



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 478 OF 2004**

**GIRO COMMERCIAL BANK LIMITED.....PLAINTIFF**

**- VERSUS -**

**BENLUCKS (K) LIMITED.....1<sup>ST</sup> DEFENDANT**

**AMRATLAL BHANJI LAXMAN.....2<sup>ND</sup> DEFENDANT**

**MRS. INDU LAXMAN.....3<sup>RD</sup> DEFENDANT**

**RULING NO. 2**

1. The defendants have sought leave of this court to appeal to the Court of Appeal, in respect to the Ruling dated 2<sup>nd</sup> February 2016.
2. The defendants have also asked the court to certify that a point of law of general public importance was involved.
3. Thirdly, the defendants have requested the court to order that all further proceedings in this case be stayed until the appeal was heard and determined.
4. The plaintiff does not oppose the application for leave to appeal. Accordingly, this court has no reason to reject the said application. Therefore, the defendants are granted leave to appeal.
5. As regards the request that the point of law arising in the case be certified as one of general public importance: the basis for that request is that the court would be called upon to determine issues touching on the power of the High Court to dismiss suits for want of prosecution, and the right of defendants to a fair hearing and a just and expeditious determination of the suit. For that reason, the defendants asserted that the appeal was not frivolous.
6. It has not been suggested that the appeal was frivolous. Indeed, if I had come to the conclusion that the appeal was frivolous, I would have rejected the application for leave to appeal.
7. On the other hand, the fact that an appeal was not frivolous does not imply that the issues raised in the appeal involved matters of general public importance.
8. The courts are called upon very regularly to determine whether or not a suit ought to be dismissed for want of prosecution. Such issues are determined on the basis of the applicable law and the circumstances

of each case.

9. Issues concerning the rights to;

*a) fair hearing; and*

*b) just and expeditious determination of suit,*

come into play in every case. Again, when determining those issues, the court is called upon to give due consideration to the applicable law, together with the circumstances prevailing in each such case.

10. I hold the considered view that the defendants have failed to prove any particular or unique legal issue which can be construed as a matter of “*general public importance?*”

11. It is nothing more than speculation to suggest that the Ruling in this case may open the floodgates for similar applications, seeking to reinstate the numerous suits that had been dismissed because of the indolence of plaintiffs.

12. As I already indicated above, each case is determined on the basis of its own facts and circumstances. I am not at all convinced that there is any basis for the conclusion that, just because this case was reinstated, numerous other suits which had been dismissed for want of prosecution would be reinstated.

13. As regards the question of stay of the proceedings pending appeal, the defendants said that the appeal would be rendered nugatory if there was no stay.

14. The defendants relied on **SAMMY MUTUA MAKOVE (COMMISSIONER OF INSURANCE) Vs STATUTORY MANAGER UNITED INSURANCE COMPANY LIMITED & 198 OTHERS CIVIL APPLICATION No. 343 of 2009**. In that case, the court made the following observation;

*“On the question whether the appeal would be rendered nugatory, if stay of proceedings is not granted, we recognize that the grounds of appeal include grounds based on bias and prejudice. The applicant apprehends that, if the trial continues, there will be no fair trial as the trial Judge had made expressions which betray his mind and indicate that the said Judge would ultimately dismiss the petition?.”*

15. In comparison, the defendants in this case have asserted that they would not get a fair trial because of the delay that the plaintiff has been guilty of.

16. There is no suggestion that the Judge had made any expressions which could be deemed to betray his mind, that he would determine the suit against the defendants.

17. Therefore, the authority cited by the defendants is wholly distinguishable from the case before me.

18. The other authority cited by the defendants was **CHESILYOT ENTERPRISES LIMITED Vs CO-OPERATIVE BANK (K) LIMITED Hccc No. 2020 of 1995**.

19. In that case the learned Judge rejected the application for stay of proceedings.

20. Towards the end of her Ruling, Lesiit J. quoted the following words from the Court of Appeal’s decision in **KENYA COMMERCIAL BANK LIMITED Vs BENJOH AMALGAMATED LIMITED & ANOTHER, CIVIL APPEAL MISC. APPL. No. NAI. 50 of 2001;**

*“We remind ourselves that each case depends on its own facts and we find it difficult to be persuaded that the appeal on the facts of the present case would be rendered nugatory if stay is not granted. The appeal may be heard, if successful, the proceedings in the superior would be determined in accordance therewith. The hearing in the superior court might have been*

***unnecessary, for which appropriate costs can be ordered but the appeal will not have been worthless?.***

21. Lesiit J. was handling a case which was already 10 years old, but which was yet to be heard. Nonetheless, the learned Judge said;

***“Considering the special circumstances of the case, that it is an old matter filed 10 years ago, that it is yet to be heard, I am satisfied that nothing will be lost to either parties to the suit if the matter proceeds to hearing. On the other hand, given the age of the case, and the fact that the case has not been heard, all parties in this suit stand to suffer prejudice if the proceedings are halted at this stage. Delay of hearing and determining a suit causes prejudice to all parties in terms of loss or lapse of memory of the witnesses and/or loss of documents and such like important factors. The prejudice will be made worse if the appeal before the Court of Appeal delayed for some time?.***

22. The case before me was filed in 2004, which is about 12 years ago. If there is a further delay in hearing it, whilst the appeal was being determined by the Court of Appeal, much more serious prejudice would be caused to all parties, in the event that the Court of Appeal were to finally order that the case proceeds to trial.

23. On the other hand, if the Court of Appeal were to ultimately find that the case ought not to have been reinstated, yet the trial had been finalized, the only downside would be that the judicial time spent at the trial was wasted.

24. On a balance, I would rather risk wasting some judicial time by proceeding with the trial sooner, rather than later when the parties recollection would have been lost.

25. In effect, I am satisfied that the defendants have not proved that if the proceedings were not stayed, they would suffer substantial loss.

26. Accordingly, I find no merit in the application for stay of proceedings pending the hearing and determination of the appeal. I therefore reject the application for stay of these proceedings.

27. As the application has succeeded partially, whilst the other part has failed, I order each party to pay their own costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 1<sup>st</sup> day of September 2016.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of**

*Miss Mwasau for Munyu for the Plaintiff*

*S. Amin for the 1<sup>st</sup> Defendant*

*S. Amin for the 2<sup>nd</sup> Defendant*

*S. Amin for the 3<sup>rd</sup> Defendant*

*Collins Odhiambo – Court clerk.*