REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 451 of 2010

THE STANDARD GROUP LIMITED…….....…...…..……...PLAINTIFF

VERSUS

SIGNON FREIGHT LTD…….…....…….……...……1ST DEFENDANT

BASH HAULIERS LTD…….... 2ND DEFENDANT

R U L I N G

On 26th July 2012, after hearing Notice of Motion dated 3rd April 2012 I made a ruling in this suit in which I *inter alia* directed as follows:

"Having perused the particulars sought, I am of the view that most if not all the particulars sought can be answered if the parties comply with the provisions of the Civil Procedure Rules, 2010 with respect to witness statements and list and copies of documents…Accordingly, I decline to grant the particulars sought at this stage. The order that commends itself to me is a direction to the plaintiff to file and serve its list of witnesses together with their signed statements as well as complete list and copies of documents within 21 days of this decision. Upon service of the said documents the defendant will, likewise file and serve their list of witnesses as well as list and copies of documents within 21 days. Thereafter the parties to file issues, agreed or otherwise, within seven days. Liberty to apply granted".

The 2nd defendant who was the applicant in the said applicant in the said application, being aggrieved by the said decision. Although I have not been able to trace the Notice of Appeal on record, since the plaintiff has filed a Notice of Address of Service pursuant to Rule 79 of the Court of Appeal Rules, I will proceed on the assumption that a Notice of Appeal has been given.

The applicant has in the meantime made an application under Order 42 rule 6 and Order 51 rule 1 of the Civil Procedure Rules, 2012 (sic) and sections 1A,1B, 3, 3A, 63(e) of the Civil Procedure Act and all enabling provisions of the law, seeking the following orders:

1. That this application herein be certified as urgent and be heard ex-parte in the first instance.

2. That in view of the urgency of the matter the Honourable Court does in the first instance dispense with the service of this application on the respondents and makes an interim order in terms of the prayers below.

3. That the Honourable Court does grant an Order for stay of these proceedings pending the hearing and determination of this application.

4. That the Honourable Court does grant an Order for stay of these proceedings pending the hearing and determination of the intended Appeal from the aforesaid ruling of this Court issued on 26th July 2012.

5. That the costs of this application be provided for.

The application is based on the following grounds:

a) The 2nd Defendant/Applicant has given notice of its intention to appeal form the ruling delivered on 26th July 2012 in this suit and;

b)The 2nd Defendant/Applicant requires the particulars sought to enable it to amend its statement of Defence as pleaded in paragraph 19 of the 2nd defendant's Statement of Defence;

c) It will be prejudicial to the extreme to require the 2nd Defendant to proceed in a matter and have the same heard when they have clearly pleaded the right to amend its Statement of Defence as stated above;

d)Unless the court orders the stay of these proceedings, then valuable judicial time will be lost and wasted as the outcome of the intended appeal may determine the manner in which the pleadings are drawn and the manner in which this suit may be prosecuted and defended.

e) The object of this application may well be rendered nugatory if this court does not hear the matter on an urgent basis and the Applicant will thus suffer substantial loss and irreparable harm once the Plaintiff proceeds with and or disposes of the suit and the 2nd Defendant/Applicant is successful on appeal.

f) The intended appeal may have a fundamental bearing on and shall determine the final outcome of this suit and valuable judicial time and the time of this court should therefore not be dissipated in the prosecution of a suit that is not only defective, but whose fate may very well be determined by the appeal;

g)The stay of proceedings will prevent this court from a duplication of efforts and save it time and prevent a multiplicity of suits and applications being filed herein;

h)If the Defendant is successful on appeal, and these proceedings were not stayed, the same would have rendered the appeal nugatory and purely academic;

i) The Application has been made without unreasonable delay and no prejudice will be suffered by the Plaintiff/respondent if the application is granted as prayed.

j) The 2nd Defendant/Applicant stands to suffer irreparable and irreversible harm.

The application was supported by an affidavit sworn by **Omar Ahmed Bashammakh**, the 2nd defendant's Managing Director in which it is deposed that the Plaintiff is seeking to recover a claim in excess of Kshs. 70,000,000.00 which figure is astronomical and hence ought not to be treated in a pedestrian manner hence the particulars sought. In his view the applicant ought to be granted the stay sought because it has filed a Notice of Appeal and if it were required to proceed in the matter it would be prejudiced to the extreme as it would denied the opportunity to amend its pleadings for which the said particulars are required. Further it would be a waste of valuable judicial time yet the outcome of the intended appeal may determine the manner in which the pleadings are drawn and in which the suit may be prosecuted. Unless the stay is granted the object of the application may well be rendered nugatory and

substantial loss and irreparable harm will be suffered by the applicant once the Plaintiff proceeds with the suit and the appeal succeeds. According to the deponent the intended appeal may have a fundamental bearing on this suit and determine the final outcome of the suit and save valuable judicial time and prevent the court from duplication of efforts and save it in time and prevent multiplicity of suits and applications being filed. If the stay is not granted and defendant were to succeed it would have rendered the appeal nugatory and purely academic. Further it is deposed that the application is made without unreasonable delay and no prejudice is likely to be suffered by the plaintiff/respondent if the application is granted yet the 2nd defendant stands to suffer irreparable and irreversible harm. In the deponent's view the intended appeal has strong arguable grounds for the intended appeal and it would amount to a grave miscarriage of justice if the stay were to be refused.

In opposing the application the plaintiff filed the following grounds of opposition:

1. The Ruling of Mr. Justice Odunga of 26th July, 20102 merely declined "to grant the particulars sought at this stage" and granted liberty to apply – see page 14 of the Ruling.

2. The Ruling of Mr. Justice Odunga of 26th July, 2012 directed the parties to file their statements of evidence and bundles of documents in accordance with the provisions of the Civil procedure Rules, 2010 – see page 14 of the Ruling.

3. The Plaintiff's Grounds of Opposition to the application for particulars stated that the particulars requested by the second defendant were in the nature of evidence and not facts. Compliance with the directions of Mr. Justice Odunga will result in the evidence relied on by the plaintiff being made available and will probably provide the answers to the request for particulars made by the second defendant.

4. There is no prejudice to the second defendant in all the parties complying whit the directions of Mr. Justice Odunga and no judicial time or costs will be wasted by doing so.

5. If after all of the parties have complied with the directions of Mr. Justice Odunga the second defendant is still of the opinion that particulars are required then a fresh application can be made in the light of all of the statements and documents before the court.

6. In the light of the backlog of pending appeals before the Court of Appeal a stay of the proceedings pending the hearing of an intended appeal with cause great prejudice to the plaintiff.

In his oral submissions, **Mr Taib** reiterated the contents of the aforesaid supporting affidavit and added that a pre-trial process which takes place before the nature of the defence is determined is a waste of time since the process will have to be repeated again on the amendment of the pleadings should the appeal succeed. According to counsel since the institution of this suit, which was done at the very last minute no steps have been taken with a view to complying with the provisions of Order 11 of the Civil Procedure Rules hence no prejudice will be occasioned by the stay since the plaintiff has never been in a hurry to proceed with the matter. Despite giving undertaking to supply particulars and inspite of the order made herein the plaintiff has not complied. Learned counsel relied on the list of authorities filed in court.

On his part **Mr. Fraser** learned counsel for the plaintiff/applicant submitted that the plaint was filed within the limitation period and there is nothing wrong with filing a suit on the last day. By the time of the filing of the suit the Civil Procedure Rules had not come into effect since the said Rules came into effect on 17th December 2010 and the plaintiff could not be expected to comply with non-existent rules. The order made on 26th July 2012 gave the plaintiff 21 days within which to comply and yet before the expiry of the said period the 2nd defendant obtained an order for stay of proceedings hence ensuring that the plaintiff did not comply. Since the Court gave the party dissatisfied with the pre-trial process an opportunity to come back to court counsel submitted that no prejudice is likely to be occasioned to the applicant. Accordingly the application ought to be dismissed the stay lifted and the timeline for compliance rescheduled to enable the plaintiff comply.

In a rejoinder **Mr. Taib** submitted that Order 54 of the Civil Procedure Rules requires compliance even in cases filed before the coming into force of the Civil Procedure Rules 2010. Counsel submitted that the plaintiff should not expect the 2nd defendant to conduct its case in accordance with the plaintiff's timetable.

For a party to qualify for an order of stay of proceedings pending an intended appeal one must manifest a serious intention of appealing. Where the purpose of seeking an order for stay is to stall the proceedings and frustrate the hearing of the case, the Court will not allow its process to be used for such collateral purposes which the law does not recognise as genuine. Dealing with a similar matter in **David Morton Silverstein vs. Atsango Chesoni Civil Application No. Nai. 189 of 2001[2002] 1 KLR 867; [2002] 1 EA 296** the Court of Appeal citing **Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd & Another Civil Application No NAI 50 of 2001** held:

"... The onus of satisfying us on the second condition, that unless stay is granted, the intended appeal would be rendered nugatory, is also upon the applicant. In our view, it has unfortunately failed to discharge this onus. We remind ourselves that each case depends on its own facts and we find it difficult to be persuaded that the appeal on the facts of the present case would be rendered nugatory if stay is not granted. The appeal may be heard and, if successful, the proceedings in the superior court would be determined in accordance therewith. The hearing in the superior court might have been unnecessary for which appropriate costs can be ordered but the appeal will not have been worthless…These remarks aptly apply to the application before us. What will happen if we do not grant the stay sought is that the appeal in the High Court will be heard and may well be determined. But when the appeal already lodged is heard, determined and, if it succeeded, what would automatically follow is that the proceedings in the High Court would have been rendered unnecessary, but an appropriate order for costs can be made to remedy that. However, the appeal in this Court would not have been rendered nugatory".

In the present case, the applicants were not completely locked out from seeking particulars. What the Court ordered was for the parties to comply with the provisions of Order 2 Rule 3(2) as read with Order 11 of the Civil Procedure Rules which compliance is required pursuant to Order 54 of the Civil Procedure Rules whose provisions the applicant is well versed in. While being mindful of the fact that in voluntary disclosure of particulars parties may be tempted not to fully disclose their material, the Court did leave the window open for any party felling shortchanged to apply for further and better particulars. In the foregoing premises to state that if the parties were to proceed to comply with the said provisions while the appeal is pending is, in my considered view, to miss the point since the intended appeal itself seeks to have disclosure of particulars made. It therefore follows that the orders being sought in the appeal if granted would be substantially the same as the orders made herein on 26th July 2012n save that the orders made herein sought to place the parties on equal footing as mandated by the Overriding Objective by requiring compliance by all the parties to the suit. Accordingly, and pursuant to **David Morton Silverstein vs. Atsango Chesoni** (supra) I am unable to find that substantial loss is likely to be occasioned to the applicant if these proceedings are not stayed.

It is important to point out that the whole idea behind Order 2 rule 3(2) as read with Order 11 is to expedite hearing of cases by ensuring that parties disclose the substance of their case upfront in order for the parties and the Court to adopt a more expeditious and efficient mode of determining the suit. By dealing with as many aspects of the case within Order 11 processes, the Court would in effect reduce delays and justly determination of the proceedings; efficiently dispose of the business of the court; efficiently make use of the available judicial and administrative resources; and timely dispose of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties. These are the aims of the Overriding Objectives of both the Civil Procedure Act and the Appellate Jurisdiction Act. To hold otherwise would be contrary to the said objective. I am, therefore, not convinced that the intended appeal would thereby be rendered nugatory, if these proceedings are not stayed.

That the 2nd defendant may opt to amend its pleadings on being furnished with particulars is not, in my view, a sufficient reason to stay the proceedings since amendment to pleadings can be made at any stage in the proceedings including where appropriate at he appellate stage. It is also true that in my ruling dated

26th July 2012 I directed the plaintiff to comply with the pre-trial procedures within 21 days. Before the said period could run ot the applicant whether by design or accident moved the Court and secured a stay of proceedings on 15thb of August 2012. The applicant cannot therefore fall back on its own actions in placing a road block on the path of the plaintiff to charge the plaintiff with non-compliance with the court orders. Again the mere fact that a party decides to institute proceedings on the last day ought not to be used against him as long as the suit is filed within the limitation period. Dealing with a similar matter the Court of Appeal in **Jackson Mutuku Ndetei vs. A O Bayusuf & Sons Ltd. Civil Application No. Nai. 231 of 2002** expressed itself as follows:

"Although it is true that a party who decides to wait until the very last day or a few days before presenting a record of appeal runs the risk that time may expire for him before complying with the directions of a registrar, an intending Appellant is given sixty days within which to lodge a record of appeal and the only day that is to be explained is the delay falling outside the sixty days and it does not matter that an appeal is lodged on the very last day because the law allows sixty days and there must have been a valid reason for giving that period of time".

I have considered the authorities cited and I am in agreement with **Ochieng, J's** decision in Francis **Njakwe Githiari & Another vs. Hon. Daniel Toroitich Arap Moi T/A Moi Educational Centre HCCC No. 596 of 2004** that the strictures under Order 41 rule 4(2) [now Order 42 rule 6] of the Civil Procedure Rules do not strictly apply to applications for stay of proceedings pending appeal. Accordingly this application is distinguishable from **Mary Kina vs. Menengai Oil Refineries & Another Embu HCCC No. 60 of 2003**; **Swapan Sadhan Bose vs. Ketan Surendra Somaia & Others Nairobi HCCC No. 164 of 2004** and **AET Minerals Ltd & 2 Others vs. Kenedy Lumbuku & Another Bungoma HCCA No. 333 of 2004**. With regard to **Kenya Commercial Bank Limited vs. Muturi, Gakuo & Company Advocates HCCC No. 591 of 2004**, it was clear that unless stay of taxation was granted and a certificate of costs issued, the applicant would be precluded from challenging the taxation hence render the defence to the suit untenable. As already stated compliance with the order of 26th July would not preclude the applicant in this case from applying for particulars if the applicant deems fir so to do. I am also in agreement with the holding in **Njakwe Githiari & Another vs. Hon. Daniel Toroitich Arap Moi T/A Moi Educational Centre** (supra) that "if these proceedings were stayed pending the hearing and determination of the defendant's intended appeal, the plaintiffs will have to wait much longer before they could prosecute their case. Such delay is prejudicial to the plaintiffs". In that case stay was granted on the ground that there was a danger of the court being put into disrepute due to possible inconsistent decisions on the same points, in the same matter. Here I have found that the orders intended to be sought in the intended appeal would be substantially the same and have the same or substantially the same effect as the orders made on 26th July 2012.

I have said enough to show that the application dated 9th August 2012 lacks merit and the same is hereby dismissed with costs. As the period of 21 days within which the plaintiff was to comply with the orders of 26th July 2012 was frozen, I hereby lift the orders of stay with the effect that the period which fell within the lifespan of the stay is hereby excluded from computation of the said period of 21 days.

The costs of the application awarded to the plaintiff only since the 1st defendant showed no interest in the application.

Dated at Nairobi this 16th day of November 2012

G.V ODUNGA
JUDGE

Delivered in the presence of

Mr. Fraser for Plaintiff

No appearance for the 1st Defendant

Mr. Taib for the 2nd defendant