

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

Civil Appeal 428 of 2006

BAMBURI SPECIAL PRODUCTS LTD.....APPELLANT

VERSUS

DHANJAL BROTHERS LIMIED.....RESPONDENT

R U L I N G

By a notice of motion dated 24th April, 2008, Bamburi Special Products Ltd (hereinafter referred to as the applicant), seeks an order for stay of proceedings in Nairobi CMCC. No. 12402 of 2004 pending the hearing and determination of an appeal which it has lodged against the ruling of the Chief Magistrate delivered on the 2nd June, 2006.

The application is premised on grounds stated on the body of the application and an affidavit sworn by Boniface Kamau. The applicant contends that unless the order for stay of proceedings is granted, his appeal will be rendered nugatory. The suit in the Nairobi CMCC 12402 of 2004 was initiated by the applicant, who sued Dhanjal Brothers Ltd (hereinafter referred to as the respondent), for the sum of Kshs.2,308,824.40/= being the balance due in respect of goods supplied.

The respondent denied the plaintiff's claim, and raised a counterclaim of Kshs.2,433,750/=, being special damages allegedly suffered by the respondents as a result of the applicant's breach of contract. By a notice of motion dated 25th July, 2005 the applicant sought judgment on admission against the respondent for the sum of Kshs.1,259,444.20/=. That application was heard by C.W. Meoli, Ag. Chief Magistrate who delivered a ruling on the 2nd of June, 2006 rejecting the application. That ruling of which the applicant is aggrieved is the subject of the applicant's pending appeal. It is the applicant's contention that there are serious fundamental issues raised in the appeal, and therefore, it is in the interest of justice that the appeal be disposed off before the suit in the lower court is heard. The applicant further explains that there is an application coming up for hearing in the lower court, which seeks to dismiss the applicant's defence to the counterclaim, and that if the same is allowed to proceed the character of the applicant's claim will substantially change. The following cases were cited in support of the application: -

- *Civil appeal No. 323 of 2005 National Bank of Kenya Ltd vs First Interstate Trading Co. Ltd and 2 Others.*
- *Newman vs lever QBD. The Times Law Reports Vol. IV 1887 – 1888.*
- *Shah T/A as Prasul's vs Steelcode Tyres Ltd.*
- *HC. Nairobi Winding up cause No. 43 of 2000. In the Matter of Global Tours & Travel Ltd.*

For the respondent, it was submitted that the application for stay of proceedings, has been brought after 10 months and that delay has not been explained. It was further submitted that the application for summary judgment only related to part of the claim and therefore the court had the right to exercise its discretion to hear the suit. The respondent maintained that the applicant has not satisfied the conditions for granting an order for stay of proceedings under Order XLI of the Civil Procedure Rules as he has not shown that he will suffer any substantial loss, nor has he demonstrated his preparedness to provide any security.

Having carefully considered this application, the submissions made and the authorities cited, I note that the applicant brought an application dated 4th June, 2006 in the lower court for stay of proceedings. The contention that there was undue delay in bringing this application cannot be supported as the applicant only came to this court after his application for stay of proceedings failed in the lower court.

The main consideration however in considering an application for stay of proceedings under Order XLI Rule 4(2) of the Civil Procedure Rules, is whether the applicant will suffer substantial loss. In this case, the applicant contends that his appeal will be rendered nugatory. That argument cannot however hold. Whatever orders that the trial magistrate makes in the lower court cannot prejudice the hearing of this appeal. Secondly, it was contended that the hearing of the application to strike out the defence to the counterclaim, will substantially change the character of the plaintiff's claim. This argument cannot also hold. The application for summary judgment was only in respect of part of the plaintiff's claim. The respondents filed a defence raising a counterclaim. I fail to understand how the character of the applicant's claim can be affected by the counterclaim which in fact is a separate claim. The application to strike out the defence to the counterclaim must be considered on its own merit. The upshot of the above is that the applicant has failed to show any substantial loss that he is likely to suffer if the application for stay of proceedings is not granted. For these reasons I find no merit in the application and therefore dismiss it with costs.

Orders accordingly.

Dated and delivered this 19th day of May, 2008

H. M. OKWENGU

JUDGE