REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL AND ADMIRALTY DIVISION

WINDING UP CAUSE NO. 29 OF 2010

IN THE MATTER OF TATU CITY LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT

R U L I N G

When this file came up for mention before me on the 12th October, 2011, both Mr. Wamae for the Applicant/Petitioner and Mr. Oraro for the Respondent informed me that there was pending before the Court of Appeal an application put forward by the Applicants herein for an Injunction to issue and a stay of further proceedings in this Winding – Up Cause as before this Court. It was more or less agreed by consent that Mr. Wamae would be allowed to withdraw the Applicant's Application dated 28th July, 2011 being an application for stay of proceedings before this Court pending the hearing of the injunction appeal in the Court of Appeal. That appeal I understood was against the Ruling of my brother Apondi, J. dated 22nd July, 2011 wherein he dismissed the application to disqualify the firm of Oraro & Co. Advocates from appearing for the Respondent Company herein.

On the 12th October, 2011, both Mr. Wamae and Mr. Oraro did not wish me to give directions as regards the hearing and disposal of the various applications (12 in number, I am given to understand) until they had the opportunity of going before the Court of Appeal on the 13th October, 2011. I am now informed from the bar and have seen a copy of the Court of Appeal's Order dated the same day, that all that transpired at the hearing before the Court of Appeal on that day, was that O'Kubasu, J.A. disqualified himself from sitting on the matter and, consequently, the Bench will need to be reconstituted. However, the Court of Appeal has ordered that the application is adjourned to a date to be re-fixed on a priority basis.

Now the parties are back before me for directions. Mr. Oraro is keen to get on with the hearing of the various matters outstanding before this Court. Mr. Wamae takes a different view of matters. Mr. Oraro submitted to me that by an Order by Consent made by Apondi, J. on the 1st March, 2011, it was agreed that both parties would put in written submissions in respect of the Applications before this Court dated 15th October, 2010 and 12th November, 2010. Indeed, Mr. Oraro detailed that such submissions had been filed and that already Mr. Wamae had spent six hours of the Court's time highlighting the same for the Applicants herein and now it was the Respondent's turn for highlighting, fixed for the 24th October, 2011. On his part, Mr. Oraro felt that he could leave it to this Court to determine what is already on

record or whether his highlighting of the Respondent's filed submissions should proceed.

In his turn, Mr. Wamae pointed out that the application before the Court of Appeal was for it to decide upon the disqualification of Mr. Oraro's firm from acting for the Respondent Company and the taking out of the Winding – Up Petition by the same firm. The record before this Court would show that the parties had agreed that the matter of Oraro's Company's disqualification should be dealt with first and that a large part of the submissions filed herein dealt upon that application and both parties had spent time in highlighting the same. Mr. Wamae noted that quite apart from dealing with the disqualification matter, the Applicants had gone a step further and requested the Court of Appeal that Oraro & Co. should be restrained from proceeding further with matters before this Court. Further, Mr. Wamae, submitted that the fact that the High Court had disallowed the application to disqualify is not the end of the matter, because there is the right of appeal against that decision. I was referred to the cases that had been cited in the disqualification proceeding in this Court, where the Court of Appeal had set aside orders of the High Court. The two cases that I was informed to were:- **Kenya Woolen Mills and Galet Industries vs. Standard Chartered Bank of Kenya Ltd.,** being *Civil Application No. 102/94* and **African Safari Club vs. Safe Rentals**, *Civil Application No. 53/2010*. These cases, according to Mr. Wamae involved situations where disqualification had not been allowed by the High Court but its decision had been overturned by the Court of Appeal. He noted that not a single case had been cited by any party where a Court had allowed an advocate, against whom an application has been made for an injunction to cease from acting, to be allowed to act while such matter was pending before that Court. It is a case, Mr. Wamae reiterated, where justice is done fairly for both parties.

As I understand it, what Mr. Wamae is really seeking is a stay of proceedings before this Court pending the hearing of the appeal in the Court of Appeal against Apondi, J's said ruling of the 22nd July, 2011. I have looked at both the authorities quoted above and cited to me by Mr. Wamae. I have also perused the authorities cited to me by Mr. Oraro, being **Delphis Bank Ltd. vs. Chatthe & 6 Others** (2005) 1KLR 766, **Ododa & Another vs. Yier & Another** (2004) LLR 4412 and **H. F. Fire Africa vs. A.M.R. Gharieb**, *HCCC No. 665/2003* (Milimani). With respect to learned counsel, all these cases dwell on the point as to whether advocates should be disqualified from acting in each particular case. Such are of little assistance to me here as they all have relevance to the appeal before the Court of Appeal and it would be highly presumptuous of me to attempt to predict the finding of that Honourable Court for each case turns on its own particular facts and circumstances. I must therefore turn to the authorities which lay down the now well established principles in relation to staying proceedings before the lower Court while awaiting the finding of the higher Court on appeal.

To this end, I am bound by the findings of the Court of Appeal in **Madhupaper International Ltd. vs. Kerr**, *Civil Application No. 116/1985*. Per the Appeal Court's Judgment referring to the judge in the Court below:

"He was referred to Erinford Properties Ltd. vs. Cheshire County Council (1974) 2 All ER 443 in which Mr. Justice Megarry held that where a judge dismissed an application for interlocutory injunction he has jurisdiction to grant the unsuccessful applicant an injunction pending an appeal against the dismissal. It is unnecessary for him to apply to the Court of Appeal for it. There is no inconsistency in doing so. The purpose of granting one having just refused to do it is to prevent the decision of the Court of Appeal being nugatory should it reverse the judgment below which sometimes happens".

Further in the Appeal Court's judgment, it had this to say:

"It is preferable for the High Court to deal with such an application, in any event, not so much as to protect this court from a sudden dilation of its lists but more because this court would have the distinct advantage of seeing what the judge made of it. The learned Judges of the High Court should take not of this concurrent jurisdiction which the two courts have and exercise theirs. There are cases, however, where it would be wrong to grant an injunction pending appeal. These would include where the appeal is frivolous or to grant it would inflict greater hardship than it would avoid. And there will be others which we have not expressed yet".

The **Madhupaper** decision has been followed more recently by Nyamu, J. (as he then was) in **Murungaru vs. Kenya Anti-Corruption Commission & Another** (2006 eKLR). Quoting both **Madhupaper** and **Erinford**, the learned judge had this to say:

"The ratio in both cases is that where a Judge dismisses an interlocutory motion for an injunction, he has jurisdiction to grant the unsuccessful applicant an injunction pending an appeal against the dismissal. It is not necessary for the applicant to apply to the Court of Appeal and that there is no inconsistency in granting such an injunction after the dismissal. This then is the ratio in the two cases cited".

Of course in this case, Mr. Wamae finds himself in a bit of a predicament. When he appeared before me on the 12th October, 2011, anticipating perhaps relief from the Court of Appeal, the next day, he applied for, Mr. Oraro consented thereto and I allowed him to withdraw his formal application for stay dated 28th July, 2011. The Court of Appeal hearing not having come off, Mr. Wamae is now back before with what amounts to this oral application for stay. I have not doubt that I have the jurisdiction to rule upon it taking into account the authorities that I have cited above. I am also mindful of the provisions of **Rule 6 (1)** of **Order 42** *Civil Procedure Rules 2010*. What I consider that I should be primarily guided by is the principle of whether the forthcoming appeal before the Court of Appeal will be rendered nugatory (as Mr. Wamae say it will) or not. What then will be the effect on the current matters pending before this Court should the Court of Appeal reverse Apondi, J.s' said Ruling and disqualify the firm of Oraro & Co. from acting for the Company? To my mind, such a decision will have a profound effect on some if not all the currently outstanding applications 12 in all. I am also aware that the Court of Appeal has ordered that the said appeal against Apondi, J.'s ruling is to be heard on a date to be re-fixed on priority basis. This would indicate to me that there should be minimal delay to the proceedings before this Court as the Court of Appeal has clearly indicated that it intends to hear the appeal just as soon as a date can be fixed. Finally, I note that when the question of a stay was argued before Apondi, J. on the 22nd July, 2011, rather than rule upon the verbal application of the applicants he directed that a formal application be made, which it was and filed on 28th July, 2011. In today's circumstances, and bearing in mind the provisions of Article 159 (2) (d) of the Constitution 2010, I do not find that I have any difficulty in ruling on Mr. Wamae's verbal application.

The upshot of this matter is that I hereby grant an injunction to stay the proceedings currently before this Court until the hearing of the Appeal to disqualify the firm of Oraro & Co. Advocates from acting for the Company is heard, decided and upon and disposal of.

Costs in the cause.

DATED and DELIVERED at NAIROBI this 21st day of October, 2011.

J. B. HAVELOCK
JUDGE