



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)
CIVIL CASE 54 OF 2012

**S.G.S. SOCIETIES GENERALE DE SURVEILLANCE SAKENYA LTD. &
 ANOTHER1ST PLAINTIFF/APPLICANT**

S.G.S. KENYA LIMITED.....2ND
PLAINTIFF/APPLICANT

- VERSUS -

TRACER LIMITED.....1ST
DEFENDANT/RESPONDENT

PETER NANYUMBAH ECHESSAH.....2ND
DEFENDANT/RESPONDENT

AUTOMATED LOGITICS KENYA LTD.....3RD
DEFENDANT/RESPONDENT

R U L I N G

The application before the court is a Notice of Motion dated 22nd March 2012. It seeks as the substantive prayer an order that pending the determination of the intended appeal, a stay of execution of the orders issued by this court on 16th March 2012 be stayed. The application is supported by the affidavits of PETER NANYUMBAH ECHESSAH, JULIUS MARS OUMA and KARIM PIRBHAI dated 22nd March 2012 with their annextures. The application is premised on the several grounds stated therein, but mainly on the ground that on 8th February 2012 the Applicants filed two Preliminary Objections together with an application filed by way of Chamber Summons dated 8th February 2012 seeking for stay of proceedings under Section 6 of the Arbitration Act.

The said Preliminary Objection on behalf of the 1st Respondent was challenging the jurisdiction of the court under Section 7 of the Arbitration Act to determine this matter. The objection on behalf of the 2nd and 3rd Respondents was on the grounds that they were not privy to the Teaming Agreement dated 10th August 2010 and the Reseller Agreement dated 15th February 2011 between the Plaintiffs and the 1st Defendants and were therefore ill suited parties in the enforcement of any dispute under the said

agreement. The Applicants contend that they only presented their case on the Preliminary Objection dated 8th February 2012 and the court ought to have given a Ruling in respect of the Preliminary Objection only. The Applicants state that they did not file any defence affidavits or grounds of opposition in respect of the Chamber Summons application dated 19th January 2012. The Applicants further premise this application on the ground that the injunctive orders issued by this court are very draconian as against the Defendant yet the Applicants were not given any opportunity to protest, challenge or controvert the said averments in the affidavit in support of the application. Among the grounds the Applicant states that there is an apparent error on the face of the records. On these and other grounds, the Applicants have, through this application, sought for the stay of the injunctive orders this court issued on 16th March 2012 pending an appeal to the Court of Appeal.

The application is brought under Section 1A, 1B and 3A of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules 2010.

The application is opposed vide a replying affidavit by GERALD VAN ASWEGEN dated 30th March 2012 together with annexures thereto.

Parties filed written submissions which were highlighted on 10th May 2012. For the purposes of this application the main submission by the Applicants are that they were not heard on the Chamber Summons dated 19th January 2012, and that, the court, after determining the Preliminary Objection went ahead and determined the said Chamber Summons without the Applicants' input. The Applicant has cited the case of **MUKISA BISCUITS MANUFACTURING CO. LTD. – VS – END DISTRIBUTOR LTD.** In that case it was held that:-

“ . . . a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued may dispose off the suit.”

On this understanding the Applicants did not take any steps in the suit as they were awaiting the determination of the Preliminary Objection, which determination would have had a bearing on the next step which the Defendant/Applicant would have taken.

To the contrary, the Plaintiff/Respondents have submitted that the Defendant/Applicants were given an opportunity to be heard and that in such response the Defendants filed a notice of Preliminary Objection together with written submissions which were then highlighted by the parties.

I am now faced with these two opposing views.

Before I may proceed any further, I wish to clarify that the orders of 16th March 2012 the subject matter of this application were granted by myself. I am therefore able to know what truly transpired in this matter. To help me determine this application I wish to raise issues to determine as follows:-

1. *The submissions of the parties before the court on 15th February 2012, and whether there is an error on the face of the record.*
2. *Whether this court can grant the orders being sought.*
3. *Whether the arbitration process is already in place.*

To address the first issue, the application was argued before me by Messers Mungai for the Plaintiff and Kilonzo Jr. for the Defendant. The impression created before me, was that the parties would submit both on Mr. Kilonzo's Preliminary Objection and on the Chamber Summons dated 19th January 2012. Mr. Kilonzo Jr. fortified this impression in his oral submission. He submitted *inter-a-alia* that the Applicants,

“had prayed for very many types of injunction varying from 1 year to 2 years. The Chamber Summons seeks a temporary injunction for 1 – 2 years pending arbitration. That arbitration has not even began

and yet the Applicant seeks orders.”

He further submitted that:-

“Second aspect of objection is that the 2nd and 3rd Respondents are not parties to the said 2 agreements mentioned. The addition of another party to the arbitral proceedings cannot be allowed by this court. If allowed it would amend the said agreements by default.”

In his submissions Mr. Mungai fortified this impression. He submitted:-

“This court can give the injunctions from 1 – 2 years.”

This was in response to the question I asked him as to whether I could grant an injunction of upto one year. I remember Mr. Kilonzo affirming that indeed I could not grant an injunction of one year. All these were in reference to the Chamber Summons application.

That same impression was further fortified by the submissions of all the Parties. Indeed the Plaintiffs submissions were, without a doubt, based on the said Chamber Summons as the Plaintiff did not file any response to the Preliminary Objection. The Plaintiff relied on their supporting affidavit to the Chamber Summons. In fact it was part of the Plaintiff’s submissions that the Defendant had not filed any substantive response to the application for interim reliefs.

Further the Defendants submissions filed in court on 13th February 2012 made several references to the Chamber Summons and was not solely confined to the Preliminary Objection. In their response to the submission by the Plaintiffs that they had not filed any substantive response to the application for interim reliefs, the Defendants submitted, at page 10, that there was no reason to go into the merit of the said application until the court has determined whether it had jurisdiction to hear and determine the matter. This submission was coming too late in the day, after the Plaintiff had submitted on the Chamber Summons and the court was led to believe that the issues were dealt with jointly. At page 12 of their submissions the Defendants concluded:-

“There is no basis in law for such reliefs and the ex-parte injunction against the 2nd and 3rd Respondents ought to be discharged.”

The above observations notwithstanding, and from hindsight wisdom, it is clear to me that the Defendant actually intended to fully respond to the Chamber Summons application after the court had made a decision on jurisdiction. However, I want to affirm to the parties that this court firmly and honestly proceeded on the strength that those submissions were for the disposal of all the applications before the court, and in that belief determined the issues precisely and honestly on the strength of the pleadings and submissions. There is absolutely no error on the face of the record. The record reveals the impression which was created and carried along by the court in the honest discharge of the business of the court. Nevertheless, I must emphasize that the decision I arrived at was not arbitrary or capricious. It was a reasoned decision, supported by the law and authority. I do believe that I would reach the same finding given the facts and the law, were the Defendant to be given additional space to submit.

The second issue is whether this court can lawfully grant the orders sought. The application is brought under Order 42 of the Civil Procedure Rules. The order allows for stay of execution of a decree or Order pending an appeal. The orders of injunction which I granted on 16th of March 2012, it is submitted by the Plaintiffs, are not capable of being executed i.e. that it is not a positive order. To support this view the Plaintiff has cited the case of **CONSOLIDATED BANK OF KENYA, DOLPHINE AUCTIONEERS AND CENTENARY VALUERS & AUCTIONEERS – VS – USAFI LTD**, Civil Appeal number 195 of 2005. In that case, the Court of Appeal, whilst faced with an application for stay of an injunction under Rule 5 (2) (b) held that:-

“ . . . We are unable to appreciate how one can stay an order for injunction and yet at the same time sustain on record . . . We are of the view that once an injunction has been ordered it is in force and

no further proceedings are required to give effect to it.”

In Civil Appeal Number 70 of 209 (UR 41/200) DELTA AIRLINES INCORPORATION, the Court of Appeal states thus:-

“It is clear that the Applicant is seeking a stay of prohibitory injunctive orders which as stated in CONSOLIDATED BANK (supra), this court has no jurisdiction to grant.”

The Plaintiff contends a stay of execution is not envisaged under Order 42 (6).

The Defendants countered this position by citing the case of CONTINENTAL CREDIT FINANCE LIMTIED – VS – ISAAC GATHUNGU WANJOHI & OTHERS (2006) e KLR. This is a High Court case where the Judge concluded that:-

“. . . a stay of injunction can be granted, for sufficient cause, of execution of decree or order . . . Execution is putting into force that order. Therefore stay of that order . . . can be granted.”

While the position of the Court of Appeal binds me in this matter, the view taken by the High Court is persuasive.

In my view, however, a matter premised under Order 42 together with Sections 1A and 1B and 3A of the Civil Procedure Act gives hope to such an Applicant. Order 42 6 (1) in part states:-

“. . . but, the court appealed from may for sufficient cause order stay of execution of such decree or order . . .”

This Order, read with Section 1A, 1B and 3A of the Civil Procedure Act would allow this court to grant a stay of execution of injunction. It should be noted that Sections 1A and 1B of the Civil Procedure Act breathe life into the Civil Procedure Orders. It is therefore clear that a court dealing with a matter determinable under the Civil Procedure Act and Civil Procedure Rules must have in mind the overriding objectives of the Act, that is, the need to do justice. This means that the court should be in a position to stay an injunction in particular circumstances of a case, and where justice would demand the same.

I am however, not persuaded that the case in issue merits such approach. I would decline to grant this application on this ground based on two issues.

Firstly, and like I said earlier, I am the Judge who issued the orders of 16th March 2012. In my said Ruling I explained how I arrived at the orders I issued. I have had another chance to reflect upon the said orders. My Ruling was reasoned. It was not arbitrary. It was not capricious. I provided reasons for it. I also cited case law, legal writing and statutory provisions upon which I premised it. I believe the Ruling is sound and I have no reason to depart from it. To do that would amount to an absurdity as I would be sitting on appeal over my own Ruling.

Secondly, the Defendant/Applicant stated in the grounds to this application that there was an error on the face of the record. In my view there was no error, as I have already explained the circumstances under which the court proceeded to hear the application and render a Ruling. But if there is an error on the face of the record, then that error could be corrected, and the procedure for correcting an error is found under Order 40 Rule 7 which states:-

“Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.”

The Applicant has not chosen to challenge the injunction granted by either applying to set side or discharge or vary the same.

Lastly, in my Ruling of the 16th March 2012 I ruled that the arbitration process was to commence within

21 days of the said Ruling. There is no record before the court or any substantive submission by the parties that such a process has began, though the counsel for the Defendant Mr. Kilonzo alluded in his submissions that the process is underway. Even if the process is not underway, there is direction to the effect that it should have commenced. I am entitled to take judicial notice that that Order has been complied with since there is no stay on record stopping it. If that is so, I would decline to issue any orders which could impede the progression of the arbitral process.

For the said reasons I dismiss with costs to the Plaintiffs the Notice of Motion dated 22nd March 2012.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 20TH DAY OF JUNE 2012.

E. K. O. OGOLA
JUDGE

PRESENT:

Mr. Maondo for the Plaintiff
Mr. Kilonzo Jr. for the Defendant
Teresia – Court clerk