



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CORAM: D. S. MAJANJA J.

MISC. CIVIL APPLICATION NO. E146 OF 2019

BETWEEN

NATIONAL BANK OF KENYA LIMITED.....CLIENT/APPLICANT

AND

RACHUONYO & RACHUONYO ADVOCATES.....ADVOCATES/RESPONDENT

AND

RULING NO. 2

1. I am surprised that the Applicant (“the Bank”) invoked **Rule 5(2)(b)** of the *Court of Appeal Rules* in its Notice of Motion dated 19th May 2021 seeking an order of stay of execution and proceedings of the ruling of the Deputy Registrar’s delivered on 30th April 2019 and that of the court delivered on 5th May 2021 pending the hearing and determination of an intended appeal to the Court of Appeal. This court does not exercise jurisdiction under the *Court of Appeal Rules* hence the rule is inapplicable.

2. In substance what the Bank seeks is an order of stay of execution and further proceedings pending appeal, this court having dismissed the its reference from the decision of the Deputy Registrar certifying costs in the Advocates favour. The application ought to have been made under **Order 46 rule 6** of the *Civil Procedure Rules* which deals with stay pending appeal. As to whether the court can ignore this obvious and apparent error, the court is guided in such circumstances by **Article 159(2)(d)** of the Constitution which enjoins the court to eschew technicalities in favour of substantive justice. Moreover, **Order 51 rule 10** of the *Civil Procedure Rules* provides as follows as follows:

[Order 51, rule 10.] Provision under which application is made to be stated.

10. (1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.

3. In proceeding, as I do, I do not think any of the parties will suffer any prejudice as either party is clear on the matters in issue. They have articulated their respective positions based on the facts and proper legal position and the interest of justice demand that the matter be resolved once and for all.

4. The application is supported by the grounds on its face and the affidavit of Chrispus Maithya, a Legal Officer with the Bank, sworn on 19th May 2021. It is opposed by the Respondent through the replying affidavit of Clifford Owuor Rachuonyo, an advocate and partner in the Respondent law firm (“the Advocates”), sworn on 2nd June 2021. The parties made brief oral submissions in support of their respective cases.

5. The principles that guide the court in an application for stay of execution and proceedings pending an appeal are grounded in **Order 42 Rule 6 (2)** of the *Civil Procedure Rules*. In order to succeed, the applicant must demonstrate substantial loss may result unless the order of stay is made. It must also demonstrate that the application has been brought without undue delay and lastly, the applicant must give such security as the court may order for the due performance of the decree or order as the case may be. In *Christopher Ndolo Mutuku & another*

v CFC Stanbic Bank Limited ML HCCC No. 74 of 2011 [2015] eKLR Gikonyo J., amplified the legal considerations in an application for stay of proceedings by stating that, *“the decision 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 a 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; 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.”*

6. The Bank is seeking to stay the taxation of the Bill of Costs dated 30th April 2019 taxed and costs certified in accordance with the ruling of the Deputy Registrar made on 30th April 2020 and affirmed by the court on 5th May 2021. The Bank is now required to pay KES. 2,554,410.70 duly certified as due to the Advocates. In considering whether the grant stay, I am cognizant of the fact that the Advocates are entitled to enjoy the fruits the costs certified in their favour while the Bank is entitled to an assurance that should the appeal succeed it will have recourse to the money it pays out in satisfaction of the order made against it.

7. Before hearing the reference, the parties filed a consent dated 9th October 2020 indicating, inter alia, that with the exception of item number 1 and item number 352 dealing with instruction fee and getting up fees, all the other items in the Bill of Costs be taxed and allowed to the total sum of KES. 981,651.00 and that the court determines the relating to instruction fees and getting up fees. Hence the sum of KES. 981,651.00 is not in dispute and there is no reason why the sum should not be settled as it cannot be the subject of the intended appeal. Further, the Bank does not dispute the retainer hence the issue is contention is the quantum of instruction fees which may or may not be reduced on appeal. On its part, the Bank has offered to provide on irrevocable bank guarantee from a reputable institution as security for the taxed amount.

8. For the reasons I have set out and balancing the interests of both parties, I order as follows:

(a) There shall be a stay of further proceedings pending the hearing and determination of the intended appeal from the ruling dated 5th May 2021 on the terms set out hereafter.

(b) The Applicant/Client shall pay the Advocates/Respondent KES. 1,000,000.00 and provide a bank guarantee for the sum of KES 1,500,000.00 from a reputable bank other than the Applicant to be agreed upon by the parties within 45 days from the date hereof.

(c) The stay of execution shall remain in force for a period of one year from the date hereof unless otherwise extended by this court or the Court of Appeal.

(d) In default of any condition of this order, the order of stay shall stand discharged.

(e) The costs of this application shall be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JUNE 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Amuga instructed by Amuga and Company Advocates for the Advocates/Applicant.

Mr Juma instructed by Mutua Waweru and Company Advocates for the Client/Respondent.