

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 1361 of 1999

AFRICAN AIRLINES INTERNATIONAL LIMITED.....PLAINTIFF

VERSUS

EASTERN AND SOUTHERN AFRICAN DEVELOPMENT BANKDEFENDANT

R U L I N G

1. On 28th September, 2012, this Court granted the Plaintiff an injunction in terms of Prayer 4 of its Notice of motion dated 27th July, 2012 on condition that the Plaintiff paid to the Defendant US\$800,000 within 7 days in default of which the orders would stand discharged without the necessity of any other order to that effect. The Plaintiff did not comply with that Order. On 9th October, 2012 the Plaintiff took out a motion on notice under Section 3A of the Civil Procedure Act, Order 40 Rules 1, 2 and 4, Order 42 Rule 6 and Order 26 Rule 5(1) seeking an Order of stay of that Order pending appeal. That application was supported by the Affidavit and the Further Supporting Affidavit of Stephen Musalia Mwenesi sworn on 9th October, 2012 and 15th November, 2012 respectively. A Further Affidavit in support of the Application was also sworn by Captain Musa Hassan Bulhan on 16th October 2012.
2. It was submitted for the Plaintiff that this Court had not given directions with regard to the main hearing of the suit when it made the ruling dated 28th September, 2012. That there was a substantive claim against the Defendant arising from the irregular appointment of the Receiver Manager who occasioned losses and consequential damage on the Plaintiff's business. That while rendering the Ruling, the Court did not take cognizance of the fact that the Plaintiff had duly amended its Plaint which particularized the loss it incurred due to the Defendant's alleged irregular appointment of a Receiver Managers. That being aggrieved by the order, the Plaintiff intended to appeal and had filed a Notice of Appeal dated 3rd October, 2012. That the condition requiring the Plaintiff to pay the Defendant USD\$ 800,000 was stringent and could not be met as the Plaintiff was faced with financial constraints. It was the opinion of the Plaintiff that in view of the Amended Plaint on record and the fact there is no Defence filed by the Defendant this far, it would be unjust and unfair and prejudicial to deny the Plaintiff the Orders for stay. The Plaintiff urged that the application be allowed.
3. The Defendant opposed the application by filing a Replying Affidavit of David Mulira sworn on 8th November, 2012. The Defendant contended that the Plaintiff had not complied with the condition set by the Court for the payment of USD\$ 800,000 within seven days, that the Plaintiff's application is devoid of merit as it had been denied orders of injunction by the Court, including the Court of Appeal, on various interlocutory applications it had filed. That the intended appeal of the Plaintiff arising out of the Orders of the Court issued by this Court on 28th September 2012 had no merit as the Court had the discretion to grant a conditional injunction. The Plaintiff also contended that the Plaintiff was in default of rates and rent payable on the suit property known as LR. No. 9042/583 NAIROBI consequently placing the Defendant's security in jeopardy. It was also submitted on behalf of the Defendant that the Receiver Manager was not in control of the Plaintiff Company as he had been blocked from carrying out his duties. That in light of the fact that the Plaintiff did not meet the Condition set by the Court on remitting USD\$. 800,000 to the Defendant within 7 days, the injunction had automatically lapsed and as such there was no Order to capable of being stayed. The Plaintiff urged that the application be dismissed.
4. I have considered the Affidavits on record and the submission of Counsel. It is not denied that the Plaintiff was aware of the conditions set by this Court for a grant of injunction. The Plaintiff was to pay

the Defendant an amount of USD\$800,000 within seven days failure to which the orders for the grant of injunction would stand discharged without the necessity of any other order to that effect. It is also not in contest that the Plaintiff has not complied with that condition. The reason given for non-compliance is that the amount ordered is excessive and that the Plaintiff has filed a Notice of Appeal envisaging an intention to appeal against the said order.

5. The condition for granting a stay of execution pending appeal are well known. These are that the application should be made without undue delay; substantial loss may be suffered by the applicant unless the order is made and finally that the applicant should offer such security as may be ordered by the court. The question that then follows is whether there is an Order capable of being stayed. In my view the grant of injunction was conditional. If the Defendant failed to pay the Defendant a sum of USD\$. 800,000 within seven days the injunction so granted would lapse. It is evident that the Plaintiff failed to meet this condition and as such there is no Order for injunction in place. It lapsed on or before 5th October, 2012. The current application was filed on 9th October, 2012. In the circumstances of this case, I will hold that here was delay in bringing the same because as at the time it was filed, the 7 days granted for compliance had already lapsed.

6. With regard to the Amended Plaint, I find that the Plaintiff has the opportunity to present the new issues with regard to the irregular appointment of the Receiver introduced by the said Amended Plaint at the main trial. The mere existence of that Amended Plaint with fresh claims therein and the lack of Defence in response to the same in my view is not a basis for the grant of the orders sought.

7. The next issue is that of substantial loss. The Plaintiff has contended that the sum of USD\$ 800,000 ordered by court is excessive and that the seven days period was too short for compliance. This argument does not commend itself to the court because, firstly, the Plaintiff has not shown whether it sought or attempted to comply with the order and it was unable to meet the condition. All it stated was that it was faced with dire financial constraints. Secondly, the Plaintiff has not demonstrated with any acceptable evidence that the amount was excessive in the circumstances of this case. Finally, if the Plaintiff was of the view that the amount ordered was excessive as it alleges, why did it not apply to Court to have the sum reduced to a sum within its reach. Further, why did it not apply to extend time for compliance. There has been no explanation offered for such failure. To my mind therefore, this may be an excuse not to comply with the order in question. There is no evidence to show that compliance with that order will render the appeal nugatory.

8. The Plaintiff has also indicated that it is willing to give a performance bond pending the hearing and determination of the suit. Under Order 42 Rule 6, the court has the discretion of determining what constitutes security for the performance of the Decree. A condition was placed for the Plaintiff to pay to the Defendant USD \$ 800,000 within seven days. Although the Plaintiff has failed on the first two conditions under Order 42 Rule 6(2) of the Civil Procedure Rules. I am inclined to accommodate the Plaintiff on the third condition. This is because of its willingness to give security.

9. Accordingly I will grant a stay on condition that the Plaintiff deposits a sum of US\$700,000/- in an interest bearing account in the joint names of the Advocates acting for the parties in this matter within 14 days of today.

DATED and **DELIVERED** at Nairobi this 29th day of April, 2013.

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A. MABEYA
JUDGE