



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & ADMIRALTY DIVISION**

**HIGH COURT MISC. CIVIL APPLICATION NO. 431 OF 2013**

**TRATTORIA LIMITED.....APPLICANT/RESPONDENT**

**VERSUS**

**JOANINAH WANJIKU MAINA....RESPONDENT/APPLICANT**

**RULING**

[1] This Ruling is in respect of the application dated **26 November 2014** for stay or proceedings pending the hearing and determination of an intended appeal from the Ruling delivered herein on **20 December 2013**. The application was filed by **Kilonzo & Company Advocates** for the Respondent/Applicant, **Joaninah Wanjiku Maina**, pursuant to the provisions of **Section 6 of the Civil Procedure Act**, Chapter 21 of the Laws of Kenya as well as **Order 42 Rule 6** and **Order 51 Rule 1 of the Civil Procedure Rules, 2010**, on the grounds that:

[a] **The Applicant is aggrieved by the Ruling of 20 December 2013 and has filed a Notice of Appeal in respect thereof dated 10 January 2014.**

[b] **That the Applicant had, through a letter dated 9 January 2014 requested for copies of the typed proceedings, but that the proceedings had not been supplied by the time the application was filed.**

[c] **That on 19 June 2014, the Respondent filed a Supplementary Affidavit sworn by Gaetano Ruffo, seeking to have the Applicant pay costs in the sum of Kshs. 1,002,228/= together with the attendant legal costs;**

[d] **That unless stay of proceedings is granted the intended Appeal will be rendered nugatory, and therefore that it is in the interest of justice that the order for stay of proceedings be granted;**

[e] **That the application has been filed without unreasonable delay and no prejudice will be suffered by the Respondent which cannot be cured by an award of costs.**

The Application is premised on the affidavit annexed thereto, sworn by the Respondent/Applicant on **26 November 2014**, in reiteration of the grounds aforementioned.

[2] On behalf of the Applicant/Respondent, a Replying Affidavit was sworn by its Managing Director, **Gaetano Ruffo**, and filed herein on **22 May 2015**, in which it was deponed that there are no proceedings

left herein capable of being stayed, and that the application is therefore misguided. It was further averred that the Applicant had not demonstrated any substantial loss that she stood to suffer; and therefore, that it would only be fair and just that the application be dismissed.

[3] The court has carefully considered the application and the affidavits filed in respect thereof in the light of the proceedings to date. This is a matter that was filed in **October of 2013** pursuant to section **36 of the Arbitration Act No. 4 of 1995** for the recognition and enforcement of the Arbitral Award delivered by **Justice (retired) Aaron Ringera** dated **31 January 2013**. That application was allowed and the orders prayed for granted on **8 November 2013**.

[4] Thereafter, the Applicant/Respondent filed a Notice of Motion dated **6 December 2013** seeking specific orders for repair of the suit premises. One of the prayers, namely prayer 3 thereof, was for an order that the expenses and costs to be incurred by the Applicant in repairing the premises together with losses incurred since the damage and destruction of the water storage tanks and the smoke extractor fan be assessed and be paid by the Respondent/Applicant, and that in default of such payment, the Respondent/Applicant's property be attached in execution. That application was heard *ex parte* and the orders sought granted after the court was satisfied that hearing notice had been served. A subsequent application dated **16 December 2013** by the Respondent/Applicant for the stay and setting aside of the *ex parte* order was what led to the Ruling and the ensuing orders of **20 December 2013** that are the subject of the instant application.

[5] That Ruling followed a visit and inspection of the suit premises and one of the Court's observations was thus:

**"This court's role is to proceed with proceedings after the Final Award is recognized by the court as judgment of the court. Having looked at the Final Award, this court is satisfied that the finding of the Arbitrator was that the Applicant was not to be interfered with by the Respondent in the possession and enjoyment of its premises."**

Accordingly, the court declined to set aside the orders issued on **11 December 2013** as had been sought by the Respondent/Applicant.

[6] Thereupon, the Applicant/Respondent filed a Supplementary Affidavit with a view of moving the court for the assessment and payment, by the Respondent/Applicant, of the repair charges in the sum of **Kshs. 1,002,228/=** as well as legal costs; hence the Intended Appeal. The Applicant is apprehensive that the payment of the aforesaid amount will occasion pecuniary hardship on her part, and that unless stay is granted she stands to suffer substantial loss. She relied on the cases of **George Gikubu Mbutia vs Petre Njeri Mugo & 3 Others [2015 eKLR]** and **Utalii Transport Company and 3 Others vs NIC Bank Limited [2014] eKLR** to support her arguments.

[7] Needless to state that under **Order 42 Rule 6 of the Civil Procedure Rules**, it is permissible for a party to apply for stay of proceedings pending the hearing and determination of an interlocutory appeal. Sub-rule 1 thereof provides that:

**"No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order..."**

Thus, the only conditions such an applicant needs to satisfy as set out in **Rule 6(2) of Order 42** aforementioned are:

**[a] that substantial loss may result to the applicant unless the order is made;**

**[b] that the application has been made without unreasonable delay.**

[8] Accordingly, although the court has the discretion to grant stay orders, the interests of justice require that the discretion be exercised judiciously and within the aforesaid parameters. The rationale for the

circumspection has been considered in various cases such as Machira T/A Machira & Co. Advocates vs East African Standard (No. 2) [2002] KLR 63, in which it was held that:

**"The ordinary principle is that a successful party is entitled to the fruits of his judgment or any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."**

Accordingly, in determining what the interests of justice require in the instant application, I will now proceed to determine whether the two conditions aforesaid have been met herein by the Respondent/Applicant.

[9] On the question of **substantial loss**, the Respondent/Applicant's case is that if the proceedings are not stayed, she will be liable to pay the substantial sum of **Kshs. 1,002,228/=**, exposing her to pecuniary hardship and loss. This argument has, of necessity to be weighed against the interests of the Applicant/Respondent in whose favour a decree has been passed following an Arbitral Award. It is noteworthy too that the Respondent has demonstrated by way of affidavit evidence, that it has proceeded and carried out the repairs in accordance with an order of the court herein and is now seeking reimbursement from the Respondent/Applicant in terms of that same order. In the circumstances, can it be said that the Respondent/Applicant stands to suffer **substantial loss**?

[10] What amounts to substantial loss was considered in the case of Kenya Shell Limited vs Kibiru [1986] KLR thus:

**"It is not sufficient by merely stating that the sum of shs.20,380 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damage it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgment. What assurance can there be of appeal succeeding? "**

[11] A careful perusal of the Supporting Affidavit of the Respondent/Applicant merely shows that she is averse to paying the sum of **Kshs. 1,002,228/=** because she considers it to be a substantial amount. It is noteworthy however that the sum is yet to be assessed and approved by the court, per the Applicant/Respondent's application dated **6 December 2013**. No specific details or particulars were presented before me to warrant the apprehension that the Respondent/Applicant risks suffering substantial loss. Accordingly, it is my considered view that no sufficient cause has been shown to lead to the conclusion that there is imminent substantial loss headed in the direction of the Respondent/Applicant that require averting by way of stay of proceedings, noting that her right of appeal must, of necessity be weighed against the right of the Applicant/Respondent to enjoy the fruits of the arbitral award, and that to deprive it of that right, it can only be for just cause.

[12] Moreover, it is now trite that the fact that the process of execution has been put in motion does not of itself amount to substantial loss. Neither is it the case that once an appeal is filed, it would follow that the same would be rendered nugatory by reason only of such filing. This point was made in the case of Silverstein vs. Chesoni [2002] 1 EA 296 thus:

**"What will happen if we do not grant the stay sought is that the appeal in the High Court will be heard and may well be determined. But when the appeal already lodged is heard and determined and, if it succeeded, what would automatically follow is that the proceedings in the High Court would have been rendered unnecessary, but an order of costs can be made to remedy that. However, the appeal in this court would not have been rendered nugatory."**

Accordingly, what would be rendered nugatory herein, if any, is the proposed assessment and subsequent payment, if made, but not the intended appeal. In any event, it was not demonstrated that the Applicant/Respondent would not be able to pay back the sums aforementioned or any costs arising from the envisaged further proceedings.

[13] As to whether the application has been made **without unreasonable delay**, it is noteworthy that, though the Notice of Appeal was filed on **10 January 2014**, the instant application was not filed until **26 November 2014**, more than 11 months from the date of the Ruling giving rise to the intended appeal. From the standpoint of the Respondent/Applicant, the delay is not so unreasonable as to disentitle her from an order of stay. She relied on the decision of the **High Court in Utalii Company & 3 Others vs NIC Bank Limited [2014] eKLR**, which I, however, find distinguishable in so far as it was in respect of an application for dismissal of the suit for want of prosecution pursuant to **Order 17 Rule 2(1) of the Civil Procedure Rules**.

[14] It is now well settled that what amounts to **unreasonable delay** for purposes of **Order 42 Rule 6, Civil Procedure Rules**, is dependent on the peculiar circumstances of each case. For instance, in **Jaber Mohsen Ali & Another Vs. PricillahBoit& Another [2014] eKLR** the court held thus:

**"Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter."**

[15] In the instant matter, no explanation was given for the 11 months' delay in filing the application for stay. In the case of **Abdulraham Adam Hassan vs. National Bank of KenyaKisumu HCCC No. 446 of 2001**, in which there was three months' unexplained delay, the court held the delay to be unreasonable; how much more so an unexplained delay of 11 months that is the case herein?

[16] In the light of the foregoing, it is my considered finding that on both scores, the instant applicant falls short of the parameters set out in **Order 42 Rule 6(2)** of the Civil Procedure Rules. Accordingly, the application dated **26 November 2014** fails and is hereby dismissed with costs.

**SIGNED, DATED AND DELIVERED AT NAIROBI THIS 13th DAY OF MAY 2016**

**OLGA SEWE**

**JUDGE**