



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 73 of 2007**

**JETLINK EXPRESS LIMITED..... PLAINTIFF**

**VERSUS**

**EAST AFRICAN SAFARI AIR EXPRESS LTD..... DEFENDANT**

**RULING**

On 2nd October 2009, this court struck out the plaintiff's suit on the grounds that it was frivolous and vexatious. The plaintiff was aggrieved by this court's decision and has duly filed notice of its intention to appeal against the said decision to the Court of Appeal. The striking out of the plaintiff's suit provoked the filing of two applications. The first was filed by the plaintiff under provisions of **Section 3A** of the **Civil Procedure Act** and **Order XLI Rule 4** of the **Civil Procedure Rules**. The plaintiff seeks to stay execution of the said order of this court pending hearing and determination of the appeal. It further seeks to stay proceedings herein pending the hearing and determination of the intended appeal. The application is supported by the annexed affidavit of Elkana Aluvale, the managing director of the plaintiff, and the grounds on the face of the application. The application is opposed. Thota Venkata Chellarao, the general manager, finance and administration of the defendant swore a replying affidavit in opposition to the application. On its part, the defendant sought entry of judgment on admission against the plaintiff in terms of the defendant's counterclaim. The application is predicated under the provisions of **Order XII Rule 12** of the **Civil Procedure Rules**. The application is opposed. The application has been listed for hearing on 19th November 2009.

The application that was argued before the court, and that is the subject of this ruling, is the plaintiff's application seeking the two orders of stay of execution and stay of proceedings. In the grounds in support of its application, the plaintiff stated that it will suffer substantial loss by virtue of the operation of the *res judicata* rule if the court disallows the application. The plaintiff was apprehensive that if the defendant is allowed to proceed with its counterclaim before a determination is made by the Court of Appeal in regard to whether this court was right in striking out the plaintiff's suit, and in the event that the appeal is allowed, the plaintiff would have been denied an opportunity to prosecute its case at the same time as the defendant would be prosecuting its counterclaim. The plaintiff stated that the appeal was arguable and not frivolous and would be rendered nugatory if the orders sought are not granted. The plaintiff was of the view that the hearing of the defendant's counterclaim should await determination by the Court of Appeal on whether the plaintiff's claim can be sustained. The plaintiff argued that the parties would be spared further and additional costs if the court stays proceedings herein pending the hearing and determination of its appeal.

In its response, the defendant stated that there was no order on record capable of being stayed. The defendant lamented that the plaintiff have not offered any security as required under the provisions of **Order XLI Rule 4(2)(b)** of the **Civil Procedure Rules**. The defendant was of the view that the plaintiff had failed to demonstrate substantial loss it would suffer if the application is not granted. It stated that the determination of the defendant's counterclaim cannot constitute substantial loss. The defendant reiterated that the prosecution of its counterclaim would not deter the plaintiff from pursuing its appeal against the said decision of the court. The defendant stated that the orders sought cannot be granted in light of the fact that the court made no orders directing any money to be paid by the plaintiff. The defendant opined that the plaintiff's intended appeal is not arguable.

At the hearing of the application, I heard rival arguments made by Mr. Lubulellah for the

plaintiff and Mr. Kiragu Kimani for the defendant. I have carefully considered the said submissions. I have also read the pleadings filed by the parties herein in support of their respective opposing positions. The authorities cited thereto have been of help to the court. The issue for determination by this court is whether the plaintiff established a case as to entitle the court stay execution and stay proceedings in this case pending the hearing and determination of the appeal. The principles to be considered by this court in determining whether to stay execution or stay proceedings pending the hearing of an appeal are set out under **Order XLI Rule 4(2)** of the **Civil Procedure Rules**. The plaintiff must satisfy the court that it would suffer substantial loss if stay is not granted. The Court of Appeal in **Joseph Kahugu Wakari vs Barclays Bank of Kenya Limited CA Civil Appl. No. NAI 237 of 1998 (UR)** (*unreported*), in defining what constitutes substantial loss stated that: *“...there must be substantial reasons for grant of stay of execution. It is not enough to say that the applicants will be burdened financially. That is the natural consequence of a judgment entered against him. It is also not enough to say that the fact of filing of the proposed appeal entitles an applicant to a stay of execution of decree.”*

The plaintiff is required to provide such security as the court may order for the due performance of such decree or order as may ultimately be binding upon it. In regard to its application seeking to stay proceedings herein pending the hearing of the appeal, the Court of Appeal held in **Silverstein vs Chesoni [2002] 1KLR 867** at page 873 as follows: *“What will happen if we do not grant the stay sought is that the appeal in the High Court will be heard and may well be determined. But when the appeal already lodged is heard, determined and, if it succeeded, what would automatically follow is that the proceedings in the High Court would have been rendered unnecessary, but an appropriate order for costs can be made to remedy that. However, the appeal in this court would not have been rendered nugatory.”*

In the present application, if I understood the plaintiff correctly, it is its case that the claim that was struck out by the court is intertwined with the defendant’s claim in the counterclaim. It is the plaintiff’s case that the court cannot render a decision in regard to the counterclaim without necessarily looking into the merits or otherwise of the plaintiff’s claim. It was therefore the plaintiff’s submission that in light of the fact that the court had struck out the plaintiff’s suit, the plaintiff should be given an opportunity to ventilate its appeal before this court can hear the defendant’s counterclaim. The plaintiff made this argument on the basis that the cause of action in the plaintiff’s claim and that of the defendant in its counterclaim arose from the same bilateral interline agreement.

On its part, the defendant argued that the issues in the plaintiff’s suit and that in the defendant’s counterclaim were different in the sense that the plaintiff’s claim had already been struck out by the court. It argues that it should therefore be given an opportunity to agitate and ventilate its counterclaim. It was the defendant’s case that it should not be held at ransom to an extent that its counterclaim is considered after the plaintiff’s appeal has been heard and determined.

As stated earlier in this ruling, the principles to be considered by the court in determining the present application are well settled. Having evaluated the facts of this case, I am of the view that the plaintiff made a case to entitle this court to stay proceedings herein pending the hearing and determination of the intended appeal. The plaintiff is entitled to have a second opinion from the Court of Appeal in regard to the ruling of this court that is the subject of this application. It is true that the basis of the plaintiff’s claim which was struck out by this court and that of the defendant’s counterclaim which the defendant seeks to canvass before this court is the bilateral interline agreement. If the appeal were to succeed, then, it would save the parties unnecessary costs if the plaintiff’s claim and the defendant’s counterclaim are heard and determined at the same time. I am not saying that the plaintiff’s appeal will succeed: on the contrary, it is my understanding that the judges of the appellate court may be of contrary opinion to the view held by this court in the said decision. This court is mindful

of the fact that in staying proceedings herein, it would have deprived the defendant the opportunity to ventilate its counterclaim. I am however of the view that any prejudice that the defendant would suffer would be taken into consideration by this court making an appropriate order for the plaintiff to provide security for costs.

In the premises therefore, I will allow the plaintiff's application. I hereby stay proceedings herein pending the hearing and determination of the appeal lodged by the plaintiff. The stay of proceedings is granted conditionally: the plaintiff shall deposit in a joint interest earning account in a reputable bank in the names of the respective counsel for the plaintiff and the defendant the sum of Kshs7.5 million. The said amount shall be so deposited within thirty (30) days of today's date or in default thereof, the order granted herein shall lapse automatically. Costs shall be in the cause.

**DATED AT NAIROBI THIS 18TH DAY OF NOVEMBER 2009.**

**L.**

**KIMARU**

**JUDGE**