



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO. 73 OF 2007

JETLINK EXPRESS LIMITED PLAINTIFF

VERSUS

EAST AFRICAN SAFARI AIR EXPRESS LIMITED..... DEFENDANT

RULING

Before me, is the Defendant's Notice of Motion dated 14th July, 2011 brought under Sections 1A and 1B of the Civil Procedure Rules and the inherent Power of the Court. It seeks, inter alia, to set aside the order of stay given on 18/11/09 in the alternative, a variation of that Order of 18/11/09 to require the Plaintiff to give additional security to secure the Defendant's claim of US\$902,143 plus costs. There is also a prayer that the Plaintiff's undertaking as to damages given on 10th July, 2007 be secured by a deposit of funds or a bank guarantee in the sum of US\$902,143, and in the alternative, that the Defendant's Motion Dated 16th October, 2009 which seeks summary Judgment against the Plaintiff be set down for hearing.

The grounds of the application are set out in the body of the motion, the Affidavit and Further Affidavit of George Kivindyo sworn on 14/07/11 and 4/08/11, respectively. Briefly, the background to the application is that the Defendant had served the Plaintiff with a winding up notice on 31/01/07 for US\$902,143 whereupon the Plaintiff filed this suit claiming US\$4,068,091/86. On 10/07/07 the Plaintiff obtained an injunction restraining the Defendant from proceeding with its threat of commencing winding up proceedings, on 2nd October, 2009 Kimaru J struck out the Plaintiff's suit for being frivolous and vexatious and what remained for trial was the Defendant's counterclaim of US\$902,143. The Plaintiff appealed to the Court of Appeal and in the meantime applied in the High Court for stay of proceedings pending the determination of the said appeal in the Court of Appeal. On 18th November, 2009, Kimaru J stayed the proceedings herein pending the determination of the Plaintiff's said Appeal to the Court of Appeal. That order was granted on terms that the Plaintiff do deposit a sum of Kshs.7,500,000/- in the names of the parties respective Advocates which was done and the same was placed on a joint fixed deposit with CFC Stanbic Bank Limited. That order of stay of Course froze these proceedings and it is the subject of prayer Nos. 2 and 3 of the Motion before me.

Mr. Kivindyo swore that in or about April, 2011, the Plaintiff's employees had sought employment from the Defendant because of delayed payment of salary by the Plaintiff, that he had seen the Plaintiff's Accounts for the years 2006 through 2009 which disclosed what could be called acts aimed at stripping the Plaintiff of its assets by Mr. Kiran Patel and Mr. Elkana Aluvale, the directors of the Plaintiff, backed with documents he alleged to have emanated from the Plaintiff, Mr. Kivindyo gave a detailed account of how there was massive transfers of monies meant for the Plaintiff into the Directors personal accounts, those transfers totalled Kshs.39,963,626/- in 2008, Kshs.37,807,068/- in 2009, Kshs.19,890,735/68 in

2010. Mr. Kivindyo also narrated how an amount totaling over Kshs.109million being insurance, payments, refunds and other payments meant for the company has been diverted to the two directors personal account either as loans or other unexplained payments, that as a result the Plaintiff is experiencing cash flow problems, which had led to delayed employees' salaries, and being put on a cash basis with the Kenya Airports Authority, that it had issued a cheque of US\$34,500 to Kobil Petroleum which was dishonoured, that it was being charged interest on late payments by lessors of its aircraft, that the Plaintiff has nine (9) aircraft of which only four (4) were in active service.

It was submitted for the Defendant that Kshs.7,500,000/- deposited by the Plaintiff was not sufficient to secure the Defendant's bona fide claim of US\$902,143. The Defendant produced letters from the Deputy Registrar of the Court of Appeal dated 17/06/10 and 27/10/10 showing that the Court of Appeal was dealing with 2004 appeals yet the Plaintiff's appeal against the order of 18th November, 2009 was filed in 2009 which means it will take much longer for the Plaintiffs appeal to be reached.

It was further contended on behalf of the Defendant that there was real risk of the Plaintiff's assets being dissipated thereby prejudicing the Defendant's claim, that the order of 18/11/09 had tied down the Defendant who cannot move on its counterclaim or application for summary judgment. Mr. Kiragu, learned Counsel for the Defendant invited the Court to apply Section 1A and its inherent power by reviewing the subsequent events after the order of 18/11/09 and do justice to the parties, that it will be proportionate resolution of the dispute to revisit the order of 18th November, 2009 as the Court of Appeal has appeals which are older than 6 years, that it will not be prudent to appeal against the order of 18/11/09 as there will still be a delay in the Court of Appeal. Mr. Kiragu relied on **Halsburys Laws of England and Mulla on the Code of Civil Procedure Vol. 1 1995** on the proposition that the Court could exercise its inherent power and grant the orders sought. The Defendant urged the Court to grant the orders in the Motion that would be appropriate to make a level playing ground for the parties.

The Plaintiff opposed the application relying on the Replying and Further Affidavit of Elkana Mugalavai Aluvale sworn on 21st July, 2011 and 15th August, 2011 respectively. On those Affidavits, it was submitted on behalf of the Defendant that the inherent power of the Court could not be invoked whilst the process of appealing against the Order of 10/7/07 granting the injunction is still open to the Plaintiff, that the Plaintiff had filed CA No. 281 of 2009 against the order of Kimaru J striking out the Plaintiff's suit, that Appeal was still pending, that the Court had stayed the proceedings herein pending the hearing of the said Appeal on condition that the Plaintiff does deposit Kshs.7.5million in a joint interest bearing account which condition the Plaintiff had complied, that the issues raised by the Defendant had been fully canvassed in the application for stay and cannot be reconsidered afresh, that the Defendant had not preferred an appeal nor applied for review of the said order, that the Court lacked jurisdiction to set aside orders made on an application at an inter parties stage in the absence of unconscionable reproachable conduct on the part of the Respondent.

The Plaintiff contended that the Defendant was not in a position to employ the Plaintiff's staff as the Defendant had suspended all its operations by November, 2010, that it was the Defendant who was facing financial difficulties and was not meeting its obligations on time including staff salaries, that the Plaintiff's pending Appeal is meritorious, that the accounts relied on by Mr. Kivindyo are the Plaintiff's internal general ledgers and are not the Plaintiff's Audited Accounts, that the same are not under the Plaintiff's directors signatures, that the directors of the Plaintiff's have ploughed back dividends due to them into the Plaintiff since 2004, that the directors had injected their own money into the Plaintiff as per the banking slips marked "EMA23" amounting to US\$900,000/-. Mr. Aluvale denied on oath that the directors of the Plaintiff were stripping the Plaintiff of its assets, that the Plaintiff was growing from strength to strength and had nine (9) aircraft and 350 employees, that the Plaintiff had been rated 19 out of the top 100 medium sized companies in Kenya, that its revenues had grown from Kshs.0.8billion to Kshs.2.4billion as at 31/12/10.

The Plaintiff contended that the application was a malicious Scheme by among others, Fly540, the Defendant and its Advocate to bring down the operations of the Plaintiff, that the immediate former Managing Director of the Defendant one Adam Craig Ogden had stripped the Defendant of its assets in favour of his overseas companies. The Plaintiff further contended that any transfer of funds to the

Directors of the Plaintiff was not unjustified as they had put their own monies into the Plaintiff, that the Plaintiff has other two shareholders who are its only directors and is not answerable to anyone, that Mr. Kivindyo is not competent to comment on the Plaintiff's accounts, that in Law a Defendant is not answerable to a Claimant in the operation of its business or accounts.

Mr. Lubullellah, learned Counsel for the Defendant submitted that his firm had sought for an early hearing date for the Plaintiff's Appeal but none was forthcoming and his client should not be blamed for the delay in the Court of Appeal, that such a delay should not be ground to disturb the order of Kimaru J of 18/11/09. He further submitted that he application was an attempt to make the court sit on appeal on the decision of Kimaru J that the application to discharge the injunction was Res-judicata Kimaru J's decision of 2nd October, 2009, that the application was an abuse of the court process as it was contrary to the order of stay, he cited the case **HCCC No. 1061 of 1990 Mark Omollo Agencies –vs- Daniel Kioko** for the proposition that proceeding with a matter while an Appeal is pending is an abuse of Court process, that the inherent power of the Court can only be invoked where the procedural rules will work injustice, that it had not been shown that the appellate jurisdiction will work any injustice. Mr. Lubullellah attacked the Affidavit of Mr. Kivindyo on the grounds that it was hearsay and cited the case of **Bara & 13 others –vs- Maendeleo ya Wanawake (2004) 2 KLR 4555** in support of that contention. That Mr. Kivindyo had not disclosed the sources of his information contrary to Order 19 Rule 3 of the Civil Procedure Rules. The Plaintiff therefore urged that the application be dismissed with costs.

I have considered the application, the Affidavits on record, submissions of Counsel and the authorities relied on by the parties.

I will first deal with Prayer No. 4 of the Motion. That prayer seeks an order that:-

“The Plaintiff's undertaking as to damages given when the injunction was issued by the Court on 10th July, 2007 be secured by a deposit of funds or a bank guarantee in the sum of US\$902,143.”

This prayer is directed against the Order of Hon. Azangalala J made on 10th July, 2007. In that order, the Court granted an injunction to the Plaintiff whereby the Defendant was restrained from filing, lodging, commencing, advertising or otherwise prosecuting any winding-up petition or cause against the Plaintiff for a debt of US\$902,143. The Court imposed a condition upon the Plaintiff to file a written and sealed undertaking as to damages within seven (7) days. The Plaintiff duly complied and filed a suitable undertaking as to damages on 16th July, 2007. That is the undertaking which the Defendant wants the Court to enforce by directing the Plaintiff to secure the same by a deposit of funds or bank guarantee to the tune of US\$902,143.

In my view, that prayer is unmeritorious. This is because the said order of 10th July, 2007 was for **‘security for damages’** not security for the claim. The damages have not yet been shown to have been suffered and/or assessed at US\$902,143. The figure of US\$902,143 is the Defendant's claim itself against the Plaintiff. That was not the security that was ordered by the court. My understanding is that when an order for security as to damages is ordered by a court when granting an injunction, the Court in so doing is taking a precaution that in the event the order granted is finally found to have been unwarranted, the party in favour of whom the injunction is granted is bound to undertake to pay damages that may be suffered by the adversary as a result of the injunction, not the claim as in this case.

The other reason why that prayer has to fail is because on 10th November, 2008, the Defendant filed an application to strike out the Plaintiff's suit. Together with that prayer, the Defendant included a prayer to set aside the order of 10th July, 2007. Such a prayer can only be made under the relevant provision for setting aside an injunction. After considering the matter, on 2nd October, 2009 the Hon. Mr. Justice Kimaru struck out the Plaintiff's suit but declined to set aside the order of 10th July, 2007. To my mind therefore, the prayer that seeks to interfere with the order of 10th July, 2007 is res-judicata under Section 7 of the Civil Procedure Act. I hold that view because of the explanation Nos.1 and 4 to Section 7. These provide:-

“Explanation 1. The expression ‘former suit’ means a suit which has been decided before the suit in question whether or not it was instituted before it”

“Explanation 4 - Any matter which might have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

The provisions of Section 7 do apply to applications as much as it does to suits. In my view, since the application before Court on the said November, 2008 was interference with or variation of the Order of 10th July, 2007, I hold that the Defendant had an opportunity to pray for the variation of the order as to security which it seeks currently. I reject that prayer.

Amongst the grounds which the Plaintiff relied on to oppose the application were that, the application was an abuse of the Court process because there was an order for stay of proceedings and the filing of the motion before Court, was in disregard of the order of 2nd October, 2009. I do not think so. Since the application is directed at disrupting and upsetting the order of stay of proceedings of 2nd October, 2009, the application cannot be an abuse of the process of the Court. The Court has the jurisdiction to properly consider and determine the same on its merits. In any event, there was no authority or law that was cited to suggest that once an order to stay proceedings has been made, such order cannot be revisited.

The Plaintiff also argued that the application for stay of proceedings had been granted after inter partes hearing whereby all the issues were considered and determined and they cannot be reconsidered now. I reject that argument on the basis that the issues raised now are completely different from those that were raised before Hon. Kimaru J before he arrived at his decision of 2nd October, 2009. The issues before Court now are completely new and different. The question before Kimaru J was whether under order XLI Rule 4 of the former Civil Procedure Rules, there should have been a stay of the proceedings pending the determination of appeal against the order of 2nd October, 2009. Before me now, is the question whether in view of the alleged acts of the directors of the Plaintiff of stripping out the assets of the Plaintiff, the stay or order of 18th November, 2009 should be interfered with. Accordingly, I reject that ground.

Having dealt with those preliminary issues, I now proceed to consider the main prayer in the motion before me, that is that the order of stay of proceedings of 18th November, 2009 be set aside or in the alternative the order of 18th November, 2009 be varied by requiring the Plaintiff to give additional security sufficient to secure the Defendant’s claim of US\$902,143 together with interest and costs.

Before dealing with this prayer, I would address the alternative prayer which seeks to set aside the order of 18th November, 2009 and to allow the Defendant to proceed with its application dated 16th October, 2009. That application of 16th October, 2009 seeks summary Judgment or Judgment on admission. Mr. Kiragu, learned Counsel for the Defendant did not address me on this particular prayer. He submitted globally on the application as it is set out at the beginning of this Ruling. Mr. Lubullelah, learned Counsel for the Plaintiff on his part cited two cases **Mark Omollo Agencies & 2 others –vs- Daniel Kioko HCCC No. 1061 of 1990 (UR)** and **Church Road Development Co. Ltd –vs- Barclays Bank of Kenya Limited & 2 others Nairobi HCCC No. 296 of 2006** and submitted that to proceed with proceedings whilst an appeal is pending amounts to an abuse of the process of the court.

To my mind, whilst in the cases cited the applicants therein sought to proceed with proceedings whilst there were orders of stay of proceedings in force, in the case before me the Defendant has sought to first set aside the order for stay of proceedings before seeking to proceed with its application for summary Judgment and or Judgment on admission. That notwithstanding however, I fully subscribe to the ratio in **Mark OMollo Agencies & 2 others –vs- Daniel Kioko & Another (supra)** wherein Nyamu J (as he then was) observed that:-

“In addition, proceeding with the hearing while an appeal is pending would constitute an abuse of the Court process” (emphasis mine)

It should always be had in mind that in all applications for stay of execution and/or proceedings, there are

two competing principles/interests or rights of parties that are opposed to each other. Firstly, the principle that a successful party should not be hindered from enjoying the fruits of his/her Judgment and secondly, the novel principle that when a litigant is exercising his/her undoubted right of appeal (which is a legal right), that right should not be rendered superfluous by allowing execution or further proceedings that would otherwise render the intended appeal nugatory.

Both principles are novel and must always be safeguarded but in doing so, the Court has to balance the interests of both parties to ensure that a middle ground is reached, that is, justice is upheld. Applying this test to the application before me, I am of the view that allowing the alternative prayer that seeks to set aside the order of 18th November, 2009 and to allow the Defendant to prosecute its application of 16th October, 2009 would be extremely injurious to the Plaintiff. It might render the Plaintiff's pending Civil Appeal NO. 281 of 2009 superfluous if not nugatory. This Court will be the last to countenance such a scenario. Accordingly, I reject prayer No. 5 of the Motion dated 14th July, 2011. On the same basis, I also reject Prayer No. 2 of the Motion.

As regards prayer No. 3 which is in the alternative, the Defendant contended that the Plaintiff's directors Mr. Kiran Patel and Mr. Elkana Aluvale were involved in a number of transfers of large sums of the Plaintiff's money which was unjustified, that there was the stripping of the Plaintiff's assets, that the accounts of the Plaintiff had been manipulated to show an increase in capital without any injection of money by the directors, that the Plaintiff's suit having been struck out, the Plaintiff's actions were directed at defeating execution of any Judgment that might be obtained against the Plaintiff, that in the circumstances the Defendant's position required to be secured since the C.A No. 281 of 2009 against the order of 2nd October, 2009 will take long to be concluded in the Court of Appeal.

Of course there was strenuous opposition to this application, the Plaintiff contended that the Affidavit relied on was bad in law for not disclosing the sources, and the averments thereon cannot be relied on as evidence, that the Defendant had filed an appeal against the order of 18th November, 2009 and cannot seek to challenge the said order before this court, that the Plaintiff should not be blamed for the delay in the determination of CA No. 281 of 2009, that the condition of deposit of Kshs.7.5million for the grant of the stay had been complied with, that the Defendant had approached the court through the inherent power of the court without seeking for orders of Review vide a proper application, that if the Defendant was aggrieved with the order of stay it should have preferred an appeal against the same, that this court lacked jurisdiction to entertain the application as the same amounts to sitting on appeal against the Ruling of Hon. Kimaru J of 18th November, 2009, that it was the Defendant who had closed shop and whose assets had been stripped, that the application was an attempt by the Defendant in connivance with other third parties to bring down the operations of the Plaintiff and finally that the application cannot be entertained under the inherent powers of the Court.

I propose first to deal with the issue of Mr. Kivindyo's Affidavit. Mr. Kivindyo swore that he was a director of and had been authorized by the Defendant to swear the Affidavit. Although the Plaintiff did produce exhibit "EMAI" in its Further Replying Affidavit to show that the directors of the Defendant as at 2007 annual returns were E.A Air Safaris Limited and one Anthony Ambaka Kegode and that Mr. Kivindyo was not one of the directors, there were no records to show the status of the Defendant as at the time Mr. Kivindyo swore his Affidavits in 2011. I will believe Mr. Kivindyo's averment that on a balance of probability, he was a director of the Defendant in 2011.

It is true that a deponent of an Affidavit must only swear to matters that are only within his knowledge and that if in an interlocutory matter such as the one before me, a deponent swears on information and belief, he MUST disclose the sources of information and ground of belief. This is well set out in Order 19 Rules 3 (1) which provides:-

"Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove.

Provided that in interlocutory proceedings, or by leave of the Court, an affidavit may contain statements of information and belief showing the source and grounds thereon."

Mr. Kivindyo in his Affidavit of 14th July, 2011, which contains most of the materials relied on for the application, stated in paragraphs 12 and 16 of the Affidavit that his information had been received from the Plaintiff's employees whom he did not disclose as well as documents alleged to belong to the Plaintiff which had been sent to the Defendant by an anonymous person.

I should state here that such an Affidavit would ordinarily be unacceptable. Sources MUST be disclosed. The requirement for disclosure is to ensure that there may be a source which can/could be cross-examined for verification, if need arise. To swear to matters which a deponent purports to be privileged without seeking the Courts leave to do so in my view, is abuse of process. I would have rejected Mr. Kivindyo's Affidavit in relation to the issues of the Plaintiff's accounts or financial dealings and money transfers were it not for the Plaintiff's answer to the same. Faced with Mr. Kivindyo's assertions and Exhibit "GK1" from pages 22 to 57, the Plaintiff stated in its Replying Affidavit of Elkana Mugalavai Aluvale sworn on 21st July, 2011

Thus:-

"43. THAT the accounts referred to in paragraphs 16 to 34 of the Affidavit of George Kivindyo are draft internal general ledgers and are not the Plaintiff's audited accounts and are neither authentic not under the signature of the Director of the Plaintiff and the same have no probative value.

44. THAT it is not true that he Directors of the Plaintiff cannot produce any evidence of lending money to the Plaintiff. This is a matter that is internal to the Plaintiff and not the concern of its business rivals who have no locus standi in the matter.

45. That the directors of the Plaintiff have continued to plough back dividends due to them into the Plaintiff's business since inception in 2004, an act that has enabled the company to grow to its current level"

And in Mr. Elkana Mugalavai Aluvale's Further Replying Affidavit sworn on 15th August 2011, he swore:-

"24. That whereas a Company is a separate legal entity from its directors and shareholders there is no law to my knowledge which prevents the Company making advances to its shareholders and Directors and vice versa. There is no Court Order restraining the Plaintiff or its shareholders or directors from lending to each other and I honestly believe the Defendant has no locus standi to apply for such an order.

25. That I am advised by Anthony Milimu Lubullelah and believe such advice to be correct that a contingent creditor has no right or business in regulating how a Company carries out its business with its shareholder and directors."

My take of the said statements made on oath by Mr. Aluvale Was that it was an admission that the documents relied on by Mr. Kivindyo, however unlawfully obtained, belonged to or emanated from the Plaintiff, that the same were a correct reflection of the Plaintiff's operations but they were not the Audited Accounts of the Plaintiff and for that reason they cannot be relied on. It also meant that there was nothing wrong in law for the Plaintiff's directors to deal with the Plaintiff's liquid asset, money, as they did. For the foregoing reason, I accept and admit the averments of Mr. Kivindyo as far as they are based on the matters relating to the funds transfer as set out in pages 22 to 57 of Exhibit "GK1" to the Supporting Affidavit. In this regard the case cited by the Plaintiffs of **Bara & 13 others -vs- Maendeleo ya Wanawake (2004) 2 KLR 455** may have pronounced the correct position of the law but it is inapplicable in this case for the admissions made by the Plaintiff as set out above.

From Mr. Kivindyo's Affidavit and the exhibit produced thereto, it would seem that the directors of the Plaintiff have advanced themselves or transferred to their personal and private accounts a total amount in excess of Kshs.109million for the period in question – 2008 and 2010. I am not convinced that the said transfers were justified. Indeed to show how the directors of the Plaintiff treated the Defendant's

allegations and the Court, Mr. Aluvale swore at paragraph 46 of his Replying Affidavit sworn – 21st July, 2011 thus:-

“46. That the Directors of the Plaintiff have injected their own money into the Plaintiff as evidenced by some Banking slips amounting of US\$900,000 equivalent to (Ksh.81,000,000) copies hereof are annexed and marked“EMA23”.

A perusal of Exhibit “EMA23” would show three banking slips as follows:-

- 1) Banking slip dated 7/11/09 for National Bank of Kenya Ltd for US\$400,000
- 2) Stanbic Bank Banking slip dated 21/4/09 for US\$100,000
- 3) Stanbic Banking slip dated 27/8/2009 for US\$200,000

Firstly, it is clear the said sums were deposited by Mr. Aluvale on the various dates as shown. However, they do not amount to US\$900,000 sworn to but merely US\$700,000. Secondly, in the banking slip of 27/8/09, it is clear that the source of the funds disclosed by Mr. Aluvale were from Aircraft Charters – meaning the aircraft belonging to the Plaintiff. How could that be Mr. Aluvale’s personal funds. I am of the view that Mr. Aluvale was not candid with the Court in his paragraph 46 aforesaid. If at the first attempt to explain the so called funds advances to the company amounts to that, i.e. misleading the court, what of the other averments?

That being the case, I am not convinced that the funds transfers from the Plaintiff to the Directors personal accounts were justified. If the Plaintiff expected to be taken seriously it should have produced its audited Accounts for the years in question, 2008 to 2010 and would not have misled the Court in paragraph 46 as set out above. Those audited Accounts in my view, would have cleared and explained the so called internal ledgers produced by Mr. Kivindy in his Affidavit.

Accordingly, I am satisfied from the evidence on record that contrary to the averments in the Replying and Further Affidavits, the directors of the Plaintiff in making the transfers set out in the Affidavit of Mr. Kivindy, were stripping off the Plaintiff of its liquid assets, money.

It is common ground that CA No. 281 of 2009 belonging to the Plaintiff will certainly take long before it is determined. The Plaintiff swore that it had applied for earlier dates in the Court of Appeal but the response had been in the negative. While the Defendant contended that the Court of Appeal had indicated that it was still dealing with 2004 to 2006 Appeals. It is therefore clear that it would take quite some time for CA No. 281 of 2009 to be reached and dealt with by the Court of Appeal. I do agree with the Plaintiff that it cannot be blamed or punished for delay in the determination of its appeal in the Court of Appeal.

I do also agree with the Plaintiff that the condition for the grant of the order of stay of proceedings that had been imposed by Hon. Kimaru J had been promptly complied with by the Plaintiff. But consistent with that, is the fact that Hon. Kimaru J did not think it fit in November, 2009 (over two (2) years now) to grant the order of stay of proceedings without putting a condition of monetary deposit. I have seen the ruling of 18th November, 2009. Hon Kimaru J observed at pages 6 and 7 thus:-

“The Plaintiff is entitled to have a second opinion from the Court of Appeal in regard to the ruling of this court that is the subject of this application. It is true that the basis of the Plaintiff’s claim which was struck out by this Court and that of the Defendant’s counterclaim which the Defendant seeks to canvass before this Court is the bilateral interline agreement. If the appeal were to succeed, then, it would save the parties unnecessary costs if the Plaintiff’s claim and the Defendant’s counterclaim are heard and determined at the same time..... this Court is mindful of the fact that in staying the proceedings herein, it would have deprived the Defendant an opportunity to ventilate its counterclaim. I am however of the view that any prejudice that the Defendant would suffer would be taken into consideration by this court making an appropriate order for the Plaintiff to provide security for costs.”

Accordingly, Hon. Kimaru J ordered the deposit of Kshs.7.5million to act as security for the costs of the delay to be occasioned by the stay order, but not to secure the Defendant's claim

The Plaintiff contended that no appeal had been preferred against the order of 18th November, 2009 and further that there was no application before me for review under the appropriate provisions of the law to warrant this court to vary the order of 18th November, 2009. Mr. Kiragu for the Defendant submitted that the Defendant had not been aggrieved by the order of 18th November, 2009. That at the time the order was made, the Defendant had no quarrel with it, that the problem only arose when the Defendant discovered that the Directors of the Plaintiff were stripping the Plaintiff of its assets, that since the Defendant had not been aggrieved by the order of 18th November, 2009 in terms of order 45 of the Civil Procedure Rules there was no need to apply for the review of that order.

I have considered the wording of Order 45 of the Civil Procedure Rules and I agree with Mr. Lubulellah that probably if the Defendant had come under that provision, it would have not satisfied its requirement.

Be that as it may, the Defendants case is that what is aggrieved with is not the order of 18th November, 2009 but the conduct of the Plaintiff's directors which in the end result might lead to the Defendant having a paper Judgment, if it succeeded in its counterclaim. I am therefore satisfied that it was not necessary for the Defendant to have approached the Court by way of Review.

The Plaintiff argued that this Court lacked jurisdiction to entertain the application as in doing so, it would be sitting in appeal over the decision of Kimaru J. My understanding of the application before me is that the Defendant is not arguing that Kimaru J was wrong in his decision, but that due to the subsequent discovery of the consistent conduct of the Plaintiff's directors of stripping the assets of the Plaintiff, it was necessary for ends of justice to interfere with and vary the order of Kimaru J of 18/11/09. Indeed Mr. Kiragu for the Defendant did submit that the Defendant was not aggrieved with and/or was not challenging the order of Kimaru J but had only approached the Court for its position and interests to be secured taking into consideration the conduct of the Plaintiff's directors. From the Affidavits filed, I am satisfied that the matters complained of were discovered only in 2011 as the correspondence exhibited in the Replying and Further Affidavits would show. Accordingly, I reject the argument that in entertaining this application, this court would be sitting in appeal on the order of Hon. Kimaru J.

The Plaintiff contended that the application had been brought with ulterior motive. That the same was a connivance between the former Managing Director of the Defendant and other 3rd parties associated with an airline called Fly 540 to bring down the operations of the Plaintiff. In my view, there was no such direct evidence that was produced to make this Court conclude that the purpose of the motion was not for what it read i.e. securing the Defendant's position in the circumstances of the happenings in the Plaintiff's company. I reject that contention. In any event, it would seem that most of what the Replying and Further Affidavits dwelt on matters that were not directly related to the application but matters outside the purview of the Motion. These included the position of the Defendant, the alleged stripping of the assets of the Defendant by its former Managing Director the alleged collusion of the Defendants Advocates in an alleged Scheme etc etc. The Plaintiff failed to address the pertinent issue raised that is, were there massive funds transfers from the Plaintiff to its Directors' private accounts, were such transfers legal, proper and justified? These issues were in my view, never properly addressed by the Plaintiff.

The last issue raised by the Plaintiff was, that the application was incompetent in so far as it was based on the inherent power of the Court, that the Court could not grant the orders sought in exercise of its inherent power. On the other hand, it was contended for the Defendant that under the provisions of S1A and the inherent power of the Court, the Orders sought could be granted. Mr. Kiragu relied on parts of **Mulla on the code of Civil Procedure** and **Halsbury's Laws of England**. Mr. Lubulellah also referred extensively to the text of **Mulla on the Code of Civil Procedure** and the case of **Mediterranean Shipping Co. S.A –vs- International Agriculture Enterprises Ltd (1990) EA 183** to show that inherent power of the Court will not be exercised where there are specific provisions in the code, that our Civil Procedure Rules had provisions for review and appeal thereby ruling out the reliance on the inherent power of the Court, that where a remedy exists and a party fails to avail himself such remedy he cannot invoke the inherent

power of the Court, that such power can only be invoked in exercise for the ends of justice and that justice means weighing the cases of both sides.

I have considered the rival submissions of the parties.

In **Muchiri –vs- Attorney General & 3 others (1991) KLR 516**, Bosire J (as he then was) held at page 530 that:-

“Mr. Ngobi invited me to invoke the inherent jurisdiction of this Court to do justice to the case. Inherent jurisdiction is invoked where there are no clear provisions upon which relief sought may be anchored, or where the invocation of rules of procedure will work an injustice.”

In this case, the Defendant contended that it could not neither appeal nor apply for review because it was not aggrieved by the subject order. It submitted that, what aggrieved it is the actions of the Plaintiff’s directors.

In **Halsburys Laws of England 5th Edition Vol 11 2009 paragraph 15**, the learned authors have observed:-

“Note, however, that a recent decision has held that, while the Court continues to have the inherent jurisdiction to regulate the conduct of Civil Litigation, a claim should be dealt with in accordance with the rules of the Court and not by exercising the Courts inherent jurisdiction where the subject matters of the claim is governed by those rules.

In sum, it may be said that the inherent jurisdiction of the court is virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexations or oppression, to do justice between the parties and to secure a fair trial between them.” (Underlining mine)

Where therefore there are rules that provide for a particular remedy, that remedy cannot be secured from Court by way of invoking the inherent power of the Court. However, it would appear that if the invocation or application of the rules of procedure will cause an injustice, then the court will invoke its inherent power to do justice to the parties. that is what Bosire J seems to hold in **Muchiri –vs- A.G (Supra)**

In **Mulla on the code of Civil procedure (supra) at page 921** it is observed:-

“The ‘inherent power’ observed the Supreme Court in Manoharla –vs- Seth Hirraar has not been conferred on the court; it is a power inherent in the Court by virtue of its duty to do justice between the parties before it. One of the first and highest duties of all courts is to take care that the act of the court does no injury to any of the suitors....” (underlining mine)

At page 924 it is stated:-

“A Court cannot make use of the special provisions of this Section where the applicant has his remedy provided elsewhere in the code and has neglected to avail himself of it, though there is a reported case in which an order dismissing a suit under Order 11 Rule 21 was set aside in the inherent jurisdiction on the ground that an appeal would be more costly or non-efficacious – remedy.”

These quotations also buttress the position that the inherent power of the court is to be invoked only to do justice and to avoid an injustice to the parties before Court. In the said code a total of 98 situations are set out when inherent power of the Court would be exercised. Some of these are to review an interlocutory order made in chambers, to recall and cancel its invalid order or orders which cause an injustice and to grant reliefs on the basis of subsequent events.

In the said code also, 23 instances are set out when the inherent power would not be exercised. Some of these are to re consider or review an order, to set aside a decree passed on the failure of the Defendant to comply with a conditional order.

From the foregoing, my view is that the inherent power of the Court is to be exercised by the Court in very exceptional circumstances and our Civil Procedure Rules seems not to have laid down the circumstances for its exercise. In my view, the court can invoke that jurisdiction if it is satisfied that it is necessary for the ends of justice. Unless that power is prohibited by the rules, which I doubt there can be and if there is it has been held that such rule should be looked at very carefully if not unfavourably. See the case of **Rawal –vs- Mombasa Hardware Ltd (1968) EA 392** where in Sir Charles Newbold P. stated

“Now I think that any rule which purports to take away the inherent jurisdiction of the courts should be looked at very carefully before it can be construed in such a manner.”

In the application before me, it has not been shown that the procedure for review or appeal would be appropriate. Indeed the Defendant contended that review was unavailable and that whilst it did not intend to appeal as it had not been aggrieved by the subject order that procedure would be inappropriate because of the attendant delay. In any event, the events that were subsequent to the order of 18th November, 2009 came to the knowledge of the Defendant way after the time for appealing against that order had long lapsed. In **Mulla on the Code of Civil Procedure (Supra) page 936**, it is observed that:-

“The inherent power of the Court to take notice of the subsequent circumstances to do complete justice between the parties and to mould the relief accordingly, is undoubted.”

It is contended that the actions of the Directors of the Plaintiff were discovered subsequent to the order. Indeed, they span between 2008 and 2010 way after the order had been made. The relief the Court is being asked to mould is the order that stayed the proceedings pending the hearing an determination of the appeal. Justice must be applied to both parties. The Plaintiff must be left to exercise its undoubted right of appeal but the Defendant is also crying that its position should be secured in view of the actions of the Plaintiff’s Directors. Further, it is not known when the appeal will be determined. Parties come to court to seek tangible justice and not paper reliefs.

I am mindful that the Defendant has no judgment in its favour. What it has is only a claim and nothing else. It is yet to prove the same. On the issue of the appeal, this court is not competent at all to comment on whether it is meritorious or not but what is clear is that it will take quite sometime before it is disposed off in the Court of Appeal. One way or another, an equilibrium must be struck. The interests of both the Plaintiff and the Defendant must be safeguarded by the Court.

The Plaintiff’s rights of appeal has been safeguarded by the Order of stay of proceedings while the Defendant’s claim seems to be exposed. At the trial substantive justice must be seen to be done. As I have already held, the Plaintiff did not deny that large sums of the Plaintiff’s funds were being transferred to the Directors’ personal accounts. Save for stating that loans between a company and its directors/shareholder interse is not prohibited, the Plaintiff did not justify the said transfers. In any way whatsoever, it did not even see it necessary to produce the Audited Accounts to show that these called inter loans were in its books and therefore justified. That leaves this court to conclude that the said transfers were not for the benefit of the company but an outright act of stripping the assets of the Plaintiff.

I am satisfied that the Defendant has made a case for the exercise of the inherent jurisdiction of this court and the power donated by Section 1A of the Civil Procedure Act to facilitate the just and proportionate resolution of the dispute between the parties and therefore interfere with the order of 18th November, 2009 of Hon. Kimaru J. I hereby vary that order to the extent that the stay granted therein pending the hearing and determination of the appeal shall continue to be in force on the condition of the Plaintiff providing security in the sum of US\$ 902,143 by way of either depositing the same in an interest bearing account in the joint names of the Advocates on record for the parties or by bank guarantee. The cash deposit or bank guarantee is to be effected within 45 days of the date hereof.

For the avoidance of any doubt, my view is, to have the Plaintiff give security for the claim and at the same time have its Kshs.7.5 million security for costs still in place may be oppressive. Accordingly, that part of the order of 18/11/09 requiring the deposit of Kshs.7.5. million for security for costs is hereby set aside and the sums held in the joint deposit is to be released to the Plaintiff upon the Plaintiff depositing or giving the guarantee ordered herein. In default of compliance, the order of stay of 18/11/09 shall lapse.

Since I declined to grant various prayers in the motion, I will make no order as to costs.

Dated at Nairobi this 20th day of January, 2012

A.MABEYA

JUDGE