



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO. 99 OF 1994

**AFRICA PLANNING & DESIGN
CONSULTANTS.....PLAINTIFF**

VERSUS

1. SOLOLO OUTLETS LIMITED

**BOARD OF TRUSTEES, NATIONAL SOCIAL
SECURITY FUND.....DEFENDANT**

R U L I N G

1. The 2nd Defendant applied in this old suit by chamber summons dated 30th April 2006 for the main order that the Plaintiff's further amended plaint (dated 20th June 2005) be struck out with costs in so far as it related to the 2nd Defendant. The Plaintiff opposed the application.

2. It appears that when the application came up for hearing on 4th March 2010 before Rawal, J (as she then was) it was agreed that the application be determined by way of trial of the following preliminary issue:

“Whether the 2nd Defendant is liable to pay the claim of the Plaintiff either primarily or vicariously”.

3. The parties adduced evidence towards that end and made submissions. In a ruling dated and delivered on 12th May 2010 Rawal, J noted that the aforementioned issue would **“only be determined *prima facie*”**. The learned judge then found and ruled as follows -

“...Thus at this stage, I shall be hesitant to find that the suit against the 2nd Defendant is absolutely without any basis or cause of action, and/or that there is no relationship created as against the Plaintiff.

“I find as aforesaid and direct that the chamber summons dated 30th March 2006 is accordingly determined.”

4. The 2nd Defendant was not satisfied with the *prima facie* determination of the issue by Rawal, J and it appealed to the ***Court of Appeal*** vide **Civil Appeal No 166 of 2010** which is pending hearing and determination.

5. The 2nd Defendant subsequently applied by **notice of motion dated 4th May 2012** for the main order, in effect, that further proceedings in this suit be stayed pending hearing and determination of the said appeal. The Plaintiff opposed the application, which is the subject of this ruling.

6. The application was canvassed by way of written submissions which I have read and considered, including the cases cited. The 2nd Defendant's submissions were filed on 16th August 2013 while those of the Plaintiff were filed on 25th September 2013. The fact of filing of the submissions was brought to the attention of the court on 21st January 2014.

7. Under **Order 42, rule 6 (1)** of the **Civil Procedure Rules, 2010** (the **Rules**) the court has unfettered power to order stay of proceedings where an appeal or second appeal has been preferred. The power, in so far as it concerns stay of proceedings, is not fettered by the need to show "sufficient cause" as is necessary for stay of execution. Nor is the power encumbered by the conditions set out in **sub-rule (2)** of rule 6, which conditions apply only to stay of execution. The Plaintiff's submissions to the extent that they are based on rule 6 (2) are, with respect, misconceived.

8. All discretions of the court, however, even unfettered ones, must be exercised judiciously upon settled principles, not whimsically. Where the pending appeal is arguable and may be rendered nugatory if the case concerned were allowed to proceed the court may be inclined to grant stay of proceedings. See the case of *Silverstein – vs – Chesoni, Court of Appeal, Civil Application No. 1891 of 2001 (unreported)*.

9. If the issue "Whether the 2nd Defendant is liable to pay the claim of the Plaintiff either primarily or vicariously" was determined only *prima facie* by Rawal, J it means that the issue will be alive at the trial of the action and open for a final determination by the trial judge. In these circumstances I do not know that kind of decision is expected of the **Court of Appeal** in the pending appeal when the issue of the 2nd Defendant's liability to the Plaintiff was only determined *prima facie* and liable to be tried fully and finally by the High Court. Without appearing to second-guess what the **Court of Appeal** might do, the Court may well decline to entertain the issue as it is still liable to trial and final determination by the High Court!

10. In my considered and respectful view, the issue whether the 2nd Defendant is liable to pay the claim of the Plaintiff either primarily or vicariously should have been left for trial at the hearing of the action. Trying it *prima facie* does not appear to have achieved anything towards resolution of the issue.

11. At any rate, I am not satisfied, for the reasons given above, that the pending appeal will be rendered nugatory unless stay of proceedings is granted. The wider interests of justice demand that this old suit do proceed to trial to enable the High Court to make **final** decisions upon all issues involved. The parties can then usefully appeal to the **Court of Appeal**.

12. In the circumstances, I find no merit in the notice of motion dated 4th May 2012. The same is dismissed with costs to the Plaintiff. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF FEBRUARY 2014

H.P.G. WAWERU

JUDGE

DELIVERED THIS 21ST DAY OF FEBRUARY 2014