



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: KOOME, M'INOTI & MURGOR, J.J.A.)**

**NYERI CIVIL APPLICATION NO. E017 OF 2020**

**BETWEEN**

**RIFT VALLEY AGRICULTURAL CONTRACTORS LIMITED (RVACL).....1<sup>ST</sup> APPLICANT**

**MAVIPA FARMERS LIMITED (MFL).....2<sup>ND</sup> APPLICANT**

**AND**

**AGRICULTURAL FINANCE CORPORATION (AFC).....1<sup>ST</sup> RESPONDENT**

**NATIONAL BANK OF KENYA LIMITED (NBK).....2<sup>ND</sup> RESPONDENT**

**(Application for stay of proceedings pending the hearing and determination of an intended appeal  
from the Orders of the High Court of Kenya at Nakuru (Honourable Lady Justice J.N. Mulwa)**

**dated 24<sup>th</sup> day of September, 2020 in H. C. C. S. No. 21 of 2009)**

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**RULING OF THE COURT**

1. By a ruling delivered on 24<sup>th</sup> September, 2019 in **Nakuru High Court Civil Suit No. 21 of 2009** the learned Judge, **(J.N. Mulwa, J.)** who was seized of the matter, summarily struck out the 1<sup>st</sup> and 2<sup>nd</sup> applicants **Further, Further Amended Plaintiff** (amended pleadings) dated 7<sup>th</sup> January, 2019 which she found was not filed with the leave of the court, among other orders. The applicants have filed the instant motion on notice which is dated 9<sup>th</sup> December, 2020 seeking an order of stay of proceedings in the aforesaid suit pending the hearing and determination of an intended appeal which they filed on 1<sup>st</sup> February, 2012 being **Nakuru Civil Appeal E006/2021**. Moreover, the main suit was set down for hearing on 13<sup>th</sup> April, 2012 before the High court in Nakuru.

2. By the applicants' supporting affidavits and written submissions, a brief overview discernible is that; the applicants had borrowed development loans from the 1<sup>st</sup> respondent and **LR No Nakuru/Mun/Block 6/23** and **Kitale/Mun/211/5/X1** were charged as security. The applicants alleged financial misconduct, fraud, collusion among other misconduct on the part of the 1<sup>st</sup>, 2<sup>nd</sup> and the applicants' former shareholders/directors for the loss of money being the loan proceeds that were advanced to the applicants amounting to a sum of Kshs. 18 million, 24 million and Kshs. 19.2 million. By a plaintiff that was perhaps amended about three (3) times as it is titled "**further, further amended plaintiff**", the applicants sought several orders for refund of the said loan proceeds, damages, and other prayers that included interrogation of the respondents' officers and production of documents.

3. Although the applicants do not disclose when the pleadings closed, the record of the proceedings shows that the pleadings closed on or about March, 2009 when the 1<sup>st</sup> respondent filed its defence. The application before the High Court was brought under the Vacation Rules and the applicants were seeking an order for; issuance of witness summons; several specific orders of discovery; and inspection and production of documents under the custody of the respondents as per the provisions of the Civil Procedure Rules. Alongside those pleadings, the applicants had included the said amended pleadings and while ostensibly relying on an *ex parte* order issued on 10<sup>th</sup> January, 2019, the applicants filed witness statements and further list of documents.

4. Alas! The applicants state that they were surprised when they were served with an application dated 4<sup>th</sup> February, 2019, in which the

respondents' advocates were seeking to strike out the amended pleadings that they had filed on 7<sup>th</sup> January, 2019 as well as setting aside the ex parte orders that were issued on 10<sup>th</sup> January, 2019. In a quick rejoinder to the said application and in order to regularize any irregularities as regards the filing of the said amended pleadings, the applicants filed an application now properly seeking leave to file the further, further amend the plaint. This application is dated 12<sup>th</sup> February, 2019.

5. The applicants add that notwithstanding the presence of that application filed on 12<sup>th</sup> February, 2019 the learned trial Judge proceeded to strike out the applicant's **Further, Further Amended Plaint** *suo motto* without subjecting the same to due process while fully aware of the pending application for amendment of pleadings. In striking out the pleadings, the judge posited that the further, further amended plaint offended all known legal provisions on amendments of pleadings as provided for under **Order 8 of the Civil Procedure Rules**. That there was no application to amend and no leave granted to the applicants to so amend.

6. Aggrieved by the said ruling, the applicants filed a notice of appeal and record of appeal and pending the hearing thereto, they sought an order staying further proceedings on the grounds that they have an arguable appeal. The grounds stated in support of the application and the supporting affidavit sworn by **Benson Thairu Karanja** are lengthy, repetitive and longwinded; the grounds alone are in 38 paragraphs while the supporting affidavit contains 70 paragraphs. The documents filed by the applicant run to three volumes and we think it is opportune for us to remind counsel and parties of the necessary documents that are required in an application such as this one as provided under the **Court of Appeal Civil Appeal Practice Directions** of 2014.

7. That said, the gist of the matters stated therein is that, the Judge is faulted for striking out the applicants, amended pleadings which were filed without leave of the court. Alongside the said pleading, there were other pleadings that suffered the same fate namely; an affidavit sworn by **Benson Thairu Karanja** on 7<sup>th</sup> January, 2019 filed with the said pleadings, witness statements, list of witnesses and list of documents slated for discovery. According to counsel if the said hearing was to proceed, their case will be highly prejudiced.

8. It is noteworthy that the respondents did not oppose this application, however, that does not lessen the burden placed on this Court. We have a duty to exercise our discretion under the provisions of **Rule 5(2)(b)** of the **Court of Appeal Rules** based on cogent reasons so as to avert hardship or injustice in a matter. This is what the Rule states: -

**“Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may— in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”**

See the case of **Ismael Kagunji Thande vs. Housing Finance Kenya Ltd** Civil Application No. Nai. 157 of 2006 (unreported).

**“The jurisdiction of the Court under Rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are well settled. For an applicant to succeed, he must not only show that his appeal or intended appeal is arguable but also that unless the Court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory.”** **Githunguri vs. Jimba Credit Corporation Ltd.** No. 2 [198] KLR 838.

9. We have considered this application, submissions and authorities cited by the applicants which was canvassed by way of written submissions by the Court considering the same without appearance of the parties pursuant to the Court of Appeal Practice Directions to mitigate the spread of COVID - 19 Global Pandemic. We acknowledge at the outset, that a court will sparingly and only in exceptional circumstances grant an order to stay of proceedings which essentially is an interruption of the other parties' right to conduct their hearing. The principles that guide the Court on whether or not to stay proceedings are further bolstered by a persuasive text written by the learned authors of; **Halsbury's Law of England, 4th Edition. Vol. 37** page 330 and 332, as follows: -

**“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.”**

10. We now wish to consider this application within the set-out principles to answer the twin issues of whether the applicant has an arguable appeal and secondly whether the appeal if successful will be rendered nugatory without an order of stay of proceedings. It is common ground that the applicant had filed the said amended pleadings without first obtaining leave of the court. It is trite law that once pleadings have closed, further pleadings can only be filed with the leave of the court. **Order 8 Rule 1 (1) of the Civil Procedure Rules** provides that: -

**“A party may, without the leave of the court, amend any of his pleadings once at any time before the pleadings are closed.”**

**Order 2 Rule 13 of the Civil Procedure Rules** provides:-

**“The pleadings in a suit shall be closed fourteen days after service of the reply or defence to counterclaim, or, if neither is served, fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with.”**

Also, in the case of **Kiru Tea Factory Company Ltd vs. Stephen Maina Githiga & 13 others [2019] eKLR** the Court of Appeal while dealing with an application that was amended without leave and the amended application filed without leave had this to say: -

**“The common thread from the decisions cited above is that where leave of court is required, any pleading filed without leave is a nullity and liable to be struck out.”**

11. Pleadings in this case closed nearly ten (10) years ago, well before the applicants filed the amended pleadings. It is for these reasons that we are not entirely persuaded of the arguability of the applicants’ intended appeal based on the Judge’s exercise of discretion to strike out the amended pleadings that were filed without leave of the court. Even on the nugatory aspect, we are not persuaded that the applicants’ appeal will be rendered nugatory if it succeeds and if the proceedings are not stayed. This is because the applicants’ suit has not been heard, and they will have an opportunity to adduce evidence during the hearing.

12. Accordingly, the applicants have not satisfied the twin principles to warrant an order of stay of the proceedings and in the event, the application is hereby dismissed. We make no order as to costs as the application was not opposed.

**DATED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF MARCH, 2021**

**M. K. KOOME**

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**JUDGE OF APPEAL**

**K. M’INOTI**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**