



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. E028 OF 2018**

**SYNGENTA EAST AFRICA LIMITED.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**SOY-KABATIK AGRI CENTRE LIMITED.....DEFENDANT/APPLICANT**

**RULING**

1. Through an earlier application dated 16<sup>th</sup> May 2019, the defendant/applicant herein sought orders inter alia, “that the trial judge, Honourable Lady Justice Wilfrida Okwany be pleased to disqualify herself from hearing /presiding over this matter.”
2. In a ruling delivered on 31<sup>st</sup> October 2019, this court declined to grant the orders sought in the said application.
3. Aggrieved by the said ruling the applicant herein filed an appeal being Nairobi Civil Appeal No. 568 of 2019 and the instant application dated 22<sup>nd</sup> November 2019 wherein it seeks orders for stay of these proceedings pending the hearing and determination of the appeal.
4. The application is supported by the affidavit of the applicant’s Managing Director, **Mr. Japheth Mibei**, and is premised on the main grounds that: -

***1. Defendant/applicant has lodged an appeal against the ruling issued by this Honourable court on 31<sup>st</sup> day of October, 2019 vide Nairobi Civil Appeal No. 568 of 2019 – Soy Kabatik Agri- Centre Limited versus Syngenta East Africa Limited.***

***2. The defendant/applicant has already lodged and served the record of appeal upon the plaintiff/respondent.***

***3. That the appeal pending before the Court of Appeal is arguable.***

***4. Unless these proceedings are stayed, the appellant/applicant/***

***Defendant stands to suffer injustice, irreparable loss and damage.***

5. The plaintiff/respondent opposed the application through the Grounds of Opposition dated 13<sup>th</sup> December 2019 wherein it states that the applicant has failed to satisfy the requirements for the grant of an order for stay of proceedings.
6. The respondent states that the issues raised in the appeal have no basis or foundation and cannot therefore be said to be arguable. It further avers that the application is a serious, grave and fundamental interruption of the plaintiff’s/respondent’s right to conduct its litigation towards the trial on the basis of the substantive merits of its case.
7. It is the respondent’s case that the applicant has failed to demonstrate that it will suffer any substantiate loss if the order staying proceedings is not granted.
8. The respondent further contends that there is no danger of the defendant’s appeal being rendered nugatory if the stay of proceedings sought is not granted and that the instant application interferes with the respondent’s right to access justice and to be heard without delay.
9. Parties canvassed the application by way of written submissions which I have carefully considered. The main issue for determination is whether the applicant/defendant had made out a case for the granting of orders of stay of proceedings.

10. Order 42 Rule 6 of the Civil Procedure Rules stipulates as follows: -

*(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.*

*(2) No order for stay of execution shall be made under subrule (1) unless—*

*(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and*

*(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.*

*(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.*

*(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.*

*(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.*

*(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”*

11. Ringera J. persuasively stated as follows in Nairobi HC Winding-up Cause No 43 of 2000 *Global Tours & Travels Ltd*: -

*“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)*

12. Guided by the above cited authority, I will now turn to consider if the instant application meets the threshold set for grant of orders of stay of proceedings.

13. It is to be noted that the conditions set for grant of orders of stay of proceedings are similar to those for the grant of stay of execution. The said conditions can be summarized as follows: -

**A. The application is brought without undue delay;**

**B. The court is satisfied that substantial loss may result to the applicant unless stay of execution is ordered; and**

**C. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him as been given by the applicant.”**

**Delay.**

14. In the present case, as I have already noted in this ruling, the decision appealed against was rendered on 31<sup>st</sup> October 2019 and the instant application filed on 22<sup>nd</sup> November 2019. I am satisfied that in the circumstances of this case, the application for stay proceedings was filed without unreasonable delay.

**Substantial loss.**

15. In *Kenya Shell Ltd V Kibiru* [1986] KLR 410 it is held:

*“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, it the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.”*

16. In *Antoine Ndiaye V African Virtual University* [2015] e KLR, Gikonyo J. cited the decision in *Andrew Kuria Njuguna V Rose Kuria* Nairobi Civil Case No. 224 of 2001(unreported) where it was held:

***“Coming to the substantial loss likely to be suffered by the applicant if the stay order is not granted, she was bound to place before the court such material and information that should lead this court to conclude that surely she stood a risk of suffering substantial loss moneywise or other, and therefore grant the stay”.***

17. In determining if the applicant will suffer any substantial loss if the stay of proceedings pending appeal order is not granted, it is necessary to note that the appeal in question is not in respect to the main subject matter of the dispute between the parties, which is the claim for the sum of Kshs 45,535,782.58. The appeal in question is against the impugned ruling in which this court declined to recuse itself from hearing the matter.

18. Looking at the nature of the pending appeal I am not satisfied that it will be rendered nugatory should the present application for stay of proceedings be disallowed. My take is that should the appeal be successful, the appellant/applicant will be able to continue or restart the case before another court. On flipside, should the appeal be unsuccessful, the respondent would have suffered loss of precious time in pursuing its claim for the money owed to it by the defendant.

19. In a nutshell, I am not satisfied that the applicant has established that it will suffer substantial loss if the orders sought are not granted.

#### **Security for costs.**

20. In *Kenya Commercial Bank Ltd v Sun City Properties Ltd & 5 Others* [2012] eKLR, it was held as follows: -

***“In an application for stay, there are always two competing interests that must be considered. These are that successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced,...In a bid to balance the two competing interest, the court usually make an order for suitable security for the due performance of the Decree as the parties wait for the outcome of the Appeal. I do not see, why the same should not be applicable in this case.”***

21. In the present case, no judgment has been entered against the defendant in which case, the respondent cannot be said to be in danger of being kept away from the fruits of its judgment. The respondent however argued that the defendant is on a mission to deliberately delay the speedy hearing of its case.

22. The respondent highlighted the instances of delay to have started immediately it filed an application for summary judgment way back in December 2018. It was the respondent’s submissions that the applicant has constantly frustrated the hearing of the application dated 3<sup>rd</sup> December 2018 by filing numerous applications. It was the respondent’s case that the numerous applications dated 25<sup>th</sup> January 2019, 16<sup>th</sup> May 2019 and the present application are aimed at preventing it from prosecuting its case.

23. In *Elite Cars Ltd vs Tafabab Maexa T/A Maisawa Cars & Sparepart Dealers* [2015] eKLR, the court cited Halsbury’s Laws of England 4<sup>th</sup> Edition Vol. 37 P. 330 where it stated: -

***“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 proceedings beyond all reasonable doubt ought not to be allowed to continue.”***

***The court, when dismissing the application for stay of proceedings, further held:***

***“I do not see anything so fundamental that may be breached if the lower court proceedings continue parallel to the appeal herein. It is a serious issue to stay proceedings which leads to backlog of cases. Unless proceedings in a lower court are to cause grave prejudice if they are undertaken, I think a court of law should not lightly halt a legal process through a stay order. I do not think that the current appeal will be rendered nugatory if the proceedings in the lower court are left to proceed.”***

24. Considering the nature of the respondents claim against the applicant in the main suit, which is a straight forward claim for a liquidated sum of money for goods allegedly sold and delivered, one can say that the respondent’s argument that the applicant is applying delaying tactics by filing numerous applications is not farfetched.

25. I also note that the even though the applicant submitted, at length, on the conditions for granting orders of stay of execution/proceedings, it was non-committal on the issue of security for costs. Having regard to the fears of deliberate delay expressed by the respondent I am satisfied that this is a proper case for the granting of orders for provision of security for costs.

26. In conclusion, I find that in order to balance the interests of the applicant to the right of appeal and the interest of the respondent to a speedy hearing of its case, it will be fair and just to allow the application for stay of proceedings herein pending appeal but on condition that the applicant deposits as security, the sum of Kshs 45,535,782.58 in a joint interest earning account to be held in a banking institution of repute in the joint names of counsel for both parties herein within 30 days from the date of this ruling failure to which the respondent will be at liberty to prosecute its case by fixing the main suit /application for hearing. The costs of this application shall abide the outcome of the main suit.

Dated, signed and delivered via Microsoft Teams at Nairobi this 16<sup>th</sup> day of July 2020 in view of the declaration of measures restricting court operations due to Covid - 19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.

W. A. OKWANY

JUDGE

**In the presence of:**

Mr. Ondieki for the plaintiff.

No appearance for the defendant

Court Assistant: Sylvia