REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 399 of 2005

DEPOSIT PROTECTION FUND…….....……..PLAINTIFF
VERSUS
ROSALINE NJERI MACHARIA…….....……..DEFENDANT
R U L I N G

This is an application pursuant to the provisions of Order 41 rule 4 and Order 50 rule 1 of the Civil Procedure Rules, as read together with Section 3A of the Civil Procedure Act. Through this application, the plaintiff seeks a stay of execution pending the hearing and determination of its intended appeal. The plaintiff also seeks the stay of further proceedings, and in particular of the taxation of the defendant's Bill of Costs.
It was contended by the applicant that the decision by me, when striking out the Plaint, was erroneous. Therefore, the applicant has already filed a Notice of Appeal challenging the said decision.
All the parties are in agreement that this application has been brought without any delay.
The applicant then pointed out that it was a public body which was vested with powers to protect depositors' money. The money involved in this particular case is most definitely substantial, being Kshs. 804,199,888/40. Therefore, the applicant says that the costs of the claim would also be relatively substantial.

In that regard, the 2nd defendant had already indicated that its costs would be in the region of KShs. 12 million. It was thus reasonable to presume that the 1st defendant was also likely to seek costs of a similar sum.

If that were to happen, the total costs would be in the sum of Kshs. 24 million, which sum the applicant finds to be very large, when the nature of the applicant's work is taken into consideration.

As the applicant will be challenging, inter alia, the award of costs, if its appeal were to succeed, whilst the defendants had already taxed their Bills of Costs and carried out execution, the appeal would have been rendered nugatory, submitted the applicant.
In the event the court allowed the application, the applicant expresses its readiness to abide with any orders for the provision of such security as the court may deem fit, to satisfy the decree. But, at the same time, the applicant contends that the superior court has a wide discretion to determine whether or not security should be given.

Furthermore, the applicant contended that even where the court did order that security be provided, it need not be in the form of cash. In **HALAI & ANOTHER V THORNTON &**

TURPIN (1963) LTD [1990] KLR 365, the Court of Appeal did direct the successful applicant for stay of execution, to deposit a total of 3,600,000/= in the form of a banker's bond.

I was also told that although the 1st respondent was a business lady, and the 2nd respondent was a bank, that by itself should not sway the court against granting the applicant, the order for stay. The applicant relied on the case of **OCEANIC VIEW HOTEL LTD V. KENYA COMMERCIAL BANK [2002]2 KLR 338** to back that argument.

In that case the Hon. Khaminwa, Commissioner of Assize (as she then was) expressed herself as follows, at page 340:-

"I have taken into consideration as special circumstances that the amount of money in dispute is substantial and also that the applicant company could easily find all its assets sold and its establishment closed down."

Therefore, although the respondent in that case was a bank, and had submitted that it had the ability to compensate the applicant even if the appeal was ultimately successful, the court nonetheless granted an order for stay of execution, with a view to attaining the preservation of
the subject matter of the suit.

Finally, the applicant even invited me to consider the fact that in the case of NEW STANLEY HOTEL LIMITED V ARCADE TOBACCONISTS LIMITED [1986] KLR 757, the Hon. Porter J. granted an order for the stay of execution, but did not order that any security be provided.

In my reading of the decision in that case, I do not think that the learned judge did give the order of stay unconditionally. In other words, he never expressed the view that the successful applicant did not need to put down security for the due performance of the decree, as envisaged by Order 41 rule 4 (2) of the Civil Procedure Rules. He only found it difficult to ascertain the quantum of the mesne profits, as the calculation thereof was difficult, because in his view there was

"no direct authority and requiring an assessment by the court of the manner in which equity was to operate. Accordingly, my view is that the best thing to do in this case is to grant the application for stay of execution of proceedings pending appeal, and to allow the plaintiff if he wants and if he can proceed to assess the value of the mesne profits, always assuming that the court will hear such a valuation when an appeal is pending. On assessment, if that is done, on the value of mesne profits, in the particular circumstances of this case, *the court requires a personal bond from the defendant applicant that the will pay the sums due on determination of the appeal.***"**

- emphasis mine

Clearly, the court did order the successful applicant to provide security for the sums which might become due on determination of the appeal.
In response to this application both defendants submitted that it lacked merit.

First, the 2nd defendant contended that the applicant had failed to make out any case for stay of proceedings. It was submitted that the applicant should have demonstrated that there was sufficient cause, to warrant a stay of execution.

Drawing the court's attention to its Annual Report and Accounts for the year 2004, the 2nd defendant emphasized that it is so well established and sound, as a bank, that it would be able to refund any amount of costs which might become due to the applicant, in the event that the

applicant's intended appeal was successful.

Furthermore, it is the 2nd defendant's case that by virtue of the suit, through which the plaintiff was seeking the recovery of substantial sums of money, the plaintiff must be deemed to acknowledge the fact that the said defendant was substantial.

Pausing there for a moment, I must say that simply because a plaintiff had sued a defendant for a substantial amount of money, would not, by itself, imply that the plaintiff was acknowledging the defendant as being a person of substantial means. There are times when the plaintiff might sue as a matter of principle, without necessarily being able to thereafter translate the judgement into a tangible asset. Also, there are many a time when the plaintiff knows or hopes that the defendant is backed-up by an insurer. Therefore, I do not think that it is necessarily the case that whenever the plaintiff's claim is substantial, he is to be deemed to acknowledge the defendant as being a person of substance.

Going back to the 2nd defendant's arguments, I note them as saying that if the court did not grant an order for stay of the proceedings, the applicant would not suffer substantial loss, on account of the taxation of the defendants' Bills of Costs.

When faced with those submissions, the applicant did not tell the court how the taxation of the defendants' Bill of Costs would cause them substantial loss.

To my mind, the taxation of a Bill of Costs cannot occasion any loss to the person against whom it is taxed. Therefore, the issue of taxation causing substantial loss does not even arise. The only effect of taxing a Bill of Costs is the ascertainment of the quantum of costs payable by one person to another. Thereafter, the party whose costs had been ascertained could take out execution proceedings.

The applicant did not, in my considered view, make out a case for stay of proceedings, and in particular a stay of the taxation of the defendants' Bills of Costs.

Furthermore, if the learned taxing officer were to proceed to tax the defendants' Bills of Costs, the sums would be ascertained, and that would be the foundation upon which this court
could base the size of the security which the applicant would need to raise, if the court did order that there be a stay of execution.

As at the present moment, the only figures which the court has, in relation to the probable quantum of costs, is the figure cited in 2nd defendant's grounds of opposition. The said figure,
of Kshs. 12,102,998/= was said to be only in relation to

"the basic instruction fee on the amount claimed in the Plaint."

Assuming, for a moment, that the said instruction fee has been accurately calculated by the 2nd
defendant, if the quantum of the security to be deposited is based on it, the security sum would not be adequate to meet such order as may ultimately be binding on the applicant. I say so because the instruction fee is only but one of the many items usually forming part of any Bill of Costs.

On the other hand, if the calculations by the 2nd defendant were inaccurate in any manner, the
court would have based the quantum of the security on a wrong premise.
So, the only way to have a proper basis for establishing the quantum of the security to be deposited, (if the court granted an order for stay of execution), would be by having the Bills

of
Costs taxed. Therefore, I hold the view that the plaintiff's wish to have the proceedings stayed would, if allowed to come true, stand in the way of an exercise that would otherwise be
useful to the parties as well as to the court.

I find that the plaintiff has failed to satisfy the court that if the taxation were allowed to proceed, it would cause the plaintiff substantial loss. Therefore, I decline to stay the proceedings herein.

On the part of the 1st defendant, it was pointed out that there was an inconsistency between the contents of paragraph 3 of the supporting affidavit, and ground number (iii), of the

application. At paragraph 3 of the affidavit of Mr. Mohamud A. Mohamud, it is expressly stated that the plaintiff was dissatisfied with the whole of the ruling which was delivered by this court on 16th January 2006.

On the other hand, at ground (iii) of the application, it is said that the plaintiff intends to appeal against a portion of the ruling in question.

The court did note the difference between the statements in the affidavit, and those in the grounds upon which the application was founded. However, I am not entirely sure that I did appreciate the point which was being advanced by the 1st defendant, in that regard.

Even assuming that there was some inconsistency, in my view, that alone would not be reason
enough to warrant the rejection of the application before me.

But, in any event, the draft Memorandum of Appeal was attached to the affidavit in support of
the application; and it expressly indicated that the plaintiff intended to appeal against a portion of the decision made on 16th January 2006. I therefore believe that it is the applicant's
intention to only appeal against a portion of the ruling.

Another issue that was taken up by the 1st defendant was in relation to the contents of paragraph 14 of the supporting affidavit, which reads as follows:-

"14. THAT I swear this affidavit in support of the applicants application for stay of execution or the intended sale pending the hearing and determination of the appeal."

The first defendant pointed out, correctly, if I may say so, that the reference to some "intended sale" is completely inexplicable. The applicant conceded as much, and explained the said phrase as having emanated from a typographical error due to the speed with which the application was put together. I am not entirely sure that it would be accurate to describe the said error as typographical, but an error it is.

However, it is clear to my mind that the said error will not be the basis upon which the court determines whether or not to allow the plaintiff's application.

The other issue which was raised by the 1st defendant was to the effect that if the proceedings
were stayed and execution too, the said defendant would suffer irreparable loss. She had already set in motion steps to extract the order in issue, with a view to applying to the court for review. In the circumstances, if the proceedings were stayed, the 1st defendant would be prejudiced.

The plaintiff replied to that contention by submitting that the intended appeal would not be a bar to the 1st defendant's desire for review. The reason for so saying was that the plaintiff only sought to stay the taxation of the defendants' Bills of Costs.

I must say that if that had been the applicant's intention, they did not capture the spirit thereof
in the application. A perusal of the orders sought reveals that the applicant wished to have:-

"a stay of any further proceedings in this suit and more particularly the taxation of the defendant's bill of costs pending the hearing and determination of the intended appeal….."

That prayer is so wide as to cover the 1st defendant's wish to seek the review of the ruling in issue. Therefore, the 1st defendant is correct to complain that if an order for the stay of proceedings was granted, it would be deprived of its right to seek the review of the ruling dated 16th January 2006.

Meanwhile, I have already held that the plaintiff had failed to make out a case for the stay of proceedings. I now decline to grant even an order for the stay of taxation only, as the said exercise of taxation would not in any manner whatsoever occasion substantial loss to the applicant.

As regards the question of stay of execution, I have taken into account the fact that the plaintiff described itself as being a public body vested with powers to protect depositors' money. But, I believe that that fact alone would not be reason enough to earn the applicant a reprieve insofar as the issue of depositing a security was concerned, if a stay was granted. Indeed, I noted the applicant as saying that it would be ready to deposit the requisite security. Therefore, when the applicant later cited a legal authority which suggested that the superior court had a discretion on the question as to whether or not a security should be deposited, I was somewhat confused. I asked myself if the plaintiff was asking the court to grant unconditional stay, even though it was ready to deposit some security. In my considered view, the plaintiff was sending out mixed signals. Such mixed signals were wholly unnecessary,
as the legal position has been clearly spelt out in **HALAI & ANOTHER V. THORNTON & TURPIN (1963) LTD [1990] KLR 365,** which authority was cited by the applicant itself. At page 367 of that decision, the Court of Appeal held as follows:-

**" The application before the superior court was made under Order XLI rule 4. In subrule
(1) the order provides that the court appealed from may for sufficient cause (emphasis is ours) order stay of execution of a decree or order made or passed by it. Before the superior court can exercise its discretion in favour of an applicant for a stay of execution, the applicant must first establish a sufficient cause. Subrule (2) of the same rule reads:-**

"(2) No order for stay of execution shall be made under sub-rule (1) unless:

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and 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.
Thus, the Superior Court's discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay: and thirdly the applicant**

must furnish security."

There can be no doubt whatsoever, that if a stay of execution is granted by the superior court, the applicant must furnish security. Also, the extent of that security is specified, as being for the due performance of such decree or order as may ultimately be binding on the applicant.

I have already discussed herein the issue of the quantum of the costs which the applicant may ultimately have to pay. In the absence of the best guide to the said costs, which is the certificate of taxation, the best I can do is to assume that the estimates of the 2nd defendant were accurate. I make that assumption because the applicant and the 1st defendant did not raise any issues with the figure given by the 2nd defendant, which is Kshs. 12,102,998/=.

I accept the applicant's submission, that being a body corporate which is charged with the responsibility of protecting depositors funds, if it were compelled to pay out the sum of KShs.
24 million, that would occasion serious prejudice to it. Therefore, I shall endeavour to ensure that whilst the plaintiff exercises its inalienable right of appeal, it is safeguarded from the possibility of being crippled altogether. For that reason, I do hereby grant an order for stay of execution pending the hearing and determination of the plaintiff's intended appeal. However, the said order shall only take effect as and when the plaintiff will have deposited, in court, a banker's bond or cash in the sum of Kshs. 24 million.

Before concluding this ruling, I only wish to make one further comment. The applicant's counsel did submit, when replying to the defendants' submissions, that when it comes to the filing of an appeal, any party affected has a right to appeal. That statement was made in response to the 2nd defendant's observation that this application as well as the draft Memorandum of Appeal was filed in the name of **"The Deposit Protection Fund Board,"** whereas the plaintiff has always used the name **"The Deposit Protection Fund."**

To my mind, that statement by the plaintiff is very telling indeed. It caused me to ask myself if it meant that "The Deposit Protection Fund Board" was merely a party who was interested in the intended appeal. I also asked myself if that implied that the intended appellant was or was not the plaintiff herein. However, I need not answer my said questions for the purposes of determining this application.

Finally, I order that the costs of this application shall await the outcome of the intended appeal.

Dated and Delivered at Nairobi this 27th day of February 2006.

FRED A. OCHIENG
JUDGE