

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 185 of 2002

BENJAMIN KIMANI ROMOKA.....IST PLAINTIFF

ELIZABETH KAKAI.....2ND PLAINTIFF

RUTH LUNGAI.....3RD PLAINTIFF

VERSUS

EVEREADY BATTERIES (K) LTD.....DEFENDANT

RULING

On the 29th of May, 2006 this court struck out the list of documents which was filed by the defendant and which it intended to rely on during the hearing of its defence case. This court ordered the defendant to proceed with the hearing of its case on the 20th of July, 2006. The defendant was dissatisfied by the said decision of this court and sought leave of this court to appeal to the Court of Appeal. Leave to appeal was granted. Subsequently thereafter, the defendant filed a notice of appeal and applied for the certified copies of the proceedings and ruling of this court. On the 14th of July, 2006, the defendant filed an application under the provisions of **Order XLI Rule 4 of the Civil procedure Rules** seeking the orders of this court to stay further proceedings in this suit pending the hearing and determination of the appeal filed at the Court of Appeal. The grounds in support of the application are listed on the face of the application. The main ground is that the defendant contends that if the proceedings herein are not stayed, there is a chance that the parties would incur unnecessary costs if the Court of Appeal were to allow the appeal and order a retrial. The defendant contended that the documents that it intended to rely on in its defence, and which were rejected by the court, formed a substratum of its case and therefore it should be given a chance to ventilate its dissatisfaction with the ruling of this court at the Court of Appeal. The application is supported by the annexed affidavit of Andrew Musangi, the advocate for the defendant.

The application is opposed. The plaintiffs filed grounds in opposition to the defendant's application. They stated that the application for stay of proceedings was made for the sole purpose of delaying the just determination of the suit. They further contended that the defendant would suffer no prejudice if the hearing of the case proceeded. They stated that they would rather take their chances and have the case heard and determined and if the Court of Appeal were to allow the appeal filed by the defendant and order a retrial, they would be prepared to have the case retried. Otherwise they urged this court to dismiss the application with costs.

At the hearing of the application, Mr Musangi learned counsel for the defendant reiterated the contents of the application and the supporting affidavit. He submitted that the documents that the defendant intended to rely on in its defence, and which documents were excluded by this court, were of medical and scientific nature and would be crucial to the defendant in establishing its case. He submitted that the proceedings herein should therefore be stayed pending the hearing and determination of the appeal filed by the defendant challenging the decision of this court in excluding the said defendant's list of documents. He argued that the broader interest of justice demanded that the proceedings be stayed so as to avoid the necessity of a retrial were the Court of Appeal to allow the appeal filed by the defendant. He further submitted that the parties to the suit would be saved from incurring further costs if the Court of Appeal were to order a retrial. He submitted that the defendant had proved sufficient cause to enable this

court grant the order of stay of proceedings. The defendant denied the suggestion by the plaintiffs that the application herein was made with the sole purpose of scuttling the hearing of this case. He urged this court to allow the application with costs.

Mr Musembi, learned counsel for the plaintiffs opposed the application. He reiterated the grounds of opposition filed by the plaintiffs. He submitted that the defendant had not established that its application fell within the ambit of the provisions of **order XLI Rule 4(2) of the Civil Procedure Rules**. He submitted that the issue of inflated costs to be incurred or the issue of wastage of time could not constitute substantial loss as envisaged by the rules. He argued that the defendant had taken 45 days since the ruling was delivered by this court to make the application for stay of proceedings. In his view, the said delay was inordinate and showed the defendant's intention of trying to further frustrate the just conclusion of this case. He submitted that the plaintiffs would be prejudiced were this court to stay the proceedings. He further submitted that the defendant had not made any offer of security as required by the law. He submitted that the plaintiffs were prepared to take the chance to participate in the retrial if the Court of Appeal were to allow the appeal filed by the defendant. He urged this court to disallow the application with costs.

I have carefully considered the rival submissions made by the counsels to the parties to this application. I have also read the pleadings filed by the parties in support of their respective positions in this application. The issue for determination by this court is whether the defendant has established sufficient reasons to enable this court grant the order of stay of proceedings sought. **Order XLI Rule 4(1) of the Civil Procedure Rules** provides that "*No appeal or second appeal shall operate as a stay of execution on 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.....*" This court therefore may grant an order staying proceedings if the applicant establishes sufficient cause. I agree with the submissions made by Mr Musangi that **Order XLI Rule 4(2) of the Civil Procedure Rules** does not apply in respect of an application made for the stay of proceedings. It only applies in respect of application made for stay of execution.

So, why does the defendant desire to have these proceedings stayed pending the hearing of the interlocutory appeal that it has filed? The defendant has submitted that this court should stay the proceedings because the parties would incur unnecessary costs were the Court of Appeal to allow the appeal by the defendant allowing it to rely on the list of documents that this court ruled that were filed without leave of the court and therefore order a retrial. The defendant further contends that the broader interest of justice required that interlocutory issues be first resolved before this court hears and substantively conclude this case. On the other hand, the plaintiffs have argued that they would be prejudiced if the hearing of this case is further delayed. They submitted that the defendant has been guilty of laches in presenting its application for stay of proceedings in a period so close to when the defence case was scheduled to be heard.

Having carefully considered the arguments made in this application, it is clear to this court that the defendant has not established sufficient cause to enable this court grant the order of stay of proceedings sought. The defendant's main concern is that the parties to this suit would incur unnecessary costs were the Court of Appeal to order a retrial if the appeal filed by the defendant were to be successful. The plaintiffs in this case are prepared to take their chances. It is evident from the conduct of the defendant from the time this court took over the conduct of the proceedings in this case that the defendant is not interested in the expeditious determination of this case. This court therefore considers the application made by the defendant for stay of proceedings in the light of its past conduct in this case. There is no sufficient cause shown why the hearing of the defence case should not proceed. The plaintiffs have indicated to this court that they are prepared to take their chance if the intended appeal filed by the defendant were to be successful and a retrial was to be ordered.

The intended appeal to be filed would not be rendered nugatory if the hearing of this case were to proceed and a judgment rendered during the pendency of the appeal. If this court were to find in favour of the plaintiffs, the defendant would still be at liberty to raise the same ground of appeal if it were to appeal against the said decision of this court. I think the circumstances of this case this court would be endorsing

the recalcitrant conduct of the defendant if it were to allow the application for stay of proceedings. This court is fortified in its finding by the decision of the Court of Appeal in the case of **Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd & Another CA Civil Application No.NAI 50 of 2001 (29/2001 UR)** (unreported) where it held at page 3 of its ruling, in a similar application for stay of proceedings, that;

“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.”

In the present application therefore, the fact that additional costs may be incurred is no reason why this court should grant stay of proceedings. Costs are incidental to any civil proceedings in court. I therefore find that the application for stay of proceedings by the defendant lacks merit and is consequently dismissed with costs.

DATED at Nakuru this 9th day of August, 2006

L. KIMARU

JUDGE