REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION – MILIMANI

CIVIL CASE NO. 122 OF 2010

BLUE LIMITED.....CLAIMANT

VERSUS

JARIBU CREDIT TRADERS LTD.....1ST RESPONDENT

SURESH NANALAL KANTARIA.....2ND RESPONDENT

KEVAL NANALAL KANTARIA.....3RD RESPONDENT

RULING

This application is brought by notice of motion dated 10th January, 2011, and taken out under Sections 99 and 100 of the Civil Procedure Act; and Order 42 Rule 6 of the Civil Procedure Rules. The applicant prays for orders that –

(1) … (spent)

(2) The decree issued on 16th December, 2010 be varied and/or amended to include the order granting the applicants leave to appeal as per the draft annexed to the application.

(3) There be a temporary stay of execution pending the hearing and determination of this application.

(4) There be a temporary stay of proceedings including the debatement of accounts pending the hearing and determination of this application.

(5) There be a stay of execution of the decree pending the hearing and determination of the respondents' intended appeal.

(6) There be a stay of proceedings including the debatement of accounts pending the hearing and determination of the respondents' intended appeal.

(7) The costs of this application be provided for.

The application is supported by the annexed affidavit of Keval Nanalal Kantaria, the 3rd respondent and Managing Director of the 1st respondent, and is based on the grounds that there is sufficient cause for the grant of stay in that –

(a) The respondents/applicants are aggrieved by the ruling of Lady Justice Martha Koome delivered on 3rd November 2010 and have filed a notice of appeal against the ruling and applied for copies of the typed proceedings.

(b) The intended appeal has merit and has good prospects of success.

(c) The claimant has threatened to execute the decree against the respondents including instituting winding up proceedings against the 1st respondent by its letter dated 3rd January 2011.

(d) The 1st respondent is a well established importer and retailer of a variety of goods and the 2nd and 3rd respondents are directors of the 1st respondent. The respondents stand to suffer substantial loss if the claimant acts on its threat.

(e) The threatened winding up proceedings will destroy the 1st respondent's business.

(f) The Arbitrators directed that there be a taking/debatement of accounts before any party pays what it owes to the other.

(g) According to the respondents, the claimant owes them a total of Kshs. 51,386,080.75.

(h) It is therefore necessary that the parties do take the accounts so that it is established which party owes the other.

(i) Any execution in the circumstances of the case would be an abuse of the process of the court.

(j) The respondents are apprehensive that the claimant will execute the decree before the parties settle the accounts and/or before the intended appeal is heard and is determined.

(k) The assets of the claimant are unknown and the respondent may not be able to recover any monies that would have been paid out in execution.

(l) The applicant herein made an application for leave to appeal against the ruling delivered on 3rd November 2010 which application was allowed.

(m) Pursuant to Rule 89 (2) of the Court of Appeal Rules, 2010, it is a requirement that a statement that leave to appeal has been granted be included in the decree. It is necessary to amend the decree to comply with the law.

The application is opposed by the replying affidavit of Hannes Prinsloo, the country Manager of Blue Ltd (the claimant) sworn on 21st January, 2011. With the leave of the court, each of the parties filed written submissions which were highlighted by the respective counsels for the parties. I note from these submissions that whereas Mr Murugara for the applicant went straight to the issue of stay of execution pending appeal, Mr Kimuli for the respondent dwelt at length with the futility of the proposed appeal since there was no provision for appeal in respect of arbitration awards. However, Mr Murgara for the applicant was quick to point out that Mr Kimuli's submissions were on the wrong premises.

After considering the pleadings and submissions of counsel, I note from the outset that the applicants are not challenging the arbitral award at all. All they challenge is the decision declining to set aside the arbitral award. Those are two different matters. Immediately after the ruling which is the subject matter of the proposed appeal was delivered, counsel for the applicants in this application applied for leave to appeal and the same was duly granted. It is futile for counsel for the respondent herein to argue that an appeal does not lie while the High Court, in its wisdom, granted leave to appeal. Mr Kimuli's argument on that issue would, therefore, best be reserved for argument in the Court of Appeal but not in this application. The grant of that leave brought this application within the four corners of Order 42 Rule 6 of the Civil Procedure Rules, and it is the conditions spelt out in that Rule that I now turn to.

For the avoidance of any doubt, Order 42 Rule 6 (1) provides as follows -

"No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court applied from may for sufficient cause order stay of execution of such decree or order…"

This wording contemplates that an appeal must be in being before an application is entertained. Under Rule 6 (4) however, for the purposes of this Rule, an appeal to the Court of Appeal is deemed to have been filed when under the Rules of that court, notice of appeal has been given. In the instant matter, in paragraph 6 of the supporting affidavit sworn by Keval Nanalal Kantaria, states that the respondents, being aggrieved by the decision by Lady Justice Martha Koome "**have filed a notice of appeal against the decision and made a request for typed proceedings for purposes of the intended appeal."** Such notice is sufficient to constitute an appeal for the purposes of this rule and therefore it is safe to say that the appeal contemplated by Rule 6 (1) is already in being.

Rule 6 (2) of Order 42 is the most critical in terms of granting stay of execution pending appeal. It states as follows -

"(2) No order for stay of execution shall be made under subrule (1) unless –

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made

and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant".

From the wording of this subrule, three issues arise for decision. These are whether substantial loss may result to the applicant unless the order of stay is made; whether the application is brought without unreasonable delay and whether security has been given by the applicant.

I note from paragraph 21 of Mr Kantaria's supporting affidavit that the applicants are prepared to comply with any terms the court may order as regards security for the due performance of the decree. In my view, this satisfies paragraph (b) as to the giving of security by the applicant. Secondly, I also note that whereas the ruling by Judge Koome was given on 3rd November, 2010, this application for stay of execution was not filed until 11th January 2011. That was about 10 weeks from the date when the ruling was delivered and it borders on the unreasonable. If I am wrong in so thinking and if the application was made within a reasonable time, the applicant has yet to show that substantial loss may result to the applicant unless the order for stay is made. If I understood Mr Murugara correctly, the applicant's case is that there have been changes in the ownership of the respondent which is a South African Company. The applicants are therefore apprehensive that if the money goes to the respondent's, then the applicants may never recover it.

On the other hand, Mr Kimuli for the respondent submitted that substantial loss must be demonstrated and a mere allegation will not suffice. He argued that it was not true that the claimant/respondent was a South African Company. On the contrary, it is incorporated in Kenya as a subsidiary of a South African Company which is different. In my view, the onus rests entirely on the applicant to demonstrate that if any substantial sum of money is paid to the respondent, the latter will not be able to refund it in the event that the appeal succeeds. In the circumstances of this case there is no evidence that the respondent is impecunious or that it will not able to refund any amount paid to it in the event the appeal succeeds. On that score, I find that this condition has not been satisfied with the consequence that the order for stay of execution cannot issue.

The prayer for the variation and/or amendment of the decree to include the order granting the applicant's leave to appeal as per the draft annexed to the application accordingly succeeds and it is hereby granted as prayed. However, the rest of the application for stay of execution fails and it is hereby dismissed with costs.

DATED and **DELIVERED** at **NAIROBI** this 5th day of July, 2011.

L NJAGI

JUDGE