



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. E13 OF 2020

TAHIR SHEIKH SAID INVESTMENTS LIMITED.....PLAINTIFF

-VERSUS-

KCB BANK KENYA LIMITED.....1ST DEFENDANT

JAMII FLOUR MILLERS LIMITED.....2ND DEFENDANT

RULING

1. The plaintiff filed a Notice of Motion application dated 17th December, 2020 brought under the provisions of Article 50(1) of the Constitution, Sections 1A, 1B, 3 & 3A of the Civil Procedure Act, Cap 21 Laws of Kenya and Order 42 Rule 6 of the Civil Procedure Rules, 2010. The plaintiff seeks the following orders from this Court-

- (i) The application be certified urgent and service be dispensed with in the first instance;
- (ii) There be a stay of further proceedings, other than the hearing of this application, pending the hearing and determination of this application;
- (iii) There be a stay of further proceedings in the suit pending the lodging, hearing and determination of the intended appeal to the Court of Appeal or for such other period as the Honourable Court may deem just; and
- (iv) That costs of this application be in the cause.

2. The application is brought on the grounds on the face of it and is supported by an affidavit sworn by Tauhida Tahir Sheikh Said, one of the plaintiff's directors, sworn on 17th December, 2020 and filed on the same day.

3. On 22nd January, 2021, the 2nd defendant filed grounds of opposition. The 1st defendant on 18th February, 2021 filed a Notice of Preliminary Objection dated 11th February, 2021 and a replying affidavit sworn by Francis Kiranga, the 1st defendant's employee, in opposition to the application dated 17th December, 2020.

4. The application was canvassed by way of written submissions. The plaintiff's submissions were filed on 3rd March, 2021 by the law firm of Gikandi & Company Advocates. The 1st defendant's submissions were filed by the law firm of Munyao, Muthama & Kashindi Advocates on 24th March, 2021, while the 2nd defendant's submissions were filed on 25th March, 2021 by the law firm of Hamilton, Harrison & Mathews Advocates.

5. Mr. Gikandi, learned Counsel for the plaintiff relied on the case of **Kanyotta Holdings Limited v Kenya Shell Limited** [2012] eKLR, and submitted that the High Court lacks jurisdiction to determine the validity or otherwise of a Notice of Appeal filed under the Court of Appeal Rules, 2010. He further submitted that if the 1st defendant thinks an appeal only lies with leave of the Court, it is required by Rule 84 of the Court of Appeal Rules 2010 to make an application within thirty (30) days of service of the Notice of Appeal to that Court to strike out the Notice of Appeal.

6. It was submitted by Mr. Gikandi that pursuant to the provisions of Order 43 of the Civil Procedure Rules, 2010, an appeal shall lie with the leave of the Court from any other order made under the said Rules, but when the order sought to be appealed from is not made under the Civil Procedure Rules, 2010, the provisions of Order 43 become irrelevant. He argued that out of all the 54 Orders under the Civil Procedure Rules, none of them even remotely deals with recusal since applications for recusal flow directly from Article 50(1) of the Constitution of Kenya, 2010.

7. He relied on the case of **Judicial Service Commission & Secretary, Judicial Service Commission v Kalpana H. Rawal** [2015] eKLR, where the Court held that an appeal lies as of right whenever a Constitutional right is threatened with violation. Mr. Gikandi contended that even if the order appealed against was made under some provisions of Cap 21, Laws of Kenya, Section 66 of the that Act grants a right to appeal to the Court of Appeal as the said right has not been curtailed by a further requirement for leave.

8. He relied on the holding in the case of **Ezekiel Mule Musembi v H. Young & Company (E.A) Limited** [2019] eKLR, where it was held that 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.....and 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. The plaintiff's Counsel also relied on the case of **R v Gough** [1993] 2 All CR 724, where Lord Goff held that justice must be rooted in confidence and confidence is destroyed when right-minded people go away thinking the judge was biased.

9. He stated that in the present case, the plaintiff was unable to understand the reason why a file listed before one judge was in fact placed before a different judge, especially when all the parties were in fact before the other judge but there may be an answer to that, but the answer has never been provided to date.

10. He submitted that in citing the need for optimum utilization of judicial resources, the Court of Appeal in **Wardpa Holdings Limited & 3 others v Emmanuel Waweru Lima Mathai & another** [2012] eKLR held that there is now in force Section 3B of the Appellate Jurisdiction Act, which obligates this Court to further the overriding objective of that Act, which is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act, by ensuring the efficient use of the available judicial and administrative resources. Mr. Gikandi submitted that if the proceedings herein were not stayed, and if the intended appeal succeeds, substantial loss would occur.

11. Mr. Omondi, learned Counsel for the 1st defendant submitted that Order 43 Rule 1 of the Civil Procedure Rules as read with Section 75(1)(h) of the Civil Procedure Act provides for orders against which appeals lie as of right. He further submitted that an order allowing and/or rejecting an application for recusal is not amongst the orders contemplated within the provisions of Order 43 Rule 1 of the Civil Procedure Rules. He stated that as a result, an appeal from an order allowing or rejecting an application for recusal does not lie as of right, but accrues only with the leave of Court. He relied on the case of **Kikambala Housing Estate Limited v Akash Devani & 10 others** [2020] eKLR and **Peter Nyaga Muvake v Joseph Mutunga** [2015] eKLR to support his position.

12. He further submitted that the failure by the applicants to obtain leave to appeal from the order of this Court declining to recuse itself renders the plaintiff's application incompetent and defective. Mr. Omondi stated that the principles for grant of an order for stay of proceedings were rehashed in the case of **Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi** [2014] eKLR, as to whether the applicant has established that he/she has a *prima facie* arguable case; the application was filed expeditiously; and the applicant has established sufficient cause to the satisfaction of the Court and that it is in the interest of justice to grant the orders sought.

13. On whether the applicant has established that it has a *prima facie* arguable case, Mr. Omondi contended that by failing to seek leave to appeal, the appeal is rendered incompetent, thus an invitation to issue an order for stay of proceedings is handicapped at the very outset. He was of the view that the application for recusal appears to be a veiled attempt at forum shopping and to unnecessarily prolong the matter, thereby causing delay.

14. On his part, Mr. Mugambi, learned Counsel for the 2nd defendant submitted that the test for granting stay of proceedings was persuasively set out by Ringera J., in the case of **Global Tours & Travels Limited** Nairobi HC Winding Up Cause No. 43 of 2000. He submitted that the plaintiff contends that they are dissatisfied with the Judge's refusal of their application for recusal but the record does not show that their Advocate made an application for the judge to recuse herself. Mr. Mugambi indicated that the plaintiff's Counsel merely asked this Court to remit the file to the Presiding Judge for reallocation without expressly asking the judge to recuse herself from hearing the matter.

15. The 2nd defendant's Counsel argued that when some litigants fail to get their way before a Court, they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to a bias in the mind of the judge. He further submitted that the plaintiff contends that it might succeed in its intended appeal and if the proceedings herein are not stayed, the substratum of the suit might be washed away. Mr. Mugambi submitted that when the Court of Appeal was faced with a similar argument in the case of **Michael Sistu Mwaura Kamau v Ethics and Anti-Corruption Commission & 3 Others** [2015] eKLR, it held that proceedings before a Court of law should not be stopped on the basis of apprehension.

ANALYSIS AND DETERMINATION

16. I have considered the application filed herein, the grounds on the face of it and the affidavit filed in support of the said application. I have also considered the grounds of opposition, the preliminary objection, the defendants' replying affidavits and the written submissions by Counsel for the parties. The issues that arise for determination are-

(i) Whether the intended appeal is incompetent for want of leave by this Court; and

(ii) Whether the plaintiff has satisfied the conditions to warrant being granted an order for stay of proceedings.

17. In the affidavit filed by the plaintiff, it was deposed that it applied under Certificate of Urgency, for interlocutory orders and the application was considered and interim orders were granted by Hon. Lady Justice Njoki Mwangi on 3rd November, 2020 and thereafter the said application was fixed for *interpartes* hearing on 17th November, 2020.

18. It further deposed that on 17th November, 2020 the cause list issued by the Court indicated the file was listed before Hon. Lady Justice

Chepkwony and all the Advocates on record appeared before her only to realize that the file had been placed before Hon. Lady Justice Njoki Mwangi. That when the Counsel appeared before the said Judge, the plaintiff's Counsel applied for recusal of the learned judge. The plaintiff averred that the learned judge also indicated that she was curious to find out which party was forum shopping as she had seen certain documents filed and marked "Chepkwony J".

19. The plaintiff contended that although the facts hereinabove do not constitute actual bias, it would lead a reasonably informed person to doubt the fairness and impartiality of the hearing. It was further averred that the foregoing circumstances led to the plaintiff's proposal of a hearing before any other judge other than Hon. Lady Justice Njoki Mwangi and Hon. Lady Justice Chepkwony but the plaintiff's application was rejected in a ruling that was delivered on 17th November, 2020. It was deposed that aggrieved by the said ruling, the plaintiff evinced its intention to appeal to the Court of Appeal by filing a Notice of Appeal dated 17th November, 2020.

20. The plaintiff deposed that without an order staying further proceedings, the matter shall proceed to the plaintiff's great detriment. It contended that with the help of the Court, the plaintiff had obtained typed proceedings, thus it was in a position to prepare and file the Record of Appeal within twenty-one days.

21. The 2nd defendant in its grounds of opposition stated that: -

a) The applicants did not make an application for the recusal of the Honourable Lady Justice Njoki Mwangi when this matter came up in Court on 17th November, 2020;

b) The applicants are determined to veto the Honourable Lady Justice Njoki Mwangi from hearing this matter. Litigants cannot choose their judges. The applicants must not have their way as this would erode public confidence in the Court and the determination of justice;

c) The application dated 16th November, 2020 is a strained stretching of facts into tortuous contortions in an attempt to vex and scandalize the Honourable Judge to recuse herself from hearing this matter. Such attempts unbacked by evidence and riding only on strident cries of doubtful fairness and impartiality on the part of the Honourable Judge, without more, should not move the Court to give into the applicant's nefarious scheme. See **Mohammed Jawayd Iqbal (personal representative of the Estate of the late Ghulam Rasooi Janmohamed) v George Boniface Mbogua** [2020] eKLR;

d) The applicant's conduct in these proceedings so far indeed give credence to the Honourable Judge's sentiments that may be they are forum shopping for a Court. The application is therefore an abuse of the Court Process;

e) Stay of proceedings is a grave judicial action which seriously interferes with the right of litigants to conduct their litigation. It impinges on the right of access to justice, right to be heard without delay and overall, right to fair trial. See **Kenya Wildlife Service v James Mutembei** [2019] eKLR;

f) The applicants have not met the test for stay of proceedings as persuasively set out by Honourable Ringera J., (as he then was) in the case of **Global Tours & Travels Limited; Nairobi** HC Winding Up Cause No. 43 of 2000. See also **Halsbury's Law of England, 4th Edition. Vol. 37** page 330 and 332; and

g) It would not be in the interest of justice for the Court to grant a stay of proceedings in this matter as it will only serve the purpose of delaying the matter unnecessarily.

22. The 1st defendant in its Notice of Preliminary Objection stated-

a) That the Notice of Motion application dated 17th December, 2020 is premised on the Notice of Appeal dated 17th December, 2020 filed by the plaintiff;

b) That the Notice of Appeal dated 17th December, 2020 filed by the plaintiff evinces an intention to appeal against the ruling of this Court in respect of an application for recusal delivered by the Court on 17th December, 2020;

c) That an appeal against a ruling on an application for recusal does not lie as of right but accrues only with leave of the Court;

d) That the applicant neither sought nor obtained the leave of the Court prior to filing the Notice of Appeal dated 17th December, 2020 and the said Notice of Appeal is therefore incompetent, defective and void *ab initio*; and

e) That this Honourable Court lacks the jurisdiction to issue an order for stay of proceedings pending appeal in respect of the impugned ruling, for which the applicant has neither sought nor obtained the leave of the Court to appeal against.

23. The 1st defendant in its replying affidavit deposed that the plaintiff had not adduced any sufficient grounds and evidence to entitle it to the orders sought in the Notice of Motion. That there was no evidence on the Court record demonstrating that the plaintiff sought and/or obtained the leave of this Honourable Court prior to filing a Notice of Appeal. It deposed that in the absence of leave to appeal against the impugned ruling, there was no competent appeal to clothe the Court with the discretion to issue an order for stay of proceedings pending appeal.

24. It was averred by the 1st defendant that in the absence of a competent appeal, there cannot be an arguable appeal and as to how the

application was listed for hearing before Hon. Lady Justice Chepkwony as opposed to Hon. Lady Justice Njoki Mwangi on 17th November, 2020, it is an administrative function of the Registry and it may very well have been erroneously listed on the cause list on that particular day.

25. The 1st defendant averred that the plaintiff had not demonstrated that it would suffer substantial loss in the event that the orders sought were rejected and that the plaintiff had also failed to demonstrate any exceptional circumstances that would warrant the grant of an order for stay of proceedings.

Whether the intended appeal is incompetent for want of leave by the Court.

26. The defendants' argument was that an appeal from an order rejecting or granting a prayer for recusal does not lie as of right but only with the leave of the Court. They argued that the plaintiff was obligated to seek and obtain leave to appeal against the order from this Court. The plaintiff on the other hand, submitted that the Civil Procedure Rules do not even remotely deal with the issue of recusal, as such applications flow directly from Article 50(1) of the Constitution of Kenya, 2010.

27. Section 75(1) of the Civil Procedure Act provides for the orders against which an appeal would lie as of right and/or with the leave of the Court. It provides that-

“An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted-

(a) An order superseding arbitration where the award has not been completed within the period allowed by the court;

(b) An order on an award stated in the form of a special case;

(c) An order modifying or correcting an award;

(d) An order staying or refusing to stay a suit where there is an agreement to refer to arbitration;

(e) An order filing or refusing to file an award in an arbitration without the intervention of the court;

(f) An order under section 64;

(g) An order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;

(h) Any order made under rules from which an appeal is expressly allowed by rules.”

28. Order 43 Rule 1 of the Civil Procedure Rules, 2010 makes provisions for orders from which an appeal lies as of right. It provides as follows-

“An appeal shall lie as of right from the following orders and rules under the provisions of section 75(1)(h) of the Act:

(a) Order 1 (parties to suits);

(b) Order 2 (pleadings generally);

(c) Order 3 (frame and institution of suit);

(d) Order 4, rule 9 (return of plaint);

(e) Order 7, rule 12 (exclusion of counterclaim);

(f) Order 8 (amendment of pleadings);

(g) Order 10, rule 11 (setting aside judgment in default of appearance).

(h) Order 12, rule 7 (setting aside judgment or dismissal for non-attendance);

(i) Order 15, rules 10, 12 and 18 (sanctions against witnesses and parties in certain cases);

(j) Order 19 (affidavits);

(k) Order 22, rules 25, 57, 61(3) and 73 (orders in execution);

- (l) Order 23, rule 7 (trial of claim of third person in attachment of debts);
- (m) Order 24, rules 5, 6 and 7 (legal representatives);
- (n) Order 25, rule 5 (compromise of a suit);
- (o) Order 26, rules 1 and 5(2) (security for costs);
- (p) Order 27, rules 3 and 10 (payment into court and tender);
- (q) Order 28, rule 4 (orders in proceedings against the Government);
- (r) Order 34 (interpleader);
- (s) Order 36, rules 5, 7 and 10 (summary procedure);
- (t) Order 39, rules 2, 4 and 6 (furnishing security);
- (u) Order 40, rules 1, 2, 3, 7 and 11 (temporary injunctions);
- (v) Order 41, rules 1 and 4 (receivers);
- (w) Order 42, rules 3, 14, 21, 23 and 35 (appeals);
- (x) Order 45, rule 3 (application for review);
- (y) Order 50, rule 6 (enlargement of time);
- (z) Order 52, rules 4, 5, 6 and 7 (advocates);
- (aa) Order 53 (judicial review orders).”

29. Order 43 Rule 1 sub-rule 2 of the Civil Procedure Rules provides that an appeal shall lie with the leave of the Court from any other order made under the said Rules. The foregoing means that unless the order sought to be appealed against falls under the orders provided for under Order 43 Rule 1 of the Civil Procedure Rules, leave to appeal must be obtained as envisaged under Section 75(1) of the Civil Procedure Act and Order 43 Rule 1 sub-rule 3 of the Civil Procedure Rules before such an appeal can be preferred. At the first instance, such leave has to be sought from the Court that made the order either at the time the order was made by way of an oral application or within 14 days from the date the order was made.

30. In the present case, the ruling sought to be challenged by way of the intended appeal arose from an application seeking the recusal of the Trial Judge. Such an application does not therefore attract an appeal as of right but only with the leave of the Court. No affidavit evidence was adduced that an application for leave to file an appeal against the ruling that was delivered on 17th December, 2020, was ever filed by the plaintiff. On the issue of the necessity to seek leave to file an appeal in certain instances, in the case of **Serephen Nyasani Menge v Rispah Onsase** [2018] eKLR the Court held that-

“The requirement is couched in mandatory terms and my view is that where leave to appeal is a pre-requisite before an appeal can be lodged, failure to seek and obtain the leave is fatal and consequently no competent appeal can be lodged against such an order. I find that is the situation in the present matter. The application before this court is for extension of time to bring an appeal out of time and is not one for leave to appeal. Such an application under the rules could only be made before the court that made the order.”

31. In light of the foregoing, this Court finds that the plaintiff had no right to file and serve a Notice of Appeal without first seeking leave of the Court to appeal against the ruling of 17th November, 2020. In the absence of such leave, the Notice of Appeal relied on by the plaintiff is incompetent and void *ab initio*.

Whether the plaintiff has satisfied the conditions to warrant grant of an order for stay of proceedings.

32. In order to satisfy the conditions to warrant grant of an order for stay of proceedings, the applicant has a duty to establish an arguable appeal and disclose a substantial loss that would result if the stay is declined. It must also be shown that the application was brought without undue delay. It is trite that an arguable appeal must be a competent appeal even though arguability should never be elevated to the realm of an appeal that must succeed. Having found that the plaintiff’s Notice of Appeal is incompetent, this Court finds that in the absence of a competent appeal, there cannot be an arguable appeal.

33. It is trite that Court orders are not given in vain. The order sought by the plaintiff in the application dated 17th December, 2020 is for stay of further proceedings in this suit pending the lodging, hearing and determination of the intended appeal to the Court of Appeal or for such other period as the Honourable Court may deem fit. It thus follows that without an appeal as has already been held hereinabove, there would

be no basis to grant an order for stay pending nothing.

34. The powers of this Court to stay proceedings pending appeal and its jurisdiction are derived from Order 42 Rule 6 of the Civil Procedure Rules as well as the inherent jurisdiction reserved in Section 3A of the Civil Procedure Act. In the case of **Global Tours & Travels Limited**, Nairobi HC Winding Up Cause No.43 of 2000, the Court laid down the factors that ought to be considered on whether or not to stay proceedings 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” (emphasis added).

35. In the case of **Kikambala Housing Estate Limited v Akash Devani & 10 others** [2020] eKLR, the Court when declining a similar application stated thus-

“This is what I get from the author of Halsbury’s Laws of England, 4th Edition. Vol. 37 page 330 and 332, on the threshold for stay of proceedings;

“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.”

36. In deciding whether to grant a stay of proceedings, a judicious and equitable balance between the principle that matters should be allowed to proceed towards conclusion and that justice should be expeditious to both parties has to be struck. It is noteworthy that the purpose of the intended appeal and the present application is an endeavor towards a choice of forum. Therefore, to grant stay in those circumstances would have the effect of defeating rather than facilitating justice.

37. A Court of law will only grant a stay of proceedings if there are exceptional circumstances, which must be deposed in an affidavit. The plaintiff has failed to demonstrate exceptional circumstances if any, in its affidavit in support of the application herein to warrant grant of an order for stay of proceedings. On the issue of substantial loss, this Court finds that the plaintiff has failed to demonstrate how it will suffer substantial loss if any, if the orders sought herein are not granted.

38. One last issue that leaves this Court perplexed is how the case herein was listed before another Judge on 17th December, 2020 whereas the staff at the Mombasa High Court Commercial, Civil & Admiralty Registry are fully aware that this Court granted the plaintiff *ex parte* orders under a certificate of urgency. It also turned out that this case was also listed before this Court on the cause list of 17th December, 2020 and the file was brought to this Court to enable it to proceed with the hearing of the application dated 3rd November, 2020, *inter partes*, as per the directions given by this Court on the said date.

39. To assuage the plaintiff’s fears of bias or impartiality, if indeed this Court was biased as against the plaintiff as it would like all and sundry to believe, this Court would as well have been biased as from the time it dealt with the plaintiff’s certificate of urgency dated 3rd November, 2020. After all, no other proceedings had taken place between then and the 17th of November, 2020, when the application came up for *inter partes* hearing. As at the time of writing this ruling, the plaintiff is still enjoying the *ex parte* orders given on 3rd November, 2020. It is evident that the plaintiff herein is crying foul when there is nothing worth crying about.

40. The upshot is that the application dated 17th December, 2020 is ill informed, and devoid of merit. The same is hereby dismissed with costs to the defendants.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 15TH DAY OF OCTOBER, 2021.

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 the 17th April, 2020 and subsequent directions, the ruling herein has been delivered through Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of-

Mr. Gikandi for the plaintiff/applicant

Mr. Kariuki Henry for the 1st defendant/respondent

Mr. Lelu for the 2nd defendant/respondent.