



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**

**PETITION NO. 001 OF 2021**

**LUCY MUTHONI NJOROGE.....PETITIONER**

**VERSUS**

**THE CAPITAL MARKETS AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**BOC HOLDINGS.....2<sup>ND</sup> RESPONDENT**

**BOC KENYA PLC.....3<sup>RD</sup> RESPONDENT**

**CARBACID INVESTMENTS PLC.....4<sup>TH</sup> RESPONDENT**

**AKSAYA INVESTMENTS LLP.....5<sup>TH</sup> RESPONDENT**

**COMPETITION AUTHORITY OF KENYA.....6<sup>TH</sup> RESPONDENT**

**RULING**

1. On 13<sup>th</sup> May, 2021, this court delivered a ruling in respect of an application dated 22<sup>nd</sup> April, 2021 wherein the 2<sup>nd</sup> Respondent had sought a transfer of this file from the Commercial and Tax Division to the Judicial Review Division. This court dismissed the said application for the reasons that were set out in the ruling.
2. Consequently, the 2<sup>nd</sup> Respondent filed the instant Notice of Motion dated 17<sup>th</sup> May, 2021 under **Rules 19 and 32(3)** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2010** seeking a stay of the proceedings herein pending the hearing and determination of its intended Appeal against the Ruling and orders of 13<sup>th</sup> May, 2021.
3. The application is based on the grounds on the face of it and supported by an Affidavit sworn on even date by **MICHAEL DEVINE**, the Chief Transactions Counsel and Head of Legal Integration for Linde Plc and the Linde Group of Companies. He averred that the 2<sup>nd</sup> Respondent is aggrieved by the said Ruling in view of the following:
  - a. The court completely misdirected itself on the matters for determination in the Petition.
  - b. The matters highlighted as issues for determination by the court do not arise from the matters set out in the Petition and more specifically, the conclusions drawn alleging applicability of the Companies Act, 2015 to the matters in dispute herein.
  - c. The Petition and the issues raised therein lie squarely under the Capital Markets Act (Cap 485A) Laws of Kenya and the Regulations therein and in particular the Capital Markets (Take-Overs and Mergers) Regulations, 2002 and the Companies Act, 2015.
  - d. The court raised serious allegations suggesting oppressive conduct by the 2<sup>nd</sup> Respondent as against minority shareholders of the 3<sup>rd</sup> Respondent and collusion between the 2<sup>nd</sup> Respondent and the 4<sup>th</sup> and 5<sup>th</sup> Respondents, which matters do not arise from the Petition.
  - e. No issue of oppression of minority shareholders arises in view of the fact that none of the shareholders of the 3<sup>rd</sup> Respondent are being forced to sell or take any action.

4. He stated that in view of the foregoing, the 2<sup>nd</sup> Respondent is apprehensive that it may not get a fair hearing in the matter since there is a real and present danger that what it is required to defend as raised in the Petition is not what the court will make its determination on. He noted that the 2<sup>nd</sup> Respondent wishes to appeal against the Ruling and has already filed a Notice of Appeal in that regard.

5. In his view therefore, it is only fair and just that the court stays these proceedings until the Court of Appeal makes its determination on the 2<sup>nd</sup> Respondent's intended appeal. He stated that if the court proceeds with the hearing of the Petition as earlier scheduled, the intended appeal will be a mere academic exercise. Finally, he averred that the instant application has been made without unreasonable delay.

6. In response, the Petitioner filed Grounds of Opposition dated 24<sup>th</sup> May, 2021. She argued that the 2<sup>nd</sup> Respondent's application has been filed by the firm of Coulson Harney LLP which does not act for the said party thus rendering the application bad in law and incurably defective. She also contended that the Application does not conform to **Rules 19 and 32(3) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** in that:

a. The 2<sup>nd</sup> Respondent uses the word "will" instead of "shall" in the first sentence of their Notice of Motion, contrary to the requirements stated in Form D of **the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**.

b. The 2<sup>nd</sup> Respondent has omitted the statement "*WHICH APPLICATION is made on the following grounds*" in their Notice of Motion as provided in Form D of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**.

c. The 2<sup>nd</sup> Respondent has also omitted the words "*If any person served does not appear at the time and place abovementioned such orders shall be made and proceedings taken as the court deems just and expedient*" in their Notice of Motion, contrary to the requirements provided in Form D of **the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**.

7. Further, the Petitioner stated that the Affidavit in support of the Application is incurably defective in that:

a. It does not have the Jurat as by law required.

b. The date of the expiry of the Commissioner of Notary Public is false as the date of expiry on the stamp is 12/22/2022 whereas the commission expiry date on the Affidavit is stated to be 12/22/2021 by the Notary Public.

c. In paragraph 11 of the Affidavit, the deponent refers to pages 8 and 9 of "Exhibit MD3", which only has 7 pages, rendering the whole Affidavit a nullity.

d. The Exhibit to the Affidavit has not been served and neither has it been stamped by the Notary Public and is therefore inadmissible.

e. In paragraph 4 of the Affidavit, the 2<sup>nd</sup> Respondent does not give the source of information rendering the Affidavit incurably defective and the said paragraph should be expunged.

f. The Affidavit is not a factual Affidavit and is based on opinion and conjecture of the deponent and is based on speculative and scandalous views of a lawyer from another jurisdiction and the nexus between the Deponent and the Applicant is not explained.

g. The Affidavit has missing Exhibits, namely "MD1" and "MD2"

h. The Deponent has put himself in the position of the 2<sup>nd</sup> Respondent and deponed as the 2<sup>nd</sup> Respondent whereas the authority to swear the Affidavit for BOC Holdings has not been provided thus rendering the whole Affidavit defective.

i. The Affidavit contains averments not within the knowledge of the Deponent

8. Further, the Petitioner argued that the 2<sup>nd</sup> Respondent has not attached a draft Memorandum of Appeal thus rendering the Application defective as merely filing a Notice of Appeal does not and cannot suffice to allow the application for stay to be granted. It was also her contention that the 2<sup>nd</sup> Respondent has not on a balance of probabilities shown that it has an arguable Appeal with any reasonable prospect of success. In her view, the 2<sup>nd</sup> Respondent's application is a blatant attempt at forum shopping.

9. In addition, she averred that staying the hearing of the Petition which raises profound constitutional issues is perverse and contrary to the principles of natural justice. She argued that the Application is contrary to the provisions of **Article 159 (2) (b) of the Constitution of Kenya** and **Rules 4 and 5 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** as it is meant to perpetuate delay. She also noted that the Application goes against the principle of the Overriding Objective, the purpose of which is to enable litigants to obtain justice expeditiously.

10. Further, it was her view that the 2<sup>nd</sup> Respondent has not established that it will suffer any prejudice should this court proceed to hear and determine the Petition.

11. The Petitioner also filed a Notice of Preliminary Objection dated 26<sup>th</sup> May, 2021 contending that the purported service afresh of the Supporting Affidavit and the annexures thereto on 25<sup>th</sup> May, 2021 by the 2<sup>nd</sup> Respondent after the Petitioner had filed its Grounds of Opposition is unprocedural, unjust and unfair as it deprives the Petitioner of her right to respond adequately. The Petitioner thus urged that the 2<sup>nd</sup> Respondent's Supporting Affidavit be expunged from the record in toto for being incurably defective in substance and form.

12. On the part of the 4<sup>th</sup> and 5<sup>th</sup> Respondents, they supported the instant application vide a document titled "**Grounds in Support**" dated 3<sup>rd</sup> June, 2021. They reiterated the 2<sup>nd</sup> Respondent's averments in support of its application. They added that the issues raised in the 2<sup>nd</sup> Respondent's earlier application require a preliminary determination before a hearing of the Petition can proceed. They stated that the jurisdiction to determine whether there is unfair prejudice is a special jurisdiction granted under **Section 780 of the Companies Act 2015**. They stated that they will be denied the right of a fair hearing if the proceedings continue before the Court of Appeal determines that the Commercial Division of the High Court can nevertheless proceed without the Applicant making an application as conceived under the Companies Act.

13. Further, they stated that this Court has express notice of the proceedings before the Capital Markets Tribunal thus, it would be unfair for it to continue with the hearing herein before the Court of Appeal determines whether with respect to the same subject matter, a dispute can proceed both before a statutory tribunal, in which the court's intervention is limited to Judicial Review, and as a commercial dispute before the High Court. In their view therefore, it is only fair and just that this Court stays the present proceedings pending the hearing and determination of the 2<sup>nd</sup> Respondent's appeal.

### **Submissions**

14. The application was canvassed by both written and oral submissions. The 2<sup>nd</sup> Respondent's written submissions are dated 27<sup>th</sup> May, 2021 while the Petitioner's written submissions are dated 4<sup>th</sup> June, 2021. During the oral highlighting of the submissions, the Petitioner was represented by Senior Counsel, Mr. Bowry, the 1<sup>st</sup> Respondent by Mr. Githendu Advocate, the 2<sup>nd</sup> Respondent by Ms. Mwangi Advocate whilst the 4<sup>th</sup> and 5<sup>th</sup> Respondents were represented by Ms. Arora advocate.

### **2<sup>nd</sup> Respondent's submissions**

15. The 2<sup>nd</sup> Respondent submitted that under **Rule 32(3) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 ("the Rules")**, an application for stay may be filed within 14 days of the decision appealed from. It stated that it filed the instant application on 17<sup>th</sup> May, 2021 which is within the stipulated timelines.

16. The 2<sup>nd</sup> Respondent further submitted that the test for grant of a stay under **Rule 32(3)** is not similar to the one set out in **Order 42 Rule 6 of the Civil Procedure Rules**. It argued that an application for stay under Rule 32(3) of the Rules is purely a matter for the exercise of the discretion of the court, as opposed to an application under the Civil Procedure Rules, which requires that certain conditions be met, before such a stay is granted. It relied on the cases of **Mundia Njeru Geteria v Embu County Government & 4 Others [2014] eKLR** for the proposition that the discretion of the court to grant a stay under Rule 32(3) of the Rules is wider than the discretion of the court under Order 42 Rule 6 of the Civil Procedure Rules.

17. The 2<sup>nd</sup> Respondent also relied on **John Juma & 2 others v Patricia Lihanda & Another; Zedekiah Orera & 4 Others (Interested Parties) [2019] eKLR** for the position that the exercise of the discretion of the court in an application under Rule 32(3) ought to be guided by the principles set by the Court of Appeal in the case of **Butt versus Rent Restriction Tribunal [1982] KLR 417** namely: that a stay must be granted so that an appeal is not rendered nugatory; and that the court ought to consider the special circumstances of the case.

18. Further, it asserted that if a stay of these proceedings is not granted, its intended appeal will be a mere academic exercise since by the time the appeal is heard and determined, the court will have already concluded the proceedings in the instant Petition and made a determination in respect of the Take Over process on the basis of a wrong legislation which is the Companies Act, 2015. It also reiterated that the court is likely to delve into matters outside the ambit of the issues for determination in the Petition.

19. In addition, the 2<sup>nd</sup> Respondent stated that the Take Over transaction complained of by the Petitioner was stayed upon the filing of **Capital Markets Tribunal Appeal No.2 of 2021 Kiuna Ngugi Kiuna v The Capital Markets Authority, BOC Holdings and BOC Kenya Plc ("CMT Appeal No. 2 of 2021")** which was filed on or about 2<sup>nd</sup> March, 2021, also challenging the Take Over. In its view therefore, the instant application should be allowed in the interests of justice.

### **Petitioner's submissions**

20. On her part, the Petitioner submitted that the 2<sup>nd</sup> Respondent partially served her advocates with an improper exhibit then purported to belatedly serve them with an exhibit on 25<sup>th</sup> May, 2021 which led to the filing of the Notice of Preliminary Objection. The Petitioner urged the Court to examine the defects in the 2<sup>nd</sup> Respondent's Application and the Affidavit in support thereof and dismissed the same. She submitted that no attempt has been made to remedy the defective Affidavit and argued that the 2<sup>nd</sup> Respondent's decision not to address and traverse the contentions in her Grounds of Opposition means that the same are conceded.

21. Further, the Petitioner argued that the 2<sup>nd</sup> Respondent and other supporting parties have turned a total blind eye in their submissions by failing to respond to important matters raised in her Grounds of Opposition.

22. As regards jurisdiction, the Petitioner was emphatic that the High Court remains the High Court and divisions are only administrative.

She reiterated her view that the 2<sup>nd</sup> Respondent is simply forum hunting.

23. Further, it was submitted that the 4<sup>th</sup> and 5<sup>th</sup> Respondents' opposition based on Section 780 of the Companies Act, 2015 is misplaced since the said Act is subservient to the Constitution under which the Petitioner has come to court and as such, she must be heard urgently. The Petitioner also asserted that the special circumstances and unique requirements in the Constitutional Petition warrant dismissal of the instant Application.

24. In addition, she contended that the 2<sup>nd</sup> Respondent's Application fails to meet the standards to warrant a Stay of Proceedings. She relied on the case of **Venture Capital and Credit Ltd v Consolidated Bank of Kenya [2004] 1 EA 357** where the Court of Appeal held that an application for stay pending appeal had no merit since the Applicant therein had not exhibited a copy of the draft Memorandum of Appeal or the Memorandum of Appeal already filed.

25. Reliance was also placed on the case of **Patricia Njeri & 3 Others v National Museum of Kenya (2004) eKLR** where the Court set down the principles to be considered when determining whether to grant an injunction pending appeal. The Petitioner was also of the view that the 2<sup>nd</sup> Respondent has failed to meet the threshold set out in **Giella v Cassman Brown and Co Ltd [1973] EA 358** for the grant of an interlocutory injunction as it has not shown that it has an arguable Appeal with reasonable prospects of success or demonstrated that it may suffer any prejudice should this Court proceed to hear and determine the Petition.

26. It was further submitted that the 2<sup>nd</sup> Respondent's Application would inflict greater hardship than it would avoid and that the stay, if granted, will further delay the Petition which was filed under a Certificate of Urgency hence denying the Petitioner her right to timely justice contrary to the provisions of **Article 159 (2) (b) of the Constitution of Kenya, 2010**. In addition, the Petitioner argued that the Application is inconsistent with the principles of the Overriding Objective. In support of this, she relied on the case of **Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others (2010) eKLR** where Nyamu, J.A quoted **Mradula Suresh Kantaria v Suresh Nanalal Kantaria C.A NO. 277 of 2005** in which it was observed that the Overriding Objective is meant to "facilitate the just, quick and cheap resolution of the real issues in the proceedings. In her view therefore, the instant Application should be dismissed.

#### **Rejoinder submission**

27. During the oral highlighting of the submissions, learned counsel Ms. Mwangi for the 2<sup>nd</sup> Respondent submitted that in error, the firm's court clerk instead of serving the Supporting Affidavit together with the annexure, served without. However, she noted that the said Affidavit was filed with the annexure and this can be confirmed from the payment receipt of serial number FSCA/QO70650 which was issued in that regard. She averred that the said position was duly explained to Mr. Bowry, Senior Counsel in an email dated 25<sup>th</sup> May, 2021 from the firm's court clerk which email was duly annexed to the Affidavit of Service of Simon Nyamai.

#### **Analysis and Determination**

28. I have carefully analyzed the 2<sup>nd</sup> Respondent's application, the Petitioner's Preliminary Objection, the responses thereto, the parties' submissions and the authorities cited. I have isolated two issues for determination namely: whether the Petitioner's Preliminary Objection is merited and whether the proceedings herein should be stayed pending the determination of the 2<sup>nd</sup> Respondent's intended appeal.

#### **Whether the Petitioner's Preliminary Objection is merited**

29. In the case of **Mukhisa Biscuit Manufacturers Limited v West End Distributors Ltd [1969] EA 696**, Law J.A. at page 700 observed:-

*“So far as I am aware a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleading and which if argued as Preliminary Objection may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion’.”*

30. In **Aviation & Allied Workers Union Kenya v. Kenya Airways Ltd & 3 Others [2015] eKLR**, the Court stated:

*“Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”*

31. On the basis of the above, the questions that arise for this Court's consideration are: *what pure point of law has the Petitioner raised in her preliminary objection and whether the facts in issue are settled?*

32. I note that the Petitioner avers that the fresh service by the 2<sup>nd</sup> Respondent of its Supporting Affidavit and the annexures thereto after the Petitioner had filed its Grounds of Opposition is unprocedural, unjust and unfair as it deprives the Petitioner of her right to respond adequately. The Petitioner also averred that the Supporting Affidavit is incurably defective in substance and form and thus should be expunged from the record in toto.

33. In my view, these are factual issues which can only be established by first evaluating the evidence from both parties. They do not

constitute valid grounds for raising a preliminary objection as they do not raise any pure points of law on their own. I therefore find that the Petitioner's Preliminary Objection lacks merit and I dismiss it.

**Whether the proceedings herein should be stayed pending the determination of the 2<sup>nd</sup> Respondent's intended appeal**

34. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. As such, it is a radical remedy which can only be granted in exceptional circumstances. In *Halsbury's Law of England*, 4<sup>th</sup> Edition, Vol. 37 page 330 and 332, the principles upon which stay of proceedings may be granted are summarized as follows:

*“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue... This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases. It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”*

35. In *Global Tours & Travels Limited Nairobi HC Winding Up Cause No. 43 of 2000*, Ringera J. (as he then was) held that:

*“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.”*

36. It can thus be said that for an order of stay of proceedings to be granted, the applicant must establish, *inter alia*, that:

- i. There is a *prima facie* arguable appeal;
- ii. The application was brought expeditiously; and
- iii. The interests of justice demand that the order of stay be granted.

37. To begin with, I have no doubt that the instant application was brought without undue delay. The Ruling which the 2<sup>nd</sup> Respondent intends to appeal against was delivered on 13<sup>th</sup> May, 2021 and the instant application was filed three days later on 17<sup>th</sup> May, 2021.

38. Regarding the question of whether the 2<sup>nd</sup> Respondent has an arguable appeal, I note that no Memorandum of Appeal or a draft of the same has been annexed to the Supporting Affidavit to enable the court determine whether on its face, the intended appeal is arguable so as to warrant the issuance of the orders sought. The court is therefore not in a position to make an informed decision regarding the arguability of the 2<sup>nd</sup> Respondent's intended appeal.

39. As regards the issue of whether the interests of justice demand that an order of stay be granted herein, I have no doubt in my mind that the answer is in the negative. I find that it would not be in the interest of justice to grant stay of proceedings as it will only serve the purpose of delaying the expeditious disposal of a Petition which was filed under a Certificate of Urgency. The issues being canvassed in the Petition deserve to be heard and determined at the earliest and without any further delay.

40. The upshot is that the 2<sup>nd</sup> Respondent's application dated 17<sup>th</sup> May, 2021 has no merit.

**Deposition**

41. Consequently, the 2<sup>nd</sup> Respondent's Notice of Motion dated 17<sup>th</sup> May, 2021 and the Petitioner's Notice of Objection dated 26<sup>th</sup> May, 2021 are hereby dismissed. The costs of the same shall be in the cause. It is so ordered.

**DATED AND DELIVERED THIS 21<sup>ST</sup> DAY OF JULY, 2021.**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. Miss Mwangi for the 2<sup>nd</sup> Respondent/Applicant.

2. *SC Bowry For the Petitioner/Respondent (in the application).*
3. *Mr.Githendu for the 1<sup>st</sup> Respondent (in the Petition).*
4. *Mr.Karani h/b for Mr.Munyu for the 3<sup>rd</sup> Respondent (in the Petition).*
5. *Ms. Lubano h/b for SC Oraro for the 4<sup>th</sup> & 5<sup>th</sup> Respondents (in the Petition).*