



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL SUIT NO. 127 OF 2002**

MENENGAI OIL REFINERIES LIMITED.....1ST PLAINTIFF

BARCLAYS BANK OF KENYA LTD.....2ND PLAINTIFF

VERSUS

H. N. GATHURU AND P. N. KIMANI T/A

WARUHIU &GATHURU ADVOCATES.....DEFENDANTS

**RULING**

This ruling relates to an Amended Notice of Motion brought under the inherent jurisdiction of the Court and Order XLI R. 4 of the Civil Procedure Rules. The application seeks the following orders:

1 That upon the Plaintiffs giving an undertaking to abide by any order this Honourable Court may make as to any damages that the Court shall be of the opinion that the defendants or either of them, shall have sustained by reason of this order, the defendants and each of them be restrained, whether by themselves, their servants or agents or otherwise from proceeding with the taxation of their Bill of Costs dated 3rd May, 2002 and filed in Nairobi High Court (Central Registry) under the reference Miscellaneous Cause No. 494 of 2002.

2 That in the alternative the taxation proceedings instituted by the appellants in the Nairobi High Court (Central Registry) under the reference Miscellaneous Cause No. 494 of 2002 be stayed pending the hearing and determination of the Plaintiffs' intended appeal against the ruling and order of the undersigned dated 3rd June, 2003.

The application has been supported by two affidavits of:

- *Kantilal shah and*

- *Walter Amoko.*

On the other hand, the respondents opposed the application while relying on the grounds of objections filed on 31st July, 2003. The respondent has also relied on the replying affidavit of one Ng'ang'a Gathuru dated 15th September, 2003.

The respondent's statement of grounds of objection are as follows:

1. The Plaintiffs/Applicants have failed to show that they stand to suffer substantial or if indeed any loss the stay of execution is not granted.

2. No loss can be suffered by the Plaintiffs/Applicants if the issues that were being canvassed in this suit are put before the taxing officer of the High Court, for hearing and determination because should the Plaintiffs/Applicants be aggrieved by the decision of the taxing officer, they would be entitled to file a reference in the High Court or appeal against such a decision.

3. The application raises matters which are res-judicata in any event, because an oral application for stay was on the 3rd June, 2003 dismissed with costs on the grounds that it did not have any merit at all.

4. There is no credible explanation for the delay to file the application for stay from the said 3rd June, 2003 upto the 7th July, 2003 which delay can in the circumstances of this matter only be described as being inordinate.

5. The Plaintiffs/Applicants obtained an ex parte order of stay on the 25th July, 2003 by concealing from the Court the fact that their application for stay was on the 3rd June, 2003 aforesaid, disallowed for lack of merit.

This Court has carefully perused the submissions by both Counsels and the authorities that have been quoted.

In particular, the Court hereby notes the case of

**ERINFORD PROPERTIES LTD.**

**VS**

**CHESHIRE COUNTY COUNCIL 91974) 2 A11 ER at Pg. 454**

Which states as follows:

***“One of the important factors in making such a decision, of course is the possibility that the judgment may be reversed or varied. Judges must decide cases even if they are hesitant in their conclusions., and at the other extreme a Judge may be very clear in his conclusions and yet an appeal held to be wrong. No human being is infallible, and for none are there more public and authoritative explanations of their errors than for Judges.”***

Having considered the above authority, the Court also perused the case of

**Lalji Bhimji Sanghani Builders 7 Contractors**

**Vs**

**Nairobi Golf Hotels (K) Ltd.**

in which Hon. Justice A. G. Ringera stated as follows: “In the High Court, the test as laid down by R. 4 (2) of Order XLI of the Civil Procedure Rules is whether:

*(i) the applicant may suffer substantial loss unless the Order is made; and*

*(ii) whether the application has been made without unreasonable delay; and*

*(iii) whether the applicant has given such security as the Court may order for the due performance of the Decree or order which ultimately be binding on him.*

***...“What of the defendant suffering substantial loss? I am of the opinion that for an applicant to satisfy this condition, he must persuade the court that the Decree Holder is a man of straw from whom it will be well nigh impossible or at least very difficult to obtain back the decretal amount in the event of the intended appeal succeeding. Such persuasion must spring from affidavit or other evidence on record. A bald statement from the bar or indeed in an affidavit by the judgment debtor that he will suffer substantial loss unless stay of execution is ordered unbacked by evidence of the matter I have alluded to carries no weight of persuasion in the mind of a Judge.”***

Having perused those authorities very carefully, the Court is of the considered opinion that the principles enunciated in the latter local case are more appropriate and of persuasive value. This Court is not convinced at all that the appeal to the Court of Appeal will be rendered nugatory as claimed. That has not been demonstrated in any cogent or logical way by the applicant.

It may be recalled that in my previous ruling, I had directed that the Taxing Master should listen to both parties before making a considered decision. Thereafter, any aggrieved party may approach the High Court by way of a reference. This Court cannot understand the morbid fear by the applicant to appear before a Taxing Master for taxation. In addition this Court has not been shown how the applicant will suffer substantial or any loss if the stay of execution is not granted.

Besides the above, it is apparent that this Court had dismissed an oral application for stay on 3rd June, 2003. From then upto now, nothing significant nor fundamental has occurred to change the stance that had been adopted by the Court.

Taking all the above matters in consideration, I hereby dismiss the application with costs for reasons that have been explained explicitly. Those are the orders of the Court.

**MUGA APONDI**

**JUDGE**

**Ruling read, signed and delivered in open Court in presence of both Counsels.**

**MUGA APONDI**

**JUDGE**

**12TH NOVEMBER, 2003**