IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, RAWAL, MARAGA,JJ.A.)

CIVIL APPLICATION NO. NAI 30 OF 2012 (UR 20 OF 2012)

BETWEEN

JETLINK EXPRESS LIMITED ……..…APPLICANT

AND

EASTAFRICA SAFARI AIR EXPRESS LIMITED ……..RESPONDENT

(An application for stay of execution from the Ruling and Order of the High Court of Kenya at Nairobi, (Mabeya, J.) dated 20th January, 2012

in

H.C.C.C. NO. 73 OF 2007)

****

RULING OF THE COURT

The notice ofmotiondated 3rd February,2012 arises from the Ruling and Order of the learned Judge of Kenya *(Hon. Mabeya, J.)* dated 20th January, 2012 given in ***H.C.C.C. No. 73 of 2007***. It is expressed to be premised under ***Rule 5 (2) (b),Rule 41, Rule 42 Subrule (1) and Rule 49 (1)*** of Court of Appeal Rules and ***Section 3A and 3B of the Appellate Jurisdiction Act (Cap 9)***. It seeks following prayers:-

1. ***That this Application be certified as being urgent.***

2. ***That there be an interim stay of Ruling and Orders of the Superior Civil Court (Hon. Mr. Justice Mabeya) in Nairobi Milimani Law Courts (Commercial and Admiralty Division) High Court case Number 73 of 2007 between Jetlink Express Limited –vs- East African Safari Express Limited made on the 20th day of January, 2012 pending the hearing and determination of this Application.***

3. ***That there be stay of the Ruling and Orders of the Superior Court (Hon. Justice Mabeya) in Nairobi Milimani Law Courts (Commercial and Admiralty Division) High Court case Number***

73 of 2007 between Jetlink Express Limited –vs- East African Safari Express Limited made on the 20th day of January, 2012 pending the hearing and determination of the intended appeal.

4. ***That the costs of this application be costs in the Cause.***

The application is supported by the grounds set forth on its face and on the supporting affidavit of ***Captain ElkanaMugalaviaAluvale*** sworn on 3rd February, 2012. The grounds in support can be reproduced for completion of record.

1. ***That the Applicant/Appellant has an arguable appeal with overwhelming chances of success as demonstrated by its draft Memorandum of Appeal annexed to the Affidavit in Support of this Motion.***

2. ***That the Applicant's intended Appeal to this Court may be rendered nugatory unless the Order of stay of the decision of the Superior Court delivered on 20th January, 2012 is granted.***

3. ***That the Applicant is willing to abide by such term(s) as this Court may deem just in granting the order of stay of execution.***

4. ***That substantial financial loss may be suffered by the Applicant during the dependency of the intended Appeal unless the Order of stay of the said Orders is granted.***

5. ***That the Respondent will not suffer any prejudice if the orders sought herein are granted since there is sufficient security for costs and undertaking as to damages already given by the Applicant in the Superior Court.***

6. ***That it is in the interests of justice and fairness that the orders ought herein are granted.***

7. ***That the Orders of the Superior Court made on the 20th day of January, 2012 are prejudicial to the Applicant's case before the Superior Court since the same presupposes that Judgment will ultimately be entered against the Applicant and that therefore the Respondent is entitled to security for the sum of the Counterclaim even before Judgment is given.***

This being an application under ***Rule 5(2) (b)*** of the Court's Rules, the applicant has to satisfy two trite requirements to obtain those orders, i.e. the intended appeal is arguable and secondly the intended appeal if it succeeds would be rendered nugatory if the orders are not granted.

The applicant has annexed a draft Memorandum of Appeal to put forth grounds which it contends are arguable. They are:

1. ***The Learned Judge erred in reopening and varying an Order of a Court of equivalent and concurrent jurisdiction.***

2. ***The Learned Judge erred in setting aside a portion of the Order of The Hon. Mr. Justice Kimaru made on 18th November, 2009 relating to Security for costs when there was no application in that regard before him.***

3. ***The Learned Judge erred in finding and holding that new and different issues may be argued and canvassed in an application for variation of an Order even when that Order is one for Stay of Proceedings pending Appeal.***

4. ***The Learned Judge erred in considering the principle that a successful party should not be hindered from enjoying the fruits of his/her Judgment when in fact there was no Judgment in favour of the Respondent on its Counter Claim; and this wrongly influenced him in reaching an erroneous decision.***

5. ***The Learned Judge erred in applying a strange and unprecedented test of "balancing the interest of both parties" and disregarded the time tested legal principle that an appellant' Appeal may not be impeded by the Court appealed from or otherwise rendered nugatory, and consequently imposed Security for a Claim in the absence of Judgment or decree in favour of the Respondent.***

6. ***The imposition of a condition requiring the Plaintiff to deposit the sum or the Claim in an interest bearing account or provide a Bank Guarantee for the same was onerous, oppressive and had the effect of putting the Order of Stay of Proceedings outside the reach of the Plaintiff, and has the effect of substantively denying the Appellant an Order of Stay of Proceedings.***

7. ***The Learned Judge erred in interfering with the Order of 18th November, 2009 and thereby acted either without or in excess of jurisdiction, wrongly invoked the Court's inherent power and acted capriciously and whimsically.***

8. ***The Learned Judge erred in considering and being influenced by an assumption that Cases in the Court of Appeal take long to be determined and erroneously concluded that this could be a basis for setting aside portions of a valid Order of the Superior Court staying proceedings and substituting security for costs with security for a sum claimed under a Counter Claim without proof and without a hearing in prosecution of the Counter Claim.***

9. ***The Learned Judge was biased against the Plaintiff by equating the Plaintiff's right of Appeal with the Defendant's right to sum under its Counter Claim instead of the Defendant's right to prosecution of the Counter Claim.***

10. ***The learned Judge erred in ignoring an official search of the respondent Company dated 9th August, 2011 and holding on the "balance of probability" that Mr. Kivindyo was a director of the Respondent in 2011, but failed to note that the respondent had an opportunity to contradict the Appellant's further replying Affidavit sworn by ElkanaMugalavaiAluvale on 15th August, 2011 but did not do so, neither did it raise or address the issue in Submissions before the Court, and thereby reached a conclusion which was patently wrong on the facts of the Case.***

11. ***The Learned Judge erred in finding and holding that draft ledgers of a Company which are not audited accounts and signed by Directors of a Limited liability Company can be admitted in evidence against the company.***

12. ***The learned Judge erred in holding that Affidavits which offend Order 19 Rule 3 (1) of the Civil Procedure Rules may nevertheless be admitted into evidence where the adverse party has answered the same and thereby wrongly admitted the Affidavit of George Kivindyo into evidence contrary to the Law and without reasonable basis, to the Appellant's prejudice.***

The substratum of this application is The Further Amended Plaint filed in H.C.C.C. No. 73 of 2007. We shall reproduce the pertinent claims made by the applicant in the suit.

a. ***The sum of US Dollars 4,068,091.86***

b. **…….**

c. ***A permanent injunction restraining the Defendant, its Directors, servants, agents and others claiming through it from instituting, filing, commencing, advertising or otherwise prosecuting any Winding Up Petition against the Plaintiff in relation to the disputed business debt of US Dollars 902,143 or any other sum related to the business relationship between the Plaintiff and the Defendant.***

d. ***An account of moneys profits and benefits made by the Defendant pursuant to the said Bilateral Interline Traffic Agreement of 15th November, 2005 between the Plaintiff and the Defendant.***

e. **……..**

f. **……**

The facts leading to the filing of the plaint are in brief as under.

By a Bilateral Interline Traffic Agreement the parties before the courts, both being operators of Scheduled Air Transport business, agreed to share their respective operations and businesswhichagreement eventually resulted in strained relationship and was discharged between the parties by a Settlement Agreement. The applicant then filed the suit giving rise to this application. The respondent filed a defence and counterclaim of U.S. $ 902,143.00 and also issued winding up notice against the applicant. The applicant denied the averments made in the counterclaim on grounds of lack of bona fide, fraud and malice. An application to restrain the respondent to institute and in any manner to prosecute the winding up cause was granted by ***Hon. Azangalala, J.*** vide his ruling dated 10th July,2007.

Thereafter, on an application from the respondent, the amended plaint was struck out by ***Hon. Kimaru, J.*** vide his Ruling dated 2nd October, 2009 who further allowed the application from the applicant staying proceedings of the suit pending appeal vide his ruling of 18th November,2009 on terms that the applicant deposits Kshs.7,500,000/- in a joint interest bearing accountin the names of firms of two advocates for the parties. This term wascomplied with. The appeal No. 281 of 2009 was not heard. In themeantime the respondent also filed an application dated 14th July,2011 seeking variation ofthe order of 18th November,2009 in that the applicant be ordered to give additional security to the respondent's claim of U.S.$902,143 plus costs, that the applicant's undertaking as to damages be secured by a deposit of funds or a bank guarantee in the sum of the claimed sum; orin alternativethat the respondent's application seeking summary judgment be heard immediately. This application was granted and the order was varied to the extent that the order of stay granted to continue in force on condition that the applicant provides security in the sum of U.S.$ 902,143.00 by way of either depositing that sum in an interest bearing joint account or by a bank guarantee.

We shall reproduce the enforceable part of the Ruling to understand the gist of this application:

> ***"…… the plaintiff did not deny that large sums of the plaintiff's funds were being transferred to the Director's personal accounts.***
>
> ***That leaves this court to conclude that the said transfers were not for the benefit of the company but an outright act of stripping the assets of the plaintiff."***
>
> ***"I am satisfied that the defendant has made a case for the exercise of the inherent jurisdiction of this court and the power donatedby Section 1A of the Civil Procedure Act to facilitate the just and proportionate resolution of the dispute between the parties and therefore interfere with the order of 18 November, 2009 of Hon. Kimaru, J. I hereby vary that order to the extent that the stay granted therein pending the hearing and determination of the appeal shall continue to be in force on the condition of the plaintiff providing security in the sum of US$ 902,143 by way of either depositing the same in an interest bearing account in the joint names of the Advocates on record for the parties or by bank guarantee. The cash deposit or bank guarantee is to be effected within 45 days of the date hereof.***

For the avoidance of any doubt, my view is, to have the plaintiff give security for the claim and at the same time have its Kshs.7.5 million security for costs still in place may be oppressive. Accordingly, that part of the order of 18/11/09 requiring the deposit of Kshs.7.5 million for security for costs is hereby set aside and the sums held in the joint deposit is to be released to the plaintiff upon the plaintiff depositing or giving the guarantee ordered herein. In default of compliance, the order of stay of 18/11/09 shall lapse."

Being aggrieved, the applicant filed Notice of Appeal dated 3rd February,2012 against the said Ruling dated 20th January,2012 and the application on hand.

Mr. Lubulellah the learned counsel for the applicant relied on some undisputed facts averred in the affidavit of George Kivindiyo(referred to as Mr. Kivindiyo) sworn on 14th July, 2011 in support of the application of the respondent. He conceded that during the joint ventures between the parties they had mutual directors on board who resigned after the Settlement Agreement was reached on 20th January, 2007. Mr. Kivindiyo was not a signatory of the Settlement Agreementbut he resigned. However, it was emphasized that he with one ***Mr.Chellarao,*** an employee of the respondent, acknowledged a debt of U.S. $1,041,372.00 on 15th January,2007 during the process of negotiating the separation agreement. At this stage, it is important to note that clause 2.4 of the Settlement Agreement stipulating obligations of the applicant does not reflect the said sum. The applicant has disputed the said debt which is one of the claims made in the counter-claim and has averred that the said acknowledgment did not exist as at the date of the Settlement Agreement dated 20th January,2007. It was reiterated that Mr. Kivindiyo is not a director of the respondent as per the notification dated 9th August,2011 from the Registrar of Companies and thus was not competent to swear the affidavit. It may be relevant to reproduce the said notification to show who were the directors of the respondent as per the latest annual returns filed in 2007 and its share capital.

RE: EAST AFRICAN SAFARIS AIR EXPRESS LIMITED

I refer to your letter dated 8th August, 2011.

According to the company's 2007 annual returns (latest filed) the directors/shareholders of the above mentioned company are indicated as:-

Names:	***Address:***	***Shares***
East African Air Safaris Limited.	***P O Box 28321 Nairobi***	***99***
Anthony AmbakaKegode	***P O Box 28321 Nairobi***	***1***
TOTAL		***100***

The nominal share capital of the company is Kshs.10,000/- divided into 100 ordinary shares of Kshs.100/= each.

Yours faithfully,

Assistant Registrar of Companies.

Mr. Lubulellah, relying on the said information, contended that despite the aforesaid facts, Mr. Kivindiyo has sworn the affidavit as a director and has deponed on the financial affairs and internal accounts of the applicant which are averred to have been sent to him by ***"an anonymous person".***Mr. Kivindiyohas made several statements from his beliefs and has further commented on the accounting process of the applicant. Those averments were relied upon by the learned Judgeafter accepting that he is not shown as a director of the respondent, at page 17 of the ruling (page 32 of the record), found that ***"I will believe Mr. Kivindiyo's averment that on balance of probability, he was a director of the defendant"***

The applicant posed the questionwhetherthose accountswhose source was notonly not disclosedbut were not audited or even signed by anyone couldbe relied upon as proof of the indebtedness or the fact that the company's assets are being wasted and stripped by the shareholders?

We were urged to re-evaluate these facts, consider the contentions raised and then to hold that they are arguable grounds.

Mr. Lubulellah, further submitted that the applicant has complied with the order of Hon. Kimaru, J. when he granted stay of proceedings pending the hearing anddetermination of ***C. A. No. 281 of 2009.*** This order could not be reviewed or revisited by a court of concurrent jurisdiction as the earlier order was *resjudicata*because the issue of security for the claim should have been raised and canvassed simultaneously with the issue of security for costs. Contention was raised that the learned Judge misapprehended the scope and spirit of ***Explanation (4)*** of ***Section 6*** of ***Civil Procedure Act***, which stipulates:

> ***"Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."***

Mr. Lubullelah submitted that the learned Judge sat on appeal on the ruling and order of a court of concurrent jurisdiction when he exercised his inherent power to vary the order in favour of the respondent who had not exercised its option to appeal against the said order. The exercise of court's inherent power could not be exercised to vary a lawful order pending an appeal by the applicant. However, it was so done relying on the basis of the facts and beliefs which were,first of all deponed by a person whose description is not truthful and secondly without disclosing their authentic source. To make the matter worse, the learned Judgewhile granting the impugned order assumed that there was a judgment in the sum claimed in the counter-claim and ordered the deposit of that sum, which merits the intervention of this court.

With the above submissions,Mr. Lubulellahasked us to hold that the grounds raised are arguableand have good chances of success and proceeded to submit that if the application is not granted the appeal shall be rendered nugatory. He further contended that the order of deposit of entire claim of the respondent pending appeal shall substantially disrupt the operation of the applicant that its compliance is beyond the reach of the applicant and shall result in injustice to the applicant as the respondent shall proceed to prosecute its counterclaim denying the applicant an opportunity to prosecute its claim which was struck out by the ruling of Hon. Kimaru, J. Though the applicant is expanding its operation and showing business growth and it has the operational and financial liability like any other business. ***Caltex Oil***

Kenya (now Total Marketing Kenya Ltd. –V- Evans NjiriWanjihia(Civil Application No. 190 of 2009) and ***Oraro&Rachier –V- National Bank of Kenya Ltd. [1999] 1 EA 236,*** were relied upon and we were urged to allow the application with the undertaking that the applicant shall comply with terms found suitable by this Court.

Mr. KiraguKimani, the learned counsel for the respondent, filed skeleton submissions which he highlighted. He invited us to look at the ruling of the learned Judgecarefully and holistically so that it can be discerned that the judgment is very well reasoned andcorrect. According to him, the learned Judge appropriately considered and dealt with the affidavit of Mr. Kivindiyo along with the issues raised by the applicant, found corroboration in the applicant's affidavit in reply from the applicant and thereafter came to the right conclusion to rely on the affidavit of Mr. Kivindiyo. There is no rule of law that an unaudited accounts could not be relied upon to see the financial position of a company. The term ***"director"*** has many meanings whichis not confined to a non- executive director as shown in the records of the Registrar of Companies. There are executive directors who are employed by the company to run its operations. There is no dispute that Mr. Kivindiyo had been associated with both the parties at the administrative level during subsistence of Bilateral Agreement.The facts deponedwere approached and considered by the learned Judge as per the guidance given in Article 159 of the Constitution and the same should be upheld by this Court. Thus as per Mr. Kimani, facts like the applicant being stripped and the financial constraint faced by the applicant are uncontested facts. These facts came to knowledge of the respondent only after the Ruling of Hon. Kimaru, J. and every court has power to look at its order afresh to see that justice is done to both the parties. The security of costs ordered by Hon. Kimaru, J. was for the claim of the applicant and not for the security of counter-claim of the respondent. These two issues are absolutely separate and distinct. The ground of *Res Judicata* does not have any space in this matter.In summing up on the issue of arguable ground, counsel submitted that no serious questions have been raised to be argued in the intended appeal. All the grounds argued are answered comprehensively in the Ruling making the intended appeal frivolous and an abuse of the court process.***(See In re Muge[1991]KLR 51).***

In the alternative, Mr. Kimanisubmitted that even if it can be taken that the appeal is arguable, the refusal to grant the application shall not render it nugatory. Its result shall be that the application for judgment by the respondent shall be heard with both parties before the court, with automatic right of appeal and if the appeal No. 281 of 2009 is successful, the applicant's claim shall be heard and determined. In any event, no prejudice shall be suffered if this application is rejected,because what is expected of the applicant is to offer security and not to pay the claim.Moreover, as per the affidavit of Captain Aluvale, the financial position of the applicant is sound and its assets are growing exponentially since the suit was filed. If so, there is no problem for the applicant to comply with the order. No compelling reasons are adduced before the court forthe grant of the orders sought in the application. He urged us to adopt the principles stated in the case of ***Deepak C. Kamani and Another –V- Kenya Anti-Corruption Commission and 3 Others, [Civil Application No. NAI. 302 of 2008(UR 199/2008)],*** namely:-

> ***"Under the CPR the position is fundamentally different. As rule 1.1 makes clear the CPR are*** *'new procedural code with overriding objective of enabling the court, to deal with cases justly'* ***The problem with the position prior to the introduction of the CPR was that often the courts had to take draconian steps, such as striking out the proceedings, in order to stop a general culture of failing to prosecute proceedings expeditiously. …… That led to litigation which fought furiously on both sides: on behalf of the claimants to preserve their claim, and on behalf of defendants to bring the litigation to an end irrespective of the justice of the case because of failure to comply with the rules of the court."***

The Court shall also consider, if it intends to set aside the discretionary order of the learned Judge the principles laid down in the famous case of ***Shah –V- Mbogo and Another [1967] EA.116*** namely:- whether the grant of the order sought for shall avoid injustice or hardship resulting from accident, inadvertence or excusable error or mistake.

Mr. Lubulellah in a short rejoinder contended that the only directors who could represent a company are the ones who are on official record of the Registrar of Companies, that right of automatic appeal cannot be an answer to sustain an order which is oppressive and capable of stifling the operation of a business. He brought to the fore that the averments made in the replying affidavit filed by Mr. Kivindiyo in response to this application is also suffering from the same defects of the earlier one, i.e. the averments made without disclosing the source thereof.

We have anxiously considered the application, affidavits in support and that in opposition, the record of the High Court upto filing of the application, submissions made and authorities relied by both counsel.

The suit before the learned Judge consists of plaint, defence,counter claim and its defence. The claims in plaint and those averred in the counter-claim arise from the parties' operations based on their Bilateral Interline Traffic Agreement and the Settlement Agreement after which the parties parted ways. The plaintiff's/applicant's claim of U.S. $ 4,033,701.70 was struck out by Hon. Kimaru, J. but a stay of its execution was granted vide his ruling dated 18th November, 2009 and the terms imposed are complied by the applicant. The appeal ***C.A.No. 281/09***against the ruling striking out the claim is pending before this Court. We also note that no appeal is filed against the ruling of granting stay of proceedings.

In the background of the above facts and submissions, we shall have to find whether there are arguable ground in the intended appeal and whether,if the interim relief sought is not granted, the intended appeal shall be rendered nugatory.

The application which is under challenge before us was filed, for all practical purposes, due to delay in getting the appeal No.281 of 2009 heard, and also on basis of the accounts received by Mr. Kivindiyo from an undisclosed source.

The said accounts annexed to the supporting affidavit of Mr. Kivindiyo have played a major role in determining the application and Ruling of the learned Judge under challenge.

It is common ground that the source of those accounts is unknown, and that they were neither audited nor signed.

Paragraphs 16 to 34 of the supporting affidavit of Mr. Kivindiyoare based on the said accounts and the beliefs of the deponent. Mr. Kivindiyohad further expressed his opinion on the said accounts without showing his capacity to do so or the advice which he received for such belief. The affidavit in addition to those accounts has deponed to further facts concerning the operations of the applicant without disclosure of their source.

In response the applicant filed replying affidavit sworn by ElkanaMugakaiAluvale (referred to as 'Aluvale') a director, on 21st July, 2011. Hehas denied those allegations, and has made counter allegations on financial position of the respondent. In addition, many achievements of the applicant have been averred.

The applicant has further asserted that allegation of stripping of assets is totally malicious and baseless.

These facts were before the learned Judgewhich wereconsidered coupled with submissions.

On the issue of credibility and reliance to be placed on the contents of supporting affidavit without disclosing the source, the learned Judge has this to say

> ***"… and that Mr. Kivinydo was not one of the directors, there were no records to show the status of the defendant as at the time Mr. Kivindyo swore his affidavit in 2011. I will believe Mr. Kivindyo's averments <u>that on balance of probability, he was a director of the defendant in 2011</u>."***

The date of this notification has not been noted in the ruling which we have done in earlier part of this ruling.

Be that as it may be, the learned Judgetook into account provisions of Order 19 Rule 3 (1) of the Civil Procedure Rules and commented that ***"such an affidavit would ordinarily be unacceptable"*** but considering the averments in the replying affidavit that the accounts are draft internal general ledgers (paragraph 43), those documents relied in supporting affidavit were found by the learned Judgeto be emanating from the plaintiff. It was further observed and that they were the correct reflection of the applicant's operations and thus the learned Judgeaccepted and admitted the averments of Mr. Kivindyo made in his supporting affidavit.

The learned Judge also rejected the averments in paragraph 46 of the replying affidavit (specified hereinbefore) on the basis that the exhibit only showed deposit of US$ 700,000/= and not US$ 900,000/= as averred.

The applicant's averments were rejected further on the basis of failure to put forth audited accounts and aforesaid misleading averments.

With those observations, it was found that the applicant failed to address the pertinent issues raised, that is, were there massive fund transfers from the applicant to its director's private accounts and were such transfers legal, proper and justified? The court then found:-

> ***"Accordingly, I am satisfied from the evidence on record that contrary to the averments in the Replying and Further Affidavits, the directors of the plaintiff in making the transfers set out in the Affidavit of Mr. Kivindyo, were stripping off the plaintiff of its liquid assets, money."***

We pause here and note that the only issue which the learned Judge focused on werethe averments of transfer of applicant's funds to the private account of its only two shareholders, and afterwards a conclusive finding was made, before the trial, that **"these transfers were unjustified and tantamount to stripping of the assets of the company."**

In our considered opinion, Ruling has*ex facie* failed to consider facts as regards the financial position and operational progress of the applicant. It has also *ex facie*failed to consider whether the transfers shown from the affidavit of the respondent was meant to frustrate the outcome of the counter-claim. It has also *ex facie*failed to consider the fact that the counter-claim as well as the claim (if the appeal succeeds) are awaiting hearing and determination by the Court. Moreover, the court also *ex facie*failed to consider the averments of dire financial position of the respondent made by the applicant to weigh the position of both parties before granting the order.

We need not emphasize that while giving a discretionary order, the court has to weigh the equity and justice from both sides of the parties.

It is also trite that the first limb of the grant of orders under ***Rule 5 (2) (b)*** of this Court's Rules is deemed to have been adequately met, if there is only one such arguable ground. We shall thus not consider at this stage other grounds raised including that of *res judicata*.

The conclusive determination of stripping of assets culminating to the order of deposits of the full claim in the counter-claimis in our considered view, an arguable issue to be heard and determined under the circumstances of this case. This issue in our opinion is the basis of most of the grounds raised in Memorandum of Appeal.

We shall now move to the second limb of the principles of ***Rule 5 (2) (b)*** that is, whether the appeal shall be made nugatory if the order prayed is not granted.

We do not need to reiterate the submissions made on this issue. It is true to the extent that though the applicant has stated that it is not in a dire economic position and that they have assets and cash flow to run the operation, it has failed to show the accounting documents. On the other hand, it is stressed that the deposit of the full claimed sum converted into around Kshs.80 million will stifle the operation of the applicant's business with adverse effect to all concerned. Moreover, it cannot be ignored that the respondent has yet to prove its claim andif the applicant's appeal ***(C.A. 281/09)*** succeeds it needs to oppose the claim of the applicant.

We also take cognizance of the fact that the sum ordered to be deposited is a large sum by any standard and in addition, we shall take support on the factors to be considered as stipulated in ***Sec. 1A & 1B*** of Civil Procedure Act and ***Sec. 3A & 3B*** of the Appellate Jurisdiction Act.

This court in the case of ***E. MuriuKamau and Another –vs- National Bank of Kenya Ltd.(2009) eKLR***, observed as under.

> ***"The courts including this Court in interpreting the Civil Procedure Act or the Appellant Jurisdiction Act or exercising any power must take into consideration the overriding objective as defined in the two Acts. Some of the principle aims of the overriding objective include the need to act justly in every situation; and the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of all is maintained and that as far as it is practicable to place the parties on equal footing."***

The learned Judge, under the circumstances of the matter, in our considered view, failed to look at proportionality and need to have a level playing ground for the two parties before it. To that extent, without further comments or observations on the ruling of the learned Judge, we are of definite view that this court's intervention is required at this stage.

In the premises we allow the application and grant an order of stay of execution in terms of prayer 3 of the application on condition that the applicant depositsKshs. Fifteen Million (Kshs.15,000,000/=) in the interest earning joint bank account in the names of the respective advocates within 60 days. The sum of Kshs.15,000,000/= is inclusive of the Kshs.7,500,000/= which is already deposited vide the earlier order of the learned Judge. In default, the application shall be deemed to have been dismissed.

We give liberty to either party to apply.

The costs of the application to abide the result of the appeal.

Orders accordingly.

Dated and delivered at NAIROBI this 25th day of May2012.

E. M. GITHINJI

……..

JUDGE OF APPEAL

K. H. RAWAL

……

JUDGE OF APPEAL

D. K. MARAGA

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR