



REPUBLIC OF KENYA

HIGH COURT OF AT NAIROBI (MILIMANI LAW COURTS)

Misc Appli 750 of 2004

IN THE MATTER OF THE ADVOCATES ACT CAP 16 LAWS OF KENYA

AND

IN THE MATTER OF TAXATION OF COSTS

BETWEEN

AHMEDNASSIR, ABDIKADIR & CO. ADVOCATESAPPLICANT

AND

NATIONAL BANK OF KENYA LTD.....RESPONDENT

ARISING FROM

HIGH COURT CIVIL SUIT NO.857 OF 2001 AT NAIROBI

CHEMAGRO LIMITED

HENRY OGOLA

MERAB APUNDI OGOLA.....PLAINTIFFS

VERSUS

NATIONAL BANK OF KENYA.....DEFENDANT

RULING

This is an application for two main orders that the court be pleased to grant leave to National Bank of Kenya Limited (herein after called “**the client**”) to appeal against the decision of Hon. Fred A. Ochieng made on 22.02.2007 and that further proceedings including the hearing of the Advocate/Respondent’s application dated 9.06.2005 be stayed pending the hearing and determination of the intended Appeal.

The substance of the application is that the client is aggrieved and wishes to appeal against the said decision and unless further proceedings are stayed the suit may proceed with the consequence that the client/applicant will suffer substantial loss and the intended appeal will be rendered nugatory. It is contended that the order sought to be appealed against has destroyed the substratum of the client’s defence to the advocate/respondent’s application dated 9.6.2005. Counsel for the client placed reliance upon the decision of Ochieng J in **Ahmednasir, Abdikadir & Company Advocates – vs – National Bank of Kenya Limited: HC.MISC. Application No.751 of 2004 (UR)** where in similar circumstances the Learned Judge granted a conditional stay of proceedings. On what to be considered in an application such as this counsel cited the case of **Re Global Tours and Travels Limited: HC Winding Up Cause No.43 of 2000 (UR)** where Ringera J as he then was held as follows:-

“..... 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 interest 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 interests of justice to order a stay of proceedings and if it is on what terms to be granted.”

Counsel for the advocate on his part submitted that the client was not entitled to both orders i.e. leave to appeal and stay of proceedings. On the former counsel submitted that the client is guilty of unreasonable delay and for that proposition, reliance was placed on the decision of Kuloba J in **Machira t/a Machira & Company Advocates –vs – East African Standard (No.2) [2002] 2 KLR 63** where an application for stay of proceedings was dismissed on the ground inter alia that it was lodged 4 months after the order intended to be appealed against.

On the conditions for granting a stay of proceedings pending appeal, counsel argued that Order 41 Rule 4 of the Civil Procedure Rules applies and the applicant must demonstrate that it will suffer substantial loss unless the stay is ordered. Machira’s case (supra) was again cited for that proposition. Counsel further submitted that in matters of costs, stay should not be granted. For that proposition he relied on the case of **Housing Finance Company of Kenya – vs Embakasi Youth Development Project: [HCCC No.1068 of 2001] (UR)**. In that case Ransley J held that where counsel for a party gives an undertaking to refund costs, stay of execution to recover the costs will not be granted. Also cited for the same proposition is the case of **Kenya Pipeline Company Limited – vs – Nyamogo & Nyamogo Advocates [HCCC No.1142 of 2005 [2005]**. In that case, Ojwang J followed the Court of Appeal decision in **Francis Kabaa – vs – Nancy Wambui and Jane Wanjiru Civil Application No.Nai 298 of 1995** in which the Learned Judges of Appeal doubted that stay can be granted in respect of costs. Reliance was also placed upon the decision in **Morgan – vs – Elford Vol. IV Ch. d. 1877 352** where it was held that

“A party to whom costs have been ordered to be paid will not be restrained from enforcing the order pending an appeal to the House of Lords if his solicitors undertake to refund if the order should be reversed.”

The predecessor of the Court of Appeal took the same position in **G. R. Mandavia – vs – The commissioner of Income Tax [1957] EAI**. The court observed at page 2 as follows:-

“It is contrary to the usual practice, on an application of this nature, to stay any direction for the payment of costs, provided that the solicitor who is to receive the costs gives an undertaking to refund them if called upon to do so.”

On the above authorities counsel submitted that the order sought could not be granted. He therefore urged me to dismiss the client’s application.

I have considered the application, the affidavit in support thereof, the grounds of opposition, the submissions of the counsels appearing and the authorities cited to me. Having done so, I take the following view of this matter. The discretion to grant a stay of proceedings pending appeal is unfettered. However, as with all judicial discretions it should not be exercised arbitrarily or idiosyncratically. There are however no restrictions to the discretion. In the event, I agree with the observations made by Ringera J as he then was in **Re Global Tours & Travels Limited:- W/U Cause No.43 of 2000 (UR)** that the sole question is whether it is in the interest of justice to order stay of proceedings and if it is on what terms it should be granted.

Kuloba J in **Machira t/a Machira & Company Advocates – vs – East African Standard (No.2) [2002] 2 KLR** seemed to make no distinction between an application for stay of proceedings pending appeal and one of stay of execution pending appeal. The Learned Judge was emphatic that in both applications the conditions set in Order XLI Rule 4 (1) and (2) of the Civil Procedure Rules must be satisfied before allowing the applications. A plain reading of the said Rule however reveals that the said conditions apply only to applications for stay of execution. In my view those conditions provide a useful guide on the factors to be considered in the exercise of the discretion to grant or not to grant an application for stay of proceedings pending appeal. To that extent, the considerations made by Kuloba J in the Machira case (Supra) are useful and to keep them in mind while considering an application such as the present one is not an improper exercise of judicial discretion. Accordingly, the delay involved in lodging the application is a relevant factor. The likelihood of the applicant suffering substantial loss is also a relevant factor and so is a consideration of the effect of the order on the respondent. The need for expeditions disposal of cases is another factor to be considered and so also is the consideration as to whether the appeal if one has been filed or the intended appeal if one is yet to be filed if successful will be rendered nugatory should the stay be refused. The necessity for security is also a relevant factor to be considered.

In the matter at hand, one of the proceedings sought to be stayed is the advocate's application lodged on 28.6.2005 for judgment for taxed costs which costs were taxed on 17.5.2005. A reference challenging the taxation was lodged on 12.9.2005 and Hon. Ochieng J dismissed the same on 22.2.2007. The present application was then lodged on 8.5.2007, 2 ½ months later which may not be considered prolonged but the client has not explained why it did not move the court earlier. It should also be noted that the matter involves costs taxed 2 years ago.

The client has not alleged that if this application is not allowed it stands to suffer substantial loss. It merely contends in the supporting affidavit that in the likely event of the intended appeal succeeding, it would be impossible to undo the damage that is likely to occur if the advocates application were allowed to proceed to hearing. The character of the anticipated damage is not disclosed. No attempt is made to demonstrate that unless stay is ordered the client is likely to suffer substantial injury of any kind.

It seems to me that the client's principal argument is that the proposed appeal if successful will be rendered nugatory should stay be refused. But is this really the position? The consequence of declining stay is that the advocate will proceed to have judgment for the taxed costs and may execute to recover the same. What the advocate will obtain will be a money decree. There is no suggestion that the advocate would not be able to repay the taxed costs in the event that the intended appeal succeeds. Clearly therefore the intended appeal cannot be rendered nugatory if stay is refused. The only result will be that the advocate will proceed to prosecute his application for judgment and may execute to recover the same. In a matter of days this matter will come to an end at least as far as the High Court proceedings are concerned. In the event that the intended appeal succeeds, the only issue will be refund of the costs if the same will have been paid and with counsel's undertaking the process of recovery would not in my assessment take a long time. That in my view would be optimum utilization of judicial time.

On the other hand if stay is granted as prayed, this matter will remain in abeyance as a statistic to await the conclusion of the appeal process which process may not be completed for the next 3 years taking into account the fact that the time within which the appeal should have been filed has already expired and an application to enlarge time within which the Memorandum and Records of Appeal should be filed is a prerequisite. There is also the likelihood of another appeal being mounted even after conclusion of the

above process against judgment for the taxed costs and the process will start all over again. That in my view would not be an optimum utilization of judicial time. It should also not be ignored that the advocate has two decisions in his favour: The Taxing Master's order on taxation and the judge's refusal to interfere with the taxation.

With regard to security, none was offered. On his part the advocate was prepared to undertake and did orally undertake to repay the costs in the event that the client succeeds in the intended appeal.

I have not found it necessary to refer to all the cases cited to me by counsel as in my view the ones I have not referred to are clearly distinguishable from the matter at hand. Let me however, briefly comment on the decision of Ochieng J in **HC Misc. Application No.751 of 2004 (Supra)** involving the same parties herein. The Learned Judge in that case found that the reference had been rejected on a technicality. The Learned Judge also seems to have implied that the court instead of taxing the advocates costs in the sum of KShs.2,964,560 should have enforced the agreement between the parties which provided for a fee of KShs.200,000.00. Indeed the Learned Judge ordered that the letter sum be paid to the advocate as a condition for the stay of proceedings. He also found that weighing the pros and cons of granting the order of stay of proceedings the interest of justice would be served by an order of stay. The Learned Judge was exercising his undoubted and unfettered discretion. He was perfectly entitled to do so as each case must stand on its own peculiar facts as can be demonstrated by the Learned Judge's refusal to interfere with the reference in this matter. So Ochieng J in the above case found circumstances that justified an order of stay of proceedings. I have not found any in the matter at hand.

The application for stay of proceedings is therefore declined. The advocate should however file his undertaking under oath to repay sums that may be paid to him should the order on costs be reversed. The undertaking should be filed within the next 7 days from the date hereof failing which no execution should be levied.

With regard to the clients application for leave to appeal, the advocate did not demonstrate that he will suffer any prejudice if the leave sought is granted. In my view I cannot describe the clients intended appeal as frivolous. Prima facie it seems to me arguable. Our jurisprudence in this area cries for development and the client's intended appeal provides such chance. I will accordingly grant the client the Leave sought despite the unexplained delay in approaching the court.

Costs of the application shall be borne by the client/applicant.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JULY 2007.

F. AZANGALALA

JUDGE

Read in the presence of:

Ojiambo for the Client/Applicant and Omino holding brief for Ahmednasir for the advocates.

F. AZANGALALA

JUDGE

9/7/07