



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 375 OF 2010**

**TELKOM KENYA LIMITED ..... PLAINTIFF**

**VERSUS**

**EM COMMUNICATION LIMITED**

**T/A POPOTE WIRELESS ..... DEFENDANT**

**RULING**

1. The Application herein is a Notice of Motion Application dated 20<sup>th</sup> January 2016. It is brought under section 1A, 1B, 1C and 3A of the Civil Procedure Act and Order 51 Rules 1 and 3 of the Civil Procedure rules. It is based on the grounds on the face of it, and the Affidavit sworn by **ISAAC GATHUNGU WANJOHI**.

2. The case of the Applicant is that, the Plaintiff suit herein was filed on 31<sup>st</sup> May 2010, the Summons to Enter Appearance were extracted on 2<sup>nd</sup> June 2010 and purportedly served upon the Defendant. Based on the Affidavit of service sworn by Vihaki Armstone on 6<sup>th</sup> July 2010, the Honourable Court entered judgment in default of appearance in favour of the Plaintiff and as against the Defendant. The Defendant applied to set aside the said Judgement vide an Application dated 18<sup>th</sup> February 2013 and filed in Court on 19<sup>th</sup> February 2013. The said Application was heard and dismissed on 31<sup>st</sup> July 2015. Being dissatisfied with the Ruling and decision of the Court, the Applicant, filed a Notice of Appeal on 11<sup>th</sup> August 2015. He stated that although they applied for copies of the proceedings to date, they have not received the same. Hence, the current Application to stay the proceedings pending the Appeal.

3. The Application was opposed vide grounds of objection filed in Court on 5<sup>th</sup> February 2016. The Respondent relied on the grounds that:

- ***The Defendant is guilty of laches having filed the said Application more than five (5) months after the delivery of the ruling on 31<sup>st</sup> July, 2015.***
- ***The Defendant has not demonstrated substantial loss to be suffered this being a money decree.***
- ***The Defendant has not furnished or offered to furnish security for the due performance of the decree as required by law.***

- ***The Defendant has not demonstrated sufficient cause to warrant this Honourable Court to grant a stay of further proceedings.***

4. Subsequently, the parties filed written submissions to disposed off the Application. I have considered the orders sought for in the Application, the grounds and Affidavit in support thereof and the grounds of objection. I have also considered the submissions filed by the parties.

5. The key issue for consideration is whether the Applicant has satisfied the legal principles for granting an order for stay of proceedings and or orders.

6. The general legal principles that govern the grant of an order for stay of proceedings are well established. In the case of; ***Silvestein vs Cheson (2002) eKLR 867***, the Court held that, the Applicant who is seeking for such an order for stay must satisfy the court that:

- ***the intended appeal is arguable and not frivolous and;***
- ***unless the Court grants an order of stay the intended appeal if successful, will be rendered nugatory.***

In the case of ***Lucy Waithera Kimanga & 2 others vs. John Waiganjo Gichuru (2015) eKLR*** the Court added other considerations that:

- ***The need for expeditious disposal of cases and the impediment the stay would place on the right of the Respondent to have the case determined expeditiously;***
- ***The interest of justice in the case, the pros and cons of granting or not granting the order;***
- ***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.***

These principles were also upheld in the case of; ***Global Tours & Travel Ltd; Nairobi HC Winding Up Cause No. 43 of 2000.***

7. In the instant case, the issue of service of summons upon the Defendant is contested. The Applicant submitted that, if the Application herein is not allowed then the Appeal will be rendered nugatory. As a result, execution will proceed against the Directors of the Defendant's company, who will even be held personally liable. That, the Plaintiff has already filed an application dated 16<sup>th</sup> November 2012 for enforcement of the Decree.

8. The Applicant argued that, the Appeal has merit and high chance of success, because, it is based on the grounds inter alia that, the Applicant has been deprived the enjoyment of a fair hearing guaranteed under

Article 50 of the Constitution of Kenya. The applicant will therefore be prejudiced as there was no proper service of the summons. In addition, the default Judgment requires the Defendants to pay a colossal sum of Kshs.26, 488,770. Yet, if paid, it may not be recovered as the Plaintiff has not demonstrated the ability to refund the decretal sum should the Defendants intended appeal succeed.

9. The Applicants invited the Court to consider the decision in the case of ***Africa Sarari Club vs Safe Rentals Ltd, C.A Nairobi Civil Application No. 53 of 2010***, where the Court held that, following the enactment of the overriding objectives, the Court should take into account the substantive justice both in appellate and trial state.

10. The Respondent in opposing the Application submitted that the Applicant is guilty to laches having filed the Application more than five (5) months after the delivery of the Ruling. They relied on the case of ***Kenya Union of Printing, Publishing, Paper Manufactures & Allied Workers v Jam Grac Investments (2014) eKLR***. They submitted further that, in the money decrees, it is not normal for the appeal to be rendered nugatory. They relied on the case of ***Kenya Shell Limited v Benjamin Karuga***

**Kibiru & Another (1986) eKLR** where the Court stated that,

*“if there is no evidence of substantial loss to Applicant, it would be a rare case when an appeal would be rendered nugatory... Substantial loss in its various form, is the corner stone of both jurisdictions for granting a stay... therefore without this evidence it is difficult to see why the Respondents should be kept out of their money”.*

11. They also relied on the case of **Winfred Nyawira Maina v Peterson Onyiego Gichana (2015) eKLR** where it was held:

*“The Substantial loss under order 42 rule 6 of the Civil Procedure Rules especially where money decree is involved lie in the inability of the Respondent to pay back the decretal sum should the appeal succeed. The legal burden of proving this inability lies with the Applicant and it does not shift”.*

12. They further argued that, the Applicant has no evidence before the Court to prove that, the Plaintiff will not be able to refund the decretal sum in the event the Appeal succeeds. Similarly, the Applicant has not offered security for the due performance of the Decree as a show of good faith. They referred to the cases of **Machira t/a Machira & Co. Advocates vs. East African Standard (No. 2) (2002) KLR 63** and **Mary Mwaki Masinde vs County Government of Vihiga & 2 Others (2015) eKLR** where it was held that:

*“the requirement for furnishing security is aimed at cushioning the successful litigant that should the appeal fail, there would be no difficulty in enforcing the order or executing the decree. The Applicant has not offered any security and has not even stated that it is willing to provide security should the Court order for provision of such security. The Applicant has come to Court as though stay of execution will be granted as a matter of course..... the readiness of the Applicant to provide security that shows the element of good faith on the part that Applicant in seeking the Court’s exercise of discretion. The Respondent has even said that the Applicant is interested in the delaying payment and that is why it has not offered security”.*

Finally the Respondent submitted that, the Applicant has not demonstrated sufficient cause to warrant the exercise of the Courts discretion in granting the orders sought. They relied on the case of **Auto selection (k) Ltd and 2 Others v John Namasaka Famba (2016) eKLR**.

13. I have considered all the facts herein and the law applicable and I find that, in the light of the provisions of Article 159 of the Constitution of Kenya 2010, the Courts and tribunals established by and under the said Constitution are required to exercise it’s judicial authority guided by the principles inter alia that:

- *Justice shall be done to all, irrespective of status.*
- *Justice shall not be delayed.*

14. Similarly the provisions of Article 50 of the same Constitution provide that:

*“Every person has the right to have any dispute that can be resolved by the Application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body”, and*

15. Article 48 provides for Access to Justice and states that:

*“The state shall ensure access to Justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”*

16. Section 1 A and 1 B of Civil Procedure Act provides a proviso that the overriding objective is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes. Hence, the

disposal of the disputes in an expeditious way.

17. In summation, I find that, although the Applicant may have not explained the delay of five months in filing the Application, based on the principles of a fair hearing and access to justice, I am inclined to allow the stay of proceedings herein. On the other hand, the Respondent is entitled to an expeditious disposal of the case. They need to be assured that, as the Applicant is allowed to escalate their matter upwards, and as time ticks, they will still be able to realise the fruits of their judgment, if the Appeal fails. Hence, it is an issue of balancing the scale. The orders I shall give must in the interest of justice protect the interest of both parties.

18. All in all, I allow the Application in the following terms:

- *The Applicant shall deposit the decretal sum into an interest earning bank or financial institution in the joint names of the advocates of the parties within 30 days of the date of this order.*
- *There be a stay of executing pending the compliance with order (1) above.*
- *Upon compliance with order (i) above, there be a stay of execution pending the hearing of Intended Appeal.*
- *In default to comply with order (i) above, within the stipulated time frame, the Notice of Motion Application shall stand dismissed forth with costs.*
- *The costs shall abide the outcome of the Appeal.*
- *Each party be a liberty to apply.*

**READ, DELIVERED AND DATED, AT NAROBİ THIS 19th DAY OF JULY 2016.**

**G. L NZIOKA**

**JUDGE**

**Ruling Read in open court in the presence of:**

Miss Muhoro for Plaintiff

Miss Muhoro for Munyu for Defendant

Teresia – Court Clerk