



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**LAND CASE NO. 156 OF 2016**

1. ROCKSTER INVESTMENT LIMITED.....1<sup>ST</sup> PLAINTIFF  
2. JOEL W. OKWACHI SC.....2<sup>ND</sup> PLAINTIFF  
3. AMBROSE OTIENO RACHIER.....3<sup>RD</sup> PLAINTIFF  
4. JOHN HARUN MWAU.....4<sup>TH</sup> PLAINTIFF  
5. DR. MARX OKONJI.....5<sup>TH</sup> PLAINTIFF

**VERSUS**

**BOFA INVESTMENT LIMITED.....DEFENDANT**

**RULING**

1. By a Ruling delivered herein on 21<sup>st</sup> April 2017, this Court allowed the Plaintiffs' application seeking for Judgment to be entered against the Defendant and proceeded to grant the following Orders:-

**a. *The defence and counterclaim filed herein are hereby struck out***

**b. Judgment is hereby entered for the Plaintiff against the Defendant as prayed in the Plaintiff**

**c. The Defendant will pay the costs of the suit as well as the costs of this application to the Plaintiffs.**

2. Aggrieved by the said decision the Defendant has since lodged a Notice of Appeal herein signifying its intention to appeal the entire decision to the Court of Appeal.

3. At the same time the Defendant has filed the present application before me dated 4<sup>th</sup> May 2017 in which they pray that this Court be pleased to order a stay of execution of the decree and orders granted on the said 21<sup>st</sup> April 2017 pending the hearing and determination of the Appeal to be filed as against the said Ruling.

4. The Application is supported by the annexed affidavit of Ngure Kairu, a director of the Applicant sworn on 4<sup>th</sup> May 2017 and is premised on the following grounds:-

- i. That the Application has been made without delay;**
- ii. That the Applicant is dissatisfied with the Ruling of this Court and intends to appeal;**
- iii. That the Court issued interim orders of stay of execution on 21<sup>st</sup> April 2017 for 14 days pending the filing of this application and the 14 days are almost lapsing;**
- iv. That the Applicant will suffer substantial loss if stay pending appeal is not granted as the financial capability of the respondents to pay back the money if the intended appeal is successful is not known;**
- v. That if the orders being sought are not granted, the intended appeal by the Applicant will be rendered nugatory if the Appeal succeeds;**
- vi. That the Applicant is willing to deposit money as security in a joint interest earning account of both counsels for the parties; and**
- vii. That it is in the wider interest of justice that the application be allowed.**

5. In a Replying Affidavit sworn on 17<sup>th</sup> May 2017, the 5<sup>th</sup> Plaintiff/Respondent Dr. Marx Okonji has on his own behalf and on behalf of the other Plaintiffs opposed the grant of a stay of execution. It is the Plaintiffs' case that the order extracted herein is a money decree/order. The Plaintiffs consequently aver that the Defendant/Applicant has failed to disclose or establish any factors which show that it would suffer substantial loss or create a state of affairs that would irreparably affect or mitigate the very essential core of any intended appeal.

6. In addition, the Plaintiffs aver that the Defendant/Judgment debtor has not disclosed any factors or reasons why the Plaintiffs are not entitled to the fruits of the Judgement. Citing their various business/practice backgrounds, the Plaintiffs aver that there is no allegation or proof that they would be unable to pay back the Judgment amounts should the intended appeal succeed.

7. Order 42 Rule 6(1) and (2) of the Civil Procedure Rules under which this application is brought provides as follows:-

*6(1). No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.*

(2). No order of stay shall be made under sub rule (1) unless:-

a. The Court is satisfied that substantial loss may result to the Applicant unless the order is made and the application has been made without unreasonable delay; and

b. Such Security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

8. The application before me has certainly been made without undue delay. In addition, the Applicant proceeds to state in its grounds and supporting affidavit that it will suffer substantial loss if the Respondents are allowed to execute since the Respondents will not be able to repay the amount in case the Applicant's intended appeal succeeds. This the Applicant states is because, it is unaware of the current financial capabilities of the Plaintiff/Respondents.

9. On their part, the Plaintiffs retort that they all can certainly refund the decretal amounts totaling Kshs 15,000,000/= in the unlikely event that the appeal succeeds. At paragraph 6 of the Replying Affidavit, Dr. Marx Okonji, the deponent thereof avers that;

**i. Rockster Investment Ltd (the 1<sup>st</sup> Plaintiff/Respondent herein) is an investments company with substantial holding in property, monetary shares and stocks;**

**ii. Joe W. Okwach SC(2<sup>nd</sup> Plaintiff) is a Senior Advocate who has been in continuous practice for over forty(40) years;**

**iii. Ambrose Otieno Rachier(3<sup>rd</sup> Plaintiff) is a senior Advocate of the High Court of Kenya who has equally been in continuous practice of law for more than forty(40) years;**

**iv. John Harun Mwau (the 4<sup>th</sup> Plaintiff) is a substantial businessman of public repute; and**

**v. Dr. Marx Okonyi- the 5<sup>th</sup> Plaintiff) is a Consultant Psychiatrist who after retirement from Civil Service has been practicing as a Senior Doctor for over twenty (20) years at Nairobi Hospital.**

10. In considering whether or not to grant the application before me I am persuaded by the dictum of Ringera J (as he then was) when dealing with an application of stay in **the Matter of Global Tours and Travels Limited, Nairobi High Court Winding Up Cause No. 43 of 2000(Unreported)** where the Learned Judge stated that:-

*“ .....whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion, it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interest of justice to order a stay of proceedings, and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously”.*

11. While the Plaintiff/Respondents have rightfully pointed out that this is a money decree and hence the appeal may not be rendered nugatory, I am more inclined to adopt the position taken by the Court of Appeal in **Housing Finance & Company of Kenya –vs- Sharok Kher Mohammed Ali Hirji & Another (2015)eKLR** where the Court quoting their decision **in Kenya Hotel Properties Ltd –vs- Willesden Properties Ltd(Civil Application Nai 322 of 2006(UR 178/06)** stated that:-

“ The decree is a money decree and normally the Courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the Court ascertains that the respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to

put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree.”

12. In ***Kamal Bhusan Joshi & 3 Others –vs- Wambugu, Motende & Company Advocates (2016) eKLR*** the Court of Appeal again citing the case of ***Standard Bank Ltd –vs- G.N. Kagia & Company Advocates (Civil Application No. Nai 193 of 2003***(Unreported) stated that:-

*“If the Applicant’s appeal ultimately succeeds, either wholly or partially, such success will not be totally effectual if the applicant will not easily recover the money it paid and if it has to institute other civil proceedings to recover the money. Such an eventuality should in the interest of justice be taken into account.”*

13. Having carefully considered the rival submissions of the learned counsels appearing before me, I find that the balance of convenience in this application tilts in favour of the applicant. In the premises, I will allow the application and make orders as follows:

**a. The Application dated 4<sup>th</sup> May 2017 be and is hereby allowed in terms of Prayer No. 3 thereof subject to the following conditions:**

**i. The Applicant shall deposit the decretal amount, being the sum of Kshs 15,000,000/= into an interest earning account with a reputable bank in good standing in the joint names of the respective parties’ advocates on record within thirty(30) days of the date of this ruling;**

***ii. Should the Applicant default for any reason whatsoever in the deposit of the decretal sum in terms of order(i) hereinabove, then the Applicant shall deposit the said sum in Court within ten(10) days of such default.***

**b. The costs of this application shall abide the outcome of the intended appeal.**

**c. Failure to comply with this order in terms of (a) above shall render the application herein dismissed with costs to the Respondents.**

14. Orders accordingly.

**Dated, signed and delivered at Malindi this 6th day of December, 2017.**

**J. O. OLOLA**

**JUDGE**



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