REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO 612 OF 1996

MACHIRA T/A MACHIRA & CO ADVOCATES.....APPLICANT

VERSUS

EAST AFRICAN STANDARD.....DEFENDANT

RULING

The applicant filed a notice of motion dated March 14, 2002 to seek an order that there be a stay of the proceedings pending the hearing and determination of an intended appeal against a ruling delivered on November 15, last year. The grounds cited for this application are that a notice of appeal was filed last year and unless an order of stay is granted substantial loss will be suffered.

It is said for the applicant that unless a stay of proceedings is ordered the case may be set down for "formal proof thus rendering the …. intended appeal nugatory"; and that if the intended appeal succeeds after the "formal proof" done, the parties will have wasted the court's time and incurred unnecessary expenses. The applicant is ready and willing to abide by any condition that the court may impose as the price of the order for stay.

In saying all these things, the applicant cited *Waruru v Oyasi*, Civil Application NAI 223 of 2000, in which the Court of Appeal said in respect of a stay of further proceedings, namely, assessment of damages scheduled for the stated date, pending the hearing and determination of an appeal:

"It cannot be gainsaid that unless a stay is granted the already lodged appeal will be rendered nugatory. If the process of assessing damages goes on and if the appeal in question is allowed that process would be an exercise in futility".

Now clearly, the Court of Appeal by saying this was not purporting to take away the discretion of the court – a discretion which that Court had itself acknowledged and emphasized as a judge's "undoubted discretion". What the court said above must be read in the context of peculiar facts it had found in that case. The general context of the above excerpt should not be lost sight of.

In addition, in the exercise of the court's discretion in a judicial fashion, the court cannot legitimately look at a matter on one assumption alone, favouring one party and ignoring the other party. In applications of this nature there is no rule of law or practice or sound principle requiring a court to start and proceed on initial presumption that the appeal or intended appeal shall succeed and so *prima facie* the applicant is

the preferred party. There would be no sound principle to back up such a presumption. The matter must remain in the discretion of the court always exercised judicially, ie circumspectly and considering all the material circumstances of the case and excluding everything that is extraneous, and never shutting one's eyes to the interests of any party.

As the appellant or intended appellant exercises his right of appeal nothing ought to be done which will jeopardize his interests incase his appeal is successful, or which may be a futile endeavour trying to take further steps; but on the reverse side of things, from the point of view of the party who is, at least for the time being, successful to a point, nothing should be done to unduly delay or deny expeditious justice to him in the event that the appeal or intended appeal in question fails. In bleak economic times, a weakened currency might change the matrix in hours or overnight, so that delayed further proceedings as appeal or intended appeal is awaited (which may well be unsuccessful) may have adverse effects so that assessment of damages after a failed appeal may likewise be an exercise in futility and costs a poor solace.

To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion.

The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge. This is one of the fundamental procedural values which is acknowledged and normally must be put in effect by the way we handle applications for stay of further proceedings or execution, pending appeal.

Of course, in the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in the courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.

This means that in whatever we do in the civil courts, we must, so far as is practicable, ensure that the parties fight it out on level ground on equal footing, attempt to minimize and save costs, ensure expeditious and fair disposal of the case in hand, allotting to every case an appropriate share of judicial resources as account is taken of the need to allot those resources to other cases, and the way a case is dealt with must be proportionate to (a) the amount of money involved, (b) the importance of the case, (c) the complexity of the issues, and (d) the financial position of the respective parties. In the exercise of any power under any rule, or in its interpretation, we must strive to give effect to this overriding objective; and it is the duty of the parties to help the court in the furtherance of the overriding objective to yield justice and fairness.

So, in justice and fairness, when a party has been found by a court to be in the right at whatever stage in the litigation, he should ordinarily have access to the consequences of that judicial finding and decision and enjoy his rights as so found and determined. Any subsequent decision of the court which tends to impede the normal flow of justice, by suspending the enjoyment of the consequential benefits of one's success can only be rendered in exceptional circumstances after an exercise of great caution and finding that suspension is necessary in justice and fairness.

In this regard, this process means that in order for an unsuccessful party to obtain a suspension of further proceedings or execution, he must satisfy the court on affidavit or on some other proper evidential material, that substantial loss may result to him out of all proportions in relation to the interests of justice and fairness, unless suspension or stay is ordered and the parties' positions so regulated and ordered that injustice is averted.

In attempting to convince a court that substantial loss is likely to be suffered so that whatever he intends to achieve by his intended recourse to some other authority will be nugatory if ultimately he prevails, the applicant is under a duty to do more than merely repeating to the court words of the relevant statutory rule or general words used in some judgment or ruling of a court in a decided case cited as a judicial precedent to guide. It is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory. That will not do.

If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded decree or order, before disposal of the applicant's business (eg appeal or intended appeal).

Sometimes litigants seek to go to a higher court or to ask for review, and simultaneously ask for further steps or execution to be stopped while they go forth, for reasons of expressing their unhappiness with what has been decided. Where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay merely on the ground of annoyance to feelings. Indeed, remote contingencies would not warrant the court's interference with the ordinary course of justice and the process of law.

Moreover, a court will not order a stay upon a mere vague speculation; there must be the clearest ground of necessity disclosed on evidence. Commonly, the applicant may obtain a stay of further proceedings or execution, if he shows facts which point to a conclusion that to allow execution or further proceedings to go ahead before appeal concluded would let an impecunious party to pocket and squander or pilfer what may be needed in restitution if the appeal succeeds and is allowed. Another common factor in favour of the applicant is whether to proceed further or to execute may destroy the subject matter of the action and deprive the appellant or intended appellant of the means of prosecuting the appeal or intended appeal. So, really, stay is normally not to be granted, save in exceptional circumstances.

As a further consideration of the principle of justice and fairness, the court abhors inexcusable delay in seeking an order for a stay. Such delay is an aspect of injustice and abuse of judicial process. The other party may take further steps in reliance on the belated applicant's inactivity prolonged without good reason. Costs might be incurred in the meantime. There might be a change of position to the prejudice of the other party.

I have not found it necessary to consider the requirement of security for due performance in this case, because the application is failing. The application is failing because the applicant merely repeats the words of rule that substantial loss will be suffered, but does not set out factual particulars of the kind of loss that might be suffered. The application comes late, without a good reason. This is a fit case for the ordinary principle to apply. There is nothing to bring it within the exception. In justice and fairness the plaintiff should be allowed to move on. If the appeal is successful, what is done here will be undone without serious or any prejudice to any party. We do not know what the assessment of damages may bring. So there is no basis on which one can speak of loss of a substantial nature.

For these reasons, the application is dismissed with costs.

It is so ordered.

Dated and delivered at Nairobi this 23rd day of May, 2002

R.C.N KULOBA

JUDGE