



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 119 of 2005**

**K-REP BANK LTD..... PLAINTIFF**

**VERSUS**

**FRANCIS NGIGE NYOIKE & 2 OTHERS.....DEFENDANTS**

**RULING**

This is an application expressed to have been brought under Sections 3 and 3A of the Civil Procedure Act, Order XLI Rule 4 of the Civil Procedure Rules and all other enabling provisions of the Law. It is seeking a stay of proceedings in this suit pending the hearing and determination of an intended appeal.

The grounds upon which the application is made are that the applicants being aggrieved by my ruling of 5.12.2005 intend to appeal against the said ruling and if this suit herein is concluded before the appeal is heard the same will be to the detriment of the applicants and finally that the applicants have a strong appeal. There is an affidavit in support of the application sworn by the first applicant. Annexed to the affidavit are two exhibits; a Notice of Appeal and a letter to the court seeking copies of proceedings and the said ruling.

The Respondent objects to this application on the ground that the applicants have not fulfilled the conditions upon which a stay of proceedings can be granted.

The applicants contend that unless the stay sought is granted they stand to suffer irreparably as their appeal has “*total*” merit and further that the respondent will not be prejudiced in any way if stay is granted unlike the applicants whose appeal will be rendered useless and irrelevant if stay is not granted.

I have considered the application, the supporting affidavit and its annexures, the Grounds of Opposition and the able submissions of both Learned counsels. Having done so, I take the following view of the matter. For the applicants to succeed, they had to satisfy the conditions set in Order 41 Rule 4 of the Civil Procedure Rules. Under sub-Rule (1) of that rule the applicants had to show sufficient cause to warrant a stay of proceedings in this suit. The applicants in the supporting affidavit depose that unless a stay of proceedings is granted they stand to suffer irreparably. They have not demonstrated in what way they will suffer. If the plaintiff/respondent proceeds to successfully establish its case orders

will issue declaring that there is no arbitration agreement between the first and second defendants/applicants and the plaintiff/respondent; An order of permanent injunction will also issue restraining the first and second defendants/applicants from taking further steps in the reference of the dispute to arbitration and a permanent injunction order will issue restraining the third defendant/applicant from entering into and proceeding with arbitration of the dispute between the 1<sup>st</sup> and 2<sup>nd</sup>

defendant/applicants and the plaintiff/respondent. If subsequently the applicants are heard in the appeal and are successful, the orders in favour of the respondent will be reversed and arbitration may proceed. It cannot therefore be said that if the suit herein proceeds to hearing the intended appeal would be rendered nugatory, useless or irrelevant. As the Court of Appeal observed in **Silverstein –vs- Chesoni** [2002]1 EA 296, **“In deciding whether or not an appeal would be rendered nugatory, each case had to be decided on its own facts.”** The same observation had been made in the unreported case of **Kenya Commercial Bank Limited –vs- Benjoh Amalgamated Ltd and another CA No. NAI 50 of 2001 (29/2001)UR**. At page 2 of their Ruling their Lordships delivered themselves as follows:-

**“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 and, 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.”**

I find the applicants in the application at hand in the same position as the applicants in the above two Court of Appeal decisions. On the facts in the present application, I am unpersuaded that the intended appeal would be rendered nugatory if stay is not granted.

Under Order 41 Rule 4(2) a stay of execution cannot be granted unless

**(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay and**

**(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.**

It appears that Rule 4(2) of Order XLI of the Civil Procedure Rules applies where a stay of execution is sought as **“proceedings”** are not mentioned. In my view however, a party who is seeking a stay of proceedings in demonstrating sufficient cause may in appropriate cases show that the conditions set therein have been fulfilled.

The applicants in the matter at hand lodged the present application on 7.3.2006 slightly over three (3) months since I delivered the ruling intended to be appended against. In the circumstances of this case I consider the delay unreasonable. It should not have taken the applicants three (3) months to decide to move the court for stay of proceedings.

As I have already observed above, the applicants have not demonstrated that substantial loss may result to them unless stay is granted. I cannot accept a mere say so. The applicants had to demonstrate by affidavit evidence the nature of the loss and if quantifiable that the same would be beyond the means of the respondent. They have not done so.

In the premises, I have not found sufficient cause to order stay of proceedings in this suit. The applicants’/defendants’ application dated 6.3.2006 and filed on 7.3.2006 is dismissed with costs to the Respondent.

Order accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF APRIL, 2006.**

**F. AZANGALALA**

**JUDGE**

**27.4.2006**

Ruling read in the presence of: Mr. Ougo for the plaintiff/respondent