REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 543 of 2003

EUROCRAFT AGENCIES LIMITED.....PLAINTIFF

VERSUS

TRADEWINDS EXPRESS LIMITED ..... 1ST DEFENDANT
BARRY MICHAEL TOMLINSON ..... 2ND DEFENDANT

R U L I N G

This application is for stay of proceedings. It is made by a notice of motion dated 26th November, 2009 and brought under **Order XLI Rule 4** of the **Civil Procedure Rules** and the Inherent Power of the Court. By the application, the Defendants seek the following orders –

1. ***That there be a stay of proceedings pending the hearing inter-parties and determination of this application.***

2. ***That there be a stay of proceedings pending the hearing and determination of the Applicant's intended appeal against the ruling delivered on 16th October, 2009. For the avoidance of doubt no steps be taken to appoint an independent firm of auditors in terms of the first prayer in the plaintiff's application dated 9th March, 2009 pending the hearing and determination of the intended appeal.***

3. ***That, alternatively, no further action be taken to enforce or in any manner give effect to the ruling delivered on 16th October, 2009 pending the hearing and determination of the intended appeal.***

4. ***That the costs of this application be provided for.***

The application is supported by the annexed affidavit of Barry Michael Tomlinson, the second Defendant, sworn with the authority of the 1st Defendant. It is based on the grounds that –

(a) By a ruling delivered on the 16th day of October, 2009, the court allowed the plaintiff's application dated 9th

March, 2009 seeking inter alia, the appointment of an independent firm of auditors to examine, assess, verify and report on the true accounting position between the Plaintiff and the first Defendant arising out of transactions and payments made by virtue of an arrangement to implement a concession agreement made between the Plaintiff and a third party.

(b) There are preliminary questions on the liability of the Defendants that needed to be determined by the court before an auditor could be appointed. The questions ought to be determined by the court and not an auditor.

(c) Unless the orders sought are granted, an auditor will be appointed and proceed to determine the liability of the Defendants.

(d) The Defendants are aggrieved with decision and intend to appeal to the Court of Appeal.

(e) The Defendants have grounds of appeal with prospects of success and intend to appeal to the Court of Appeal.

(f) The intended appeal will be rendered nugatory unless an order granting stay of proceedings is made pending the hearing and determination of the appeal.

Opposing the application, the Plaintiff filed 7 grounds of opposition contending that (i) the application as drawn was bad in law, incompetent, misconceived and an abuse of the process of court; (ii) the Defendants had not demonstrated sufficient cause for grounds upon which the court can grant the orders sought; (iii) the application was calculated to delay the further progress of the proceedings and the hearing and determination of this suit; (iv) the continued proceedings and in particular the taking of accounts as ordered by court would in no way prejudice the Defendants nor impact on the outcome of the intended appeal; (v) the intended appeal was on the face of it frivolous and its shaky merit should not be the basis upon which the orders of court are dispensed; (vi) the application as couched was intended to challenge the propriety of the decision of this Honourable Court rendered on 16th October, 2009 and in effect force interrogation of the grounds of the intended appeal; and (vii) that further delay in the proceedings as a result of the unwarranted stay sought would occasion insurmountable prejudice to the Plaintiff.

Each party filed and relied on written submissions citing several authorities. After considering the pleadings, the submissions and the authorities, I note that the application is made under **Order XLI Rule 4** of the **Civil Procedure Rules. Sub rule (1)** of that **Rule** states as follows –

"(1) 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 appealed from may for sufficient cause order stay of execution of such decree or order …"

The subsequent **sub rules (2), (3)** and **(5**) continue to provide elaborately for stay of execution, but nothing more is said about stay of proceedings. In the circumstances, this leaves the matter to the discretion of the court, which discretion ought to be exercised judicially

whenever there is "sufficient cause". It is noteworthy that the term "sufficient cause" is not anywhere defined, and therefore would have to be left to the circumstances of the particular case.

In the context of this case, the respective Counsel for both parties are in agreement that the decision of the Court of Appeal in **SILVERSTEIN v. ATSANGO CHESONI, [2002] 1 KLR 867,** among others, provides a reasonable yardstick for the conditions to be satisfied by an Applicant for stay of proceedings. These are that –

(a) the intended appeal is arguable and not frivolous; and

(b) ***unless the court grants an order for stay, the Applicant's intended appeal, if successful, will be rendered nugatory.***

Although these requirements are founded on the Rules of the Court of Appeal, no doubt they are broad enough to embrace what may include "sufficient cause" within **Order XLI Rule 4 (1).**

With regard to the first condition the Applicant contends that the appeal is arguable and is not frivolous. On the other hand, the Respondent takes the position that it is frivolous and its merit is shaky. It is prudent to mention at this stage that the onus of satisfying the two conditions spelt above for the grant of a stay of proceedings lies exclusively with the Applicant and, therefore, it is upon the Plaintiff in this case to establish that the intended appeal is arguable and not frivolous. In the case of **SAMWEL KAMAU MACHARIA & ANOR v. OCEANFREIGHT TRANSPORT COMPANY [2009] e KLR** the Court of Appeal took the view that an arguable appeal is one which ought to be accorded a full hearing. Should the intended appeal herein be accorded a full hearing? I am afraid that that is not for this court to say as the answer, I think, lies exclusively with the Court that will hear the appeal. At this stage, it will suffice if this Court finds that the intended appeal is not frivolous – meaning that it is not petty or shaky as the Respondent put it.

Bearing in mind the pleadings in this case, I find the intended appellant's arguments very interesting. Its contention is that the appointment of an independent auditor was the subject of a substantive prayer in the plaint, and to grant the prayer at the interlocutory stage is tantamount to condemning the Defendants unheard. It is also their case that before the court could grant a prayer for accounts and audit, it needed to have established the terms of the agreement between the parties; whether the assertion by the Defendants that the audit had already been carried out and the accounts approved by the boards of directors was sufficient; whether the assertion by the Defendants that an independent audit had been carried out and established that there was no fraudulent transaction was viable; whether the Defendants had breached their fiduciary duties; whether they had colluded to defraud the Plaintiff; whether they had unjustly enriched themselves from monies belonging to the Plaintiff; and whether the Defendants had fraudulently obtained money from the Plaintiff. In my view, these issues do not at all lie in the same camp. While the first half of them might find favour in the argument that **"may be"** the order to appoint an auditor was premature, the second half consists of issues which may be better determined after an audit report. I therefore find that the first half of those issues comprises of points which are not frivolous and which are therefore arguable.

The second main condition which the Applicant should demonstrate is that if the stay is not granted and the appeal succeeds, the success of the appeal will be rendered nugatory. It is correct to observe that if stay of proceedings is not granted, then an auditor will certainly be appointed in terms of the court order which is sought to be appealed against. If an auditor is appointed and the appeal fails, no one will be prejudiced. But if the auditor is appointed and the appeal succeeds, it is the Defendants' case that they will be prejudiced since the auditor has powers to pass judgment.

In sum, it is the Defendants' case that if the auditors are appointed and accounts taken, the auditor will examine the accounts to establish whether they are in order. Secondly, the auditor will decide whether a fraudulent transaction is disclosed in the accounts. Thirdly, the auditor will determine who is responsible for the fraudulent transaction, if any. Fourthly, the auditor will determine if the 2nd Defendant

failed to carry out his duties prudently to the Plaintiff and thereby caused economic loss to the Plaintiff. Finally, the auditor will determine who bears responsibility for any loss of monies detected during the audit. All this will be done without any of the conclusions being tested by cross-examination.

It is noteworthy that the Defendants have denied all the Plaintiff's allegations in the pleadings, and have also denied any wrong doing. In the premises, they have no reason to panic about what the auditor might say without being tested by cross-examination. Similarly, they have no reason to be apprehensive that there will be any findings of fraud or misappropriation of property by the Defendants. And even if they had such a reason, but they don't have it, the Court of Appeal addressed a similar scenario in the case of **KENYA COMMERCIAL BANK LTD. v. BENJOH AMALGAMATED LTD. & ANOR., Civil Application No. NAI 50 of 2001 (29/2001 UR)** which was also an application to stay the proceedings in the High Court pending the hearing and determination of an intended appeal to that Court. In its ruling regarding whether the intended appeal's success would be rendered nugatory if a stay was not granted, the Court rendered itself thus –

> ***"… 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 apply aptly to this application as well. If stay is not granted and the appeal succeeds, what will automatically follow is that the proceedings in the High Court will be rendered unnecessary, but an appropriate order for costs could be made to remedy that.

The Applicants seem apprehensive that if the auditor finds that the Plaintiff's allegations are sustainable, the effect would be to condemn the Defendants for these wrongdoings, some of which bear the stigma of crime. The effect will be to taint the reputation of the Defendants and the loss of business that ensues cannot be gainsaid. They also fear the loss of reputation as a result of any findings of fraud or misappropriation of property, and pose the question as to whether such a loss can be adequately addressed by damages.

To the extent that the Defendants have denied any wrongdoing, the words of Mutungi, J. ring true in **RE NATIONAL ELECTRICAL INDUSTRIES, Winding Up Cause No. 41A of 2000,** in which he said –

> ***"… a transparently managed and operated company has no cause to fear or worry over investigations…"***

Traditionally, an auditor is not a bloodhound, but a watchdog, and his role in this case is only to record the financial transactions between the parties over the relevant period. The Defendants' fears are therefore speculative and unfounded, but if the auditor steps out of his mandate and defames the Defendants, there is no reason why the latter cannot sue for defamation.

Against these observations, I find that the Applicants have not satisfied the second limb of the conditions for grant of stay of proceedings pending appeal, and their application should fail. It is accordingly dismissed with costs.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 22nd day of April, 2010.

L. NJAGI
JUDGE