

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 212 of 2008

FIDELITY SHIELD INSURANCE CO. LTD.....1ST APPLICANT

LION OF KENYA INSURANCE CO. LTD.....2ND APPLICANT

APA INSURANCE CO. LTD.3RD APPLICANT

MERCANTILE FILE AND GENERAL ASSURANCE CO. LTD.4TH APPLICANT

UAP PROVINCIAL INSURANCE CO. LTD.....5TH APPLICANT

VERSUS

RAFIA BAGS (K) LTDDEFENDANT

RULING

1. By a ruling delivered on 5th December 2008 Kihara Kariuki J granted an injunction restraining the defendant and Mr. Sarad Rao Advocate from conducting arbitral proceedings in respect of the dispute between the applicant and the defendant. That is the order that triggered the filing of this notice of motion dated 19th March 2009, filed by the defendant/applicant seeking for a stay of proceedings in this suit pending the hearing and determination of an intended appeal to the Court of Appeal against that ruling. The application is predicated on the grounds stipulated on the body of the application and the supporting affidavit of Michael Fischer.

2. According to the applicant the defendant was aggrieved by the ruling which barred Mr. Sarad Rao from proceedings with the arbitral proceedings and filed a notice of appeal. Since the notice of appeal was filed they have not obtained copies of the proceedings to enable them file an appeal. It was submitted that the applicant has an arguable appeal with high chances of success. The applicant is challenging the correctness of the ruling especially the interpretation of the arbitration clause provided in the policy document. Further if the stay is not granted the originating summons may proceed to hearing and the ruling of Originating Summons will be final with no rights of appeal.

3. The applicant is further apprehensive that the trial court may adopt the interpretation of the arbitration clause which was adopted by the judge. It is therefore in the interest of justice as held in the case of Re Global Tours and Travels Limited Case No.43/00 [200] LLR 1061 (CCK) where Ringera J (as he then was) held that:

“From a textual analysis it appears that the court has discretion to order stay of proceedings pending appeal from its order or decree and that such discretion is unfettered. The strictures that sufficient cause be shown and that no order of stay should be made unless the court is satisfied that substantial loss may result to the applicant and that the application has been made without unreasonable delay and further that such security as may be ordered for the due performance of the order or decree has been given are on a plain reading of the rule applicable only to applications for stay of execution only. Looking at the submissions that have been addressed to me, it would appear as if both counsel labored under the

misapprehension that those strictures also applied to applications of for stay of proceedings”

4. On the part of the plaintiffs/respondents this application was opposed. Counsel relied on the grounds of opposition filed on 4th September 2009. The application was challenged for having been brought to court after inordinate delay. Moreover, the order by Kariuki J is a temporary order of injunction pending the determination of the Originating Summons. The matter has not been concluded. The defendant would have an opportunity to persuade the court during the hearing on a balance of probability.

5. It was further argued that this court has inherent jurisdiction to grant an order of stay but the court must be satisfied that the appeal would be rendered nugatory. In this case, the appeal would not be rendered nugatory if a stay of proceeding is allowed. The appeal which has not been filed may take several years that will also tie the determination of the Originating Summons. In the interest of justice the court should not grant the orders sought.

6. This application invokes the exercise of this courts inherent jurisdiction. Judicial discretion gives the court flexibility to provide definitions according to the dictates of justice. This must be done judiciously based on facts and law and to promote fair and expeditious disposal of cases. The order sought to be appealed against is an interim order of injunction following an Interlocutory Application. The main suit that is the Originating Summons is still pending hearing and determination.

7. This application is also brought under the provisions of Order XLI rule 4 of the Civil Procedure Rules. Although the application seeks a stay of execution I agree with the decision of Ringera J (suppra) that the sole question is whether the stay of execution sought is in the interest of justice. In considering whether the order will serve the interest of justice certain factors ought to be brought to bear. Such factors are whether the order will hinder the expeditious disposal of the matter, whether the appeal has merit on the face of it, and whether the application has been brought expeditiously.

8. This application was filed more than three months after the ruling was delivered. This application cannot therefore meet the threshold of having been filed within a reasonable time. Regarding the interest of justice, the order sought to be appealed against is an interim order. The main suit where the issues would be determined is still pending. It is not also noteworthy that no appeal has so far been filed. The defendant will have an opportunity at the hearing of the suit to prove to the trial court against granting the orders sought.

9. If the proceedings are stayed at this point and while considering an appeal has not been filed there will be delay which will not serve the interest of justice. Accordingly I decline to grant the orders sought and dismiss the application with costs to the respondents.

RULING READ AND SIGNED ON 29TH JANUARY 2010 AT NAIROBI.

M.K. KOOME

JUDGE