



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CASE NO.269 OF 2017**

**[FORMERLY HIGH COURT CIVIL CASE NO.120 OF 2010]**

**ERI LIMITED.....PLAINTIFF**

**VERSUS**

**EQUATORIAL COMMERCIAL BANK (FORMERLY SOUTHERN**

**CREDIT BANKING CORPORATION LTD.....1<sup>ST</sup> DEFENDANT**

**ZAINUL GALIB VELJI.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. **Eli Limited**, the Plaintiff, vide notice of motion dated 5<sup>th</sup> October 2017, seeks for stay of proceedings on this matter pending the hearing and determination of their appeal on the court's ruling of 8<sup>th</sup> September 2016 striking out their suit for being res judicata. The application is based on eleven grounds marked (a) to (k) on its face and is supported by the affidavit sworn by Rasik Lavji Sanghrayka on the 5<sup>th</sup> September 2017.

2. The application is opposed by Zainul Galib Velji, the 2<sup>nd</sup> Defendant vide their replying affidavit sworn on the 2<sup>nd</sup> February 2018.

3. The application came up for hearing on the 6<sup>th</sup> February 2018 when Mr. Achura, Mr. Songok and Otieno, learned counsel for the Plaintiff, 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively made their oral submissions.

4. The issues for determination are as follows:

a) Whether the Plaintiff has made a reasonable case for stay of a proceedings order to issue.

b) Who pays the costs.

5. The court has carefully considered the grounds on the notice of motion, the affidavit evidence, the authority in the list dated 6<sup>th</sup> February 2018, the oral submission by counsel and come to the following conclusions:

a) That the application cites **Order 42 Rule 6(1) of the Civil Procedure Rules** among other provisions of the Civil Procedure Act and seeks for "an order of stay of proceedings on this matter pending the hearing and determination of the Plaintiff's/Applicant's appeal." That it is therefore clear that the Plaintiff application is not for stay of execution.

b) That both parties are in agreement that the court's ruling of 8<sup>th</sup> September 2016 struck out the Plaintiff's suit with costs. That the only proceedings initiated after that, apart from this application, is the bill of costs which was taxed on the 9<sup>th</sup> February 2018. That there is therefore no more proceedings pending before this court capable of being stayed as the next logical step will be execution. This application is not for stay of execution.

c) That the Plaintiff has already commenced an appeal on the court's ruling of 8<sup>th</sup> September 2016 as confirmed through the copy of the Notice of Appeal dated the 14<sup>th</sup> September 2016 and filed on the 16<sup>th</sup> September 2016, that is annexed to their supporting affidavit and marked RLS -2. That it is not for this court to make a finding on whether or not the Plaintiff's appeal has a high chance of succeeding as that jurisdiction lies in the Court of Appeal where the Plaintiff's appeal is pending.

d) That there has been a delay of over one year in filing this application from the date of the ruling which is the subject matter of the pending appeal. That the Plaintiff has not offered any explanation on the delay and the court finds the delay to have been inordinate.

6. That for reasons set out above, the Plaintiff's notice of motion dated and filed on the 5<sup>th</sup> October 2017 is without merit and is therefore dismissed with costs.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

DATED AND DELIVERED THIS 2<sup>ND</sup> DAY OF MAY 2018

In presence of;

Plaintiff

Absent

Defendants

Absent

Counsel

Mr. Aduva for Plaintiff

Mrs. Onyango for Otieno for 2<sup>nd</sup> Defendant.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**