



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA Commercial Civil Case 191 of 2005

EQUATOR BOTTLERS LTD.....PLAINTIFF

VERSUS

1. KENYA PORTS AUTHORITY

2. SDV TRANSAMI KENYA LIMITED

3. OCEAN FREIGHT (EA) LIMITED.....DEFENDANTS

RULING

This is an application by the plaintiff for stay of proceedings pending the hearing and determination of a proposed appeal from a ruling delivered on 13th March 2009 dismissing the plaintiff's application for review. The application has been brought under the provisions of Sections 1A, 3 and 3A of the Civil Procedure Act and all other enabling provisions of the Law. The application which is supported by an affidavit of Zehrabanu Janmohamed, the plaintiff's advocate, is premised upon some 14 grounds the primary one being that the firm of Timamy and Company Advocates have filed two bills of costs and unless the taxation thereof is stayed, the plaintiff will suffer substantial loss.

The application is opposed and there is a replying affidavit sworn by one Issa Muslim, the Respondent's Managing Director. It is deponed in the said affidavit, *inter alia*, that the plaintiff is guilty of inordinate delay and has not satisfied the legal pre-requisites for the grant of an order of stay of proceedings.

When the application came up before me for hearing on 30th November 2009, counsel agreed to file written submissions which they duly filed by 19th February 2010. I have considered the application, the affidavits filed by both parties and the submissions made to me by counsel. Having done so, I take the following view of the matter. I agree with counsel for the respondent that section 3A of the Civil Procedure Act has incorrectly been invoked as there is a specific provision which governs such an application i.e. Order XLI Rule 4 (1) of the Civil Procedure Rules. Failure to invoke the correct provisions of the Law is however not fatal to the plaintiff's application. Indeed objections based on failure to state the correct order, rule or statutory provision under or by virtue of which any application is made are specifically prohibited by Order L Rule 12 of the Civil Procedure Rules.

Counsels have argued this application on the basis that a stay of proceedings can only be ordered if the conditions set in Order 41 Rule 4 of the Civil Procedure Rules are met. With all due respect to

counsel, that is not the correct view. Those conditions apply with respect to applications for stay of execution. With respect to stay of proceedings the court's discretion to order stay is unfettered. However, like all judicial discretions, the discretion should not be exercised idiosyncratically, or capriciously or on whim. It should be exercised rationally and judiciously. The main concern of the court is to do justice to the parties. As Ringera J, (as he then was) said in Nairobi (Milimani) Winding Up Cause No. 43 of 2000: In re Global Tours & travels Limited and the Companies Act (UR), in considering whether or not to allow stay of proceedings, the court should bear in mind such factors as the need for expeditious disposal of cases, the prejudice to the respondent and whether the application has been lodged expeditiously.

With regard to delay, the order appealed against was made on 13th March 2009. This application was lodged on 18th November 2009. The delay involved is of 8 months. In the interim, the applicant on more than one occasion attended the Court for taxation of the impugned bills of costs. The delay would prima facie appear unreasonable.

With regard to expeditious disposal of cases, there is no gainsaying that the intended appeal is yet to be filed one year down the line and the life span of an appeal in the Court of Appeal is about three (3) years. The taxation will therefore most likely be held in limbo for more than four (4) years in view of the fact that the appeal has not been lodged. The objective to dispose of cases expeditiously will therefore suffer. With regard to prejudice, the plaintiff swears that if the bills of costs are taxed, it will be condemned to pay the same to an entity which is not a party to this suit. There is no suggestion that the said entity is impecunious and will not pay back the said sums in the event that the appeal eventually succeeds. The respondent has sworn that it is able to refund to the plaintiff any amount of money should that become necessary. The basis for that averment is not revealed. The source of its money is also not given.

In the premises, the order that commends itself to me which will safeguard the interests of both parties is to stay the taxation of the said bills on terms that the plaintiff deposits the sum of Kenya Shillings One Million (Kshs. 1,000,000/=) into a reputable bank or reputable financial institution in an interest earning joint account in the names of the advocates for the plaintiff and the respondent. The said deposit be made within thirty (30) days from the date of this ruling. If the plaintiff complies with this order there will be stay of proceedings pending the hearing and determination of the intended appeal. In default, this application shall stand dismissed with costs. Otherwise costs shall abide the results of the appeal.

I grant each party liberty to apply.
Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 11TH DAY OF MARCH 2010.

F. AZANGALALA

JUDGE

Ruling read in the presence of Osino holding brief for Archer & Wilcock for the Plaintiff and Ms Odhiang holding brief for Inamdar & Inamdar for the 2nd Defendant.

F. AZANGALALA

JUDGE

11TH MARCH 2010

