not a good ground to argue that the different sides of each Plaintiff

are uncapable of being advanced and considered in one sitting.

In any event, the Plaintiff will have a right to appeal against the outcome of the case if it feels at the end of the day that it suffered prejudice as a result of the two cases being heard in one file.

I have also considered the application on a balance of convenience. I do not agree with the Applicant that it will save judicial time to stay the case in order to await the Court of Appeal ruling on it. I have considered that what the Applicant stands to loose he can recover on appeal to the Court of Appeal.

There is no threat at this stage that the property that secured the loan the subject matter of both suits will be sold. It is infact to the interest of both parties in both suits that no stay should be granted to stall the hearing of the suits. The suits should be heard with expedition to avoid a situation where the principle sum remains unpaid and interest continues to accrue on the loan. That is not to the Applicant's interest at all.

There is another issue which is uncontroverted. The fact that the principle debtor in the instant suits had filed a suit HCCC No. 1838/01 and obtained an injunction before eventually it withdrawing that suit. It then filed HCCC No. 624/05 soon after the guarantor had obtained an injunction against the Respondent in HCCC No. 199/05 on the understanding the latter case would be expedited. Mr. Rachuonyo submitted that in the circumstances the very reason why the Respondent agreed to an injunction in the first place will be defeated if the proceedings were stayed.

I did consider the fact that the Respondents have since 1999 tried to recover the debt in issue in both cases and continues to wait due to injunctive orders granted in the pending suit the more reason why the stay sought ought not to be granted. The Applicants have an injunctive order in place. The debt outstanding is KShs.163 million. The appeal will take three to four years to be heard and finalized. It would not serve the interest of justice to grant a stay of proceedings on top of an injunctive order in favour of the same party. I think it would be a wrong exercise of judicial discretion to allow a party to enjoy an injunction against the sale of a security charged for a loan that is outstanding and not being serviced, to also grant a stay of the same proceedings in which the injunctive orders have been granted. I decline to make such an order.

Even if I were to consider a condition impose as a prerequisite to granting a stay of proceedings, I fail to see which kind of condition I could impose in the circumstances of this case, that would ensure justice for both parties.

In my view, I do consider that justice will be best served if the Applicant is allowed to enjoy the injunction granted in the case, pending the hearing and disposal of the suits and the consolidated cases are allowed to proceed to hearing.

Having so found I will disallow the prayer sought in this application and dismiss the same with costs to the Respondent.

Dated at Nairobi this 8th day of June, 2007.

LESIIT, J.

JUDGE

Read, signed and delivered in presence of :-

Kangethe for Applicant.

Mrs. Njeru holding brief for Mr. Rachuonyo for Respondent.

Mr. Kangethe:

I apply for leave to appeal.

Court:

Leave sought is granted.

LESIIT, J.

JUDGE