



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

**CIVIL CASE 609 OF 2004**

**TRANSROAD (K) LIMITED .....PLAINTIFF**

**VERSUS**

**GENERAL TYRE SALES LIMITED .....DEFENDANT**

**RULING**

The defendant had filed an application dated 18<sup>th</sup> September, 2007 wherein it sought orders to amend the defence dated 30<sup>th</sup> November, 2004. After hearing the merit of the application this court gave a ruling dismissing the aforesaid application. The defendant is now aggrieved by the whole of the ruling delivered on 14<sup>th</sup> February, 2007 in which its application for amendment was dismissed. It alleges that the court should have allowed the amendment of the pleadings as the same would have formed the basis of the defendant's defence to the claim of the plaintiff. The defendant having filed a notice of appeal to the Court of Appeal, contends that there is a possibility that the Court of Appeal may overrule this court and grant the defendant leave to amend its defence conditionally or unconditionally. And should the Court of Appeal allow the defendant to amend its defence the amended defence will form the defendant's primary record of this suit. The defendant therefore contends that unless an order of stay of proceedings is granted it will suffer substantial loss as this matter will proceed for hearing. And that will deny the defendant an opportunity to present its amended defence. And equally the intended appeal will be rendered nugatory.

**Mr. Munyithya** learned counsel for applicant submitted that the defendant having filed a notice of appeal against the decision of this court and the defence being the backbone and/or the central pleading, it would be in the interest of justice to stay further proceedings of this matter. He contended that if a party is denied a chance of amending its defence, such a party is bound to suffer prejudice because he may not present evidence in support of its case. And that if the orders sought are not granted, naturally this court will proceed further with the pending application. He further contended that all the pending applications is based on the premise that the defendant does not have a defence. He also contended that this court is not in a position to know of what the Court of Appeal would say and whether it would give the defendant a chance to amend its defence or not. And if the doors of the defendant's right are closed before the intended appeal is heard and determined two things will naturally happen; (1) the intended appeal would be rendered nugatory and (2) the defendant would suffer substantial loss and/or damage because this is a suit involving colossal sum of money.

On security **Mr. Munyithya** submitted that the defendant had been depositing a sum of Kshs.300,000/= with the plaintiff every month and would continue with the said deposit as and when it is due. In his view that amount to giving proper security pending the determination of appeal.

The application was opposed by **Mr. Nyachoti** Advocate and basing his argument on his replying affidavit filed in court on 28<sup>th</sup> March, 2008 he submitted the application is unmeritorious since the parties negotiated and filed a mutual agreement. He contended that after the close of pleadings the plaintiff filed a summary judgement application which was settled in an agreement subject of the alleged intended amendment. And that the defendant has always paid the agreed negotiated sums towards the settlement of the debt. The agreement was filed in court on 7<sup>th</sup> December, 2006 and the amount of money paid by the defendant is properly enumerated. He also contended that there is nothing pending for trial and this suit should be settled based on the agreement filed by the defendant on 7<sup>th</sup> December, 2006.

I have considered the argument of both sides and having carefully considered the arguments in this application it is clear to me the issue at stake is whether the intended appeal would be rendered nugatory. And as a result the defendant would suffer irreparable and/or substantial loss. In this decision, the central issue is whether or not the defendant's appeal will be rendered nugatory should the stay be refused. It is therefore important to understand and appreciate the order appealed against. In my view the order appealed against is an interlocutory order refusing the plea of the defendant to amend its defence. In my understanding orders made at interlocutory stage like the one subject of this suit are not and was not intended to be conclusive.

As stated by the defendant there are two applications pending for determination in this file. However the plaintiff contends there is only one application which is meant to enforce the settlement agreement dated 12<sup>th</sup> July, 2005 in respect of entire suit and which agreement the defendant admitted its indebtedness to the plaintiff. And indeed agreed to pay and settle the entire claim in the plaint. In essence the plaintiff contends the summary judgement application dated 24<sup>th</sup> November, 2004 has been settled or compromised through the agreement dated 12<sup>th</sup> July, 2005.

In my view the plaintiff will still have to prove that it is entitled to any orders sought in a pending application. Nobody can and would be in a position to determine the outcome of any pending application. What is important here is that the defendant would have an opportunity to challenge and contest the pending applications and the court upon hearing rival positions would make a determination based on merit of the dispute. I therefore think that it would be speculative to base the present application on the outcome of the pending applications.

In my view the failure and/or refusal to grant the defendant leave to amend its defence did not in any way give rise to a positive or negative order, judgement and/or decree capable of being executed and/or enforced against the defendant. In the pending application the court would be bound to investigate the case and/or defence of the defendant and if it is not well founded the plaintiff's application will be dismissed. In my judgement, I take the view that the intended appeal to be filed would not be rendered nugatory if the hearing of this case were to proceed. I also take the view that there is no justification and/or evidence to show that the defendant would suffer any loss if an order of stay is not granted. In short it is beyond doubt that the defendant has not established sufficient cause to enable this court to grant the orders sought in the application.

In conclusion I make a finding that there is no order capable of being executed against the defendant as things stand. And it would be totally wrong to give an order of stay based on the intended outcome for pending application.

**In the premises the application has no merit and is hereby dismissed with costs, to the plaintiff.**

Dated and delivered at Nairobi this 7<sup>th</sup> day of April, 2008.

**M. A. WARSAME**

**JUDGE**