



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 668 of 2001

ZOEA TRANSPORTERS LTD.....PLAINTIFF

VERSUS

LUTHERAN WORLD FEDERATION.....DEFENDANT

R U L I N G

1. The Defendant has applied by **notice of motion dated 23rd July, 2010** under **Order XL1, rule 4** of the **Civil Procedure Rules** (the **Rules**) and **sections 1A, 1B and 3A** of the **Civil Procedure Act** seeking the main order -

That there be a stay of further proceedings herein pending hearing and determination of the appeal arising from the ruling and order of this court (Lady Justice Ali-Aroni) granted on 11th June, 2010.

2. The grounds for the application appearing on the face thereof include -

- (i) That the Defendant shall suffer substantial loss unless a stay of proceedings pending appeal is granted.
- (ii) That the application has been made promptly without delay.
- (iii) That the Defendant has been prejudiced by the filing of the further amended plaint and will be embarrassed for having to respond to it.
- (iv) That the Defendant has been denied equal protection of the law by the said ruling and the orders of this court.
- (v) That the ruling and order appealed against has allowed a third party to amend the Plaintiff's plaint and to take over the Plaintiff's case contrary to known and settled principles of law.
- (vi) That the Defendant's appeal, if successful, will be rendered a pyrrhic victory if the proceedings proceed as the Defendant has been denied its accrued defence of limitation of action against the new Plaintiff.
- (vii) That the Defendant has an arguable appeal with good chances of success.

3. There is a supporting affidavit sworn by one PHILIP WIJMANS, the Defendant's Country Director. It elaborates the grounds for the application.

4. The Plaintiff has opposed the application by grounds of opposition dated 22nd October, 2010. No replying affidavit appears to have been filed. The grounds of opposition include –
- (i) That the court's inherent power is not available to aid a party who has not come to equity with clean hands.
 - (ii) That the application is an abuse of the court process and is intended to delay the fair trial of this case.
 - (iii) That the Defendant has not demonstrated any prejudice it might suffer if the application is refused.
 - (iv) That the appeal shall not be rendered nugatory since the same has no arguable grounds.
 - (v) That the application seeks to argue afresh issues that were raised when the Plaintiff's application for amendment was heard.
 - (vi) That it will be in the interest of justice to refuse the application and direct that the suit be heard and finalised owing to the nature of the claim.
5. I have considered the submissions of the learned counsels appearing. No authorities were cited.
6. A notice of appeal was duly lodged under the Court of Appeal Rules. So for purposes of this application there is an appeal in place. The application is for stay of proceedings, not stay of execution, pending appeal. The only thing that the Defendant needs to demonstrate, therefore, is that there is sufficient cause to stay the proceedings pending determination of the appeal.
7. The Defendant has a right of appeal against the orders of this court of 11th June, 2010, which it has exercised. Looking at the grounds for the application, some of which are obviously the points to be taken in the appeal, it cannot be said that the appeal is frivolous. Indeed it raises substantial and arguable grounds.
8. But the main consideration, in applications of this nature, is one of convenience. Is it convenient to the parties, considering all the circumstances, that the suit be stayed pending determination of the appeal, or should the suit be allowed to proceed to its logical conclusion whilst the appeal also proceeds? The order appealed against granted leave to re-amend the plaint. The Defendant has issues with the permitted re-amendments. It is a well-established principle that amendments are liberally allowed unless substantial injustice will be caused to the opposite party. In this case it will be for the Court of Appeal to decide if the re-amendments complained of by the Defendant would cause it substantial injustice.
9. Upon my own assessment on the circumstances of this case, I find no good cause to stay the proceedings before this court. It is best that the main suit be heard and determined.
10. The upshot of this is that the application herein is dismissed with costs.
11. Delay in preparation of this ruling is deeply regretted. It was caused by my poor state of health the last few years. But thank God I have now fully recovered my health.

DATED AT NAIROBI THIS 11TH DAY OF OCTOBER 2012

H.P.G. WAWERU
JUDGE

DELIVERED AT NAIROBI THIS 17TH DAY OF OCTOBER 2012