



IN THE HIGH COURT OF KENYA

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

MISC. CIVIL APPLICATION NO. 232 OF 2019

BETWEEN

SHOWCASE PROPERTY LIMITED.....CLIENT/APPLICANT

AND

MUGAMBI & COMPANY ADVOCATES.....ADVOCATES/RESPONDENT

RULING NO. 4

1. The Client/Applicant has filed the Notice of Motion dated 9th November 2020 seeking stay of proceedings in this matter following the dismissal of the reference by the ruling dated 24th August 2020 (“Ruling No. 2”) from the decision of the Deputy Registrar certifying costs amounting to KES. 23,899,864.40 due to the Respondent (“Advocates”).
2. The application is supported by the affidavit of the Applicant’s director, Francis Muhoro Gachanja, sworn on 9th November 2020. It is opposed by the replying affidavit of John N. Mugambi, sworn on 2nd December 2020. The parties filed written submissions.
3. The general principle governing the grant of stay of proceedings was elucidated by Ringera J., in **Re: Global Tours and Travels Ltd NRB HC Winding Up Cause No. 43 of 2006 (UR)** cited in **Kenya Wildlife Service v James Mutembei MRU HCCA No. 40 of 2018 [2019] eKLR** as follows:

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 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. 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.

4. As I understand, the duty of the court is to consider the respective positions of the parties in order to do justice to a party who wishes to exercise its right of appeal and one who is entitled to proceed with the case expeditiously. The key consideration in my view, is whether, in the circumstances of the case the

Appellant is entitled to stay and if so on what terms.

5. The Plaintiff has evinced its intention of appealing against Ruling No. 2 by filing the Notice to Appeal. I granted leave to appeal following a formal application by a ruling dated 2nd October 2020 (“Ruling No. 3”) whereupon the Applicant filed this application. While the application is being prosecuted 8 months down the line, it was filed a month after leave was obtained hence I cannot say the delay was inordinate.

6. In granting leave in Ruling No. 3 I observed that, *“I cannot say that the applicant has no realistic prospect of succeeding on appeal on account of the fact that the issue raised concerns the manner of assessment of the instruction fees.”* I cannot therefore say that the appeal would be hopeless so as to tilt the scales of justice in favour of the Client.

7. The only step left is for the Advocates to obtain judgment in order to recover its costs. Thus the pending appeal would only delay realization of the certified costs if the stay is granted. In this case the substantial issue concerned the manner in which the instruction fees were determined by the Deputy Registrar. The retainer was admitted hence the successful appeal would only reduce the quantum of fees. In this case therefore I think some form of security would be sufficient to assuage the Advocates pending the appeal.

8. For the reasons I have set out above, I allow the Notice of Motion dated 9th November 2020 on the following terms:

(a) A stay of proceedings pending the hearing and determination of the intended appeal from the ruling and order dated 24th August 2020 be and is hereby granted on the terms set out hereunder.

(b) That the Applicant/Client shall provide deposit or provide a bank guarantee from a reputable bank of KES. 2,000,000.00 within 60 days from the date hereof.

(c) That the stay 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 compliance with the terms of this stay, the stay order shall stand discharged.

(e) Costs of the application shall be in the appeal.

DATED and DELIVERED at NAIROBI this 14th day of JUNE 2021.

D.S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Mungai instructed by Mungai Kalande and Company Advocates for the Client/Applicant.

Mr Mbonyi with him Mr Otenyo instructed by Makhandia and Makhandia Advocates.