



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC CASE NO. 433 OF 2003

**ROSE FLORENCE WANJIRU (Suing on her own behalf and on behalf of and representing
and for the benefit of all persons interested in and being, past, present and future
accounts holders with specified banks/institutions in Kenya and includes all those persons
enjoined pursuant to the Honourable Court’s order issued on 27.8.2015).....1ST PLAINTIFF**

And 187 other Plaintiffs as named in the Amended Plaint.....2nd to 188th PLAINTIFFS

VERSUS

STANDARD CHARTERED BANK KENYA LIMITED.....1ST DEFENDANT

HABIL OLAKA (The Executive Director (Secretary).....2ND DEFENDANT

of the KENYA BANKERS ASSOCIATION being sued on behalf of the

KENYA BANKER’S ASSOCIATION

CENTRAL BANK OF KENYA.....3RD DEFENDANT

IDB CAPITAL LIMITED.....4TH DEFENDANT

RULING

1. The 187th Plaintiff seeks stay of this proceedings pending the hearing and determination of his appeal against this Court’s Ruling of 28th February 2020. The request is through a Notice of Motion dated 2nd July 2020 and mainly anchored under the provisions of Order 42 Rule 6(1) of the Civil Procedure Rules.
2. In a supporting affidavit sworn on 2nd July 2020, the Applicant tells Court that he has filed a Notice of Appeal against this Court’s decision, and in his submissions informed the Court that he has in fact filed the Record of Appeal.
3. The Applicant depones that his Appeal raises bona fide issues of law and fact and is prima facie arguable. He argues that, unless these proceedings are stayed, he will be forced to proceed under a counsel who is not of his choice whereas the substratum of the intended appeal is whether the Court can, in the absence of conflict of interest, disqualify counsel from acting for a party.
4. In opposing the application, the 2nd Defendant raises four grounds. That the order of 28th February 2020 did not disqualify the advocate and all the order did was to hold that plaintiffs in a suit can only be represented by an advocate. Further, that the applicant is free to withdraw from the suit and file separate proceedings through the advocate of his choice. In the Respondent’s view, refusal of a stay would not render the appeal nugatory.
5. This Court has given due consideration to the written submissions filed by the parties to the application.

6. Order Rule 42 Rule 6 (1) provides:-

6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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, and whether the application for such stay shall have

been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

7. In **Global Tours and Travels Limited, Nairobi HC Winding up Cause No. 43 of 2000**, Ringera J said as follows on the principles to be applied on whether or not to grant an order for stay of proceedings:-

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice...the sole question is whether it is in the interest of justice to order for stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And, in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

8. I would think, however, that where the High Court is considering stay of its own proceedings so to give a chance for the hearing and determination of an appeal from its own decision, the consideration of whether or not the appeal is arguable need not take prominence as that it may well be an invitation to the Court to comment on its own decision.

9. In the matter before this Court, the Applicant argues that the right to representation of counsel of one’s choice is without doubt a constitutional right which should not be taken lightly. It is also true that if stay is not granted then the hearing of this matter may proceed to finalization without the applicant participating with a counsel of his own choice. Those are strong arguments for grant of the order.

10. That said, there are countervailing, if not strong arguments, against the grant of the order. There are 188 or so other parties. None have applied for stay of the proceedings. They may be keen to proceed. Their interests is a matter of concern as well.

11. As to whether the Applicant will suffer some form of irreparable loss, I have not heard the Applicant’s counsel react to the options that may be available to him cited in paragraphs 9 and 10 of the impugned Ruling. The Court stated:-

“[9] The rights of the Defendants must therefore be put on a scale *vis a vis* that of the Plaintiff’s freedom to choose own counsel. The scales tip in favour of the Defendants as the 187 Plaintiffs’ right would not be seriously jeopardized because they all have a common interest and on their own volition chose to join the 1st Plaintiff. If however, any Plaintiff feels it untenable to continue the suit being represented by the agreed firm on record, then it can opt out of the suit and pursue its own proceedings. Order 1 Rule 2 contemplates such possibility and grants power to the Court to order separate trial, it reads:-

“Where it appears to the court that any joinder of plaintiffs may embarrass or delay the trial of the suit, the court may either on the application of any party or of its own motion put the plaintiffs to their election or order separate trials or make such other order as may be expedient”.

[10] Further there may be some mitigation to the Plaintiffs’ concerns. A way would be hold that it is only the firm of S. Gichuki Waigwa & Associates representing the initial Plaintiff who shall be on record as appearing for the Plaintiffs and if they so wish, the advocates for the other Plaintiffs will act under the umbrella of the firm of S. Gichuki Waigwa & Associates and on arrangement with that firm but cease to be on record. As a practical issue the Court will from time to time give directions as to whether the other advocates can participate in the proceedings and trial and the extent of such participation.”

12. The Applicant can opt out of these proceedings so as not to suffer any prejudice of not being represented by counsel of his own choice.

13. Weighing one thing against the other, the Court reaches a decision not to grant the stay of proceedings. The Application of 2nd July 2020 is dismissed with costs.

DATED, SIGNED AND DELIVERED IN COURT AT NAIROBI THIS 1ST DAY OF MARCH 2021

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by

his Lordship, the Chief Justice on 17TH April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Kimaru holding brief for Odhiambo for the Applicant.

Fraser S.C for the 1st Respondent.

Okoth for the 2nd Respondent.

Kaingu for 187th and 188th Defendants