



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NAIROBI**

**(CORAM: OMOLO, TUNOI & O’KUBASU, JJ.A.)**  
**CIVIL APPLICATION NAI 99 OF 2005 (33/2005 UR)**

**BETWEEN**

**JOHNSONS WAX (E.A.) LIMITED ..... APPLICANT**

**AND**

**JOHN MBARI MBURU ..... 1ST RESPONDENT**

**SUSAN WANGUI MBARI ..... 2ND RESPONDENT**

**TRADE HOUSE AFRICA LIMITED ..... 3RD RESPONDENT**

***(Appeal from an order of the High Court of Kenya of Nairobi  
(Mr. Justice Kuloba) dated the 16th day of July, 2003***

**in**

**H.C.C.C. NO. 2328 OF 1999)**

**\*\*\*\*\***

**RULING OF THE COURT**

This is an application by way of notice of motion brought under Rule 5(2)(b) of the Court of Appeal Rules (the Rules) in which the applicant, **JOHNSONS WAX (E.A.) LIMITED** seeks an order that:-

***“Further proceedings in the High Court Civil Case Number 2328 of 1999 be stayed pending the determination of the appeal on the grounds that the applicant has valid grounds of appeal with prospects of success and that if a stay of further proceedings is not granted and the hearing commences and evidence taken, the applicant shall be prejudiced as the appeal will have been rendered nugatory. The trial is scheduled for the 17th October, 2005.***

***And for an order that the costs of and incidental to this application abide the result of the said appeal.”***

The application is supported by a sworn affidavit of Antoine Bea Likound, the General Manager of the applicant company.

What has given rise to the application is a Chamber Summons filed in the superior court pursuant to **Order VI Rules 8 and 13** of the Civil Procedure Rules in which the applicant (as the defendant in the superior court) sought the striking out of various paragraphs of the plaint. That application was placed before Kuloba, J. on 16th July, 2003, who, without hearing the parties made the following order:-

***“Having looked at the request for particulars and the particulars supplied pursuant thereto, the***

***Chamber Summons dated 29th April, 2003 is oppressive and vexatious; and it is struck out as an abuse of the judicial process.”***

Being dissatisfied by that order of Kuloba, J. the applicant filed an appeal to this Court being Civil Appeal Number 224 of 2004. That appeal was lodged in this Court’s Registry on 5th October, 2004. After lodging the appeal, the applicant filed an application in the superior court seeking a stay of further proceedings. That application was filed in the superior court on 17th November, 2004 and was placed before Kubo, J. who dismissed it for various reasons one of which was the unexplained delay of 1½ years before filing and presenting the application in the superior court. In dismissing the application, Kubo, J. stated inter alia:-

***“As noted earlier I have not been furnished with any valid explanation for the defendant’s delay of 1½ years before filing the present application for stay of the High Court Proceedings. At any rate if the appeal succeeds, the defendant can be compensated through an order for costs if the court deems it fit.”***

It was after the foregoing order of the High Court that the applicant filed the present application for stay of proceedings. The principles for granting a stay of execution, an order of injunction or an order of stay of further proceedings under Rule 5(2)(b) of the Rules of this Court are well known – see **BUTT V. RENT RESTRICTION TRIBUNAL [1982] KLR 417, J.K. INDUSTRIES V. KENYA COMMERCIAL BANK LTD & ANOTHER [1987] KLR 506.** In exercising its unfettered discretion, the Court must be satisfied that the appeal or intended appeal is an arguable one, that is, that it is not frivolous, and that if an order of stay or injunction as the case may be, is not granted the appeal or the intended appeal would have been rendered nugatory by the refusal to grant the stay or injunction sought.

*Mr. Khawaja*, for the applicant, submitted that if we refused to grant a stay of proceedings, the appeal would be rendered nugatory because the applicant will be forced to go on with the trial without the particulars sought. He pointed out that Kuloba, J. did not hear any submissions before making the order. Finally, *Mr. Khawaja*, informed us that the suit in the High Court was not ready for trial since there are no discoveries and pre-trial preliminaries.

*Mr. Saende*, for the respondents, while conceding that pre-trial preliminaries, like discoveries, have not been concluded, was of the view that these could be dealt with before 17th October, 2005 when the suit is listed for hearing in the superior court. We have considered the rival submissions by counsel appearing for the parties, the background to this matter especially the observation of Kubo, J. in his ruling of 4th March, 2005 as regards the delay in filing the application for stay of further proceedings and we are of the view that this is not a proper case in which to order a stay of proceedings. We would echo what this Court said in **MALDE TRANSPORTERS LIMITED VS. BASHIR ARAB MOHAMED AND FATUMA HAJI HASSAN (SUING AS THE ADMINISTRATOR OF THE ESTATE OF ARAB MOHAMED AHMED AND JOHN NGANDU KINUTHIA – Civil Application No. NAI. 155 of 2005** in which it was said:-

***“We would think that every litigation is inconvenient to every litigant in one-way or another. Also, no one in his right senses enjoys being sued and ip so facto no one cherishes litigation of any nature unless it is absolutely necessary. With respect, we accept litigation is expensive and no litigant would enjoy the rigours of trial. The aftermath of vexatious and frivolous litigations is normally taken care of by costs. The discomfort of litigation would not certainly render the success of the intended appeal nugatory if we do not grant the application sought. If the learned Judge is eventually found wrong on appeal, and the applicant succeeds in its intended appeal, then the Orders so made by the learned Judge would be quashed and the applicant would be compensated for in costs.”***

In this application, we have been told that the suit in the superior court might not even proceed to hearing. It is important to note that the applicant herein intends to appeal against the ruling of Kuloba, J. in which the learned Judge dismissed the applicant’s chamber summons which sought the striking out of certain paragraphs in the plaint. If the suit proceeds to hearing, the paragraphs which were sought to be struck out will remain and will be dealt with during the trial. Should the applicant eventually succeed in his intended

appeal, the proceedings in the superior court would have been rendered unnecessary, but an appropriate order for costs can be made to remedy that.

We may add that even assuming that the applicant has an arguable appeal can it be said that the intended appeal would be rendered nugatory in the event that it is eventually allowed? We do not think so.

In **SILVERSTEIN V. CHESONI [2002] 1 KLR 867 at pp.873-4** this Court in dealing with an application for stay of proceedings had the following to say:-

***“On the second limb regarding whether the applicant’s intended appeal would be rendered nugatory if it succeeded and we refused to grant a stay, we must point out that the appeal whose success would be rendered nugatory if we do not grant a stay is the appeal already filed in this Court, not the appeal pending in the High Court. On this aspect of the matter we think we must follow the decision of this Court in the case of Kenya Commercial Bank Ltd v Benjoh Amalgamated Ltd & Another Civil Application No. NAI.50 of 2001 (29/2001 UR). That was also an application to stay the proceedings in the High Court pending the hearing and determination of an intended appeal to this Court. In its ruling regarding whether the intended appeal’s success would be rendered nugatory if a stay was not granted, the Court stated as follows:***

***“..... The onus of satisfying us on the second condition, that unless stay is granted, the intended appeal would be rendered nugatory, is also upon the applicant. In our view, it has unfortunately failed to discharge this onus. 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 a stay is not granted. The appeal may be heard and, if successful, the proceedings in the superior court 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.”***

***These remarks aptly apply to the application before us. 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, determined and, if it succeeded, what would automatically follow is that the proceedings in the High Court would have been rendered unnecessary, but an appropriate order for costs can be made to remedy that. However, the appeal in this Court would not have been rendered nugatory.***

***The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5(2)(b) of the Court’s own rules. But as the court pointed out in the case we have already cited, each case must depend on its own facts and the facts of this particular case before us, as were the facts in the earlier case, do not show that the appeal will be rendered nugatory if we do not grant a stay.”***

In view of the foregoing we are satisfied that this is not a proper case to grant a stay of further proceedings. Accordingly, we dismiss the application with costs.

***Dated and delivered at Nairobi this 7th day of October, 2005.***

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**E.O. O’KUBASU**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**