

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Misc Civ. Appli. 1059 of 2006

TRANSNATIONAL BANK OF KENYAPLAINTIFF

VERSUS

JOHN MUTHITHI KANIA AND OTHERSRESPONDENTS

R U L I N G

By a notice of motion dated 19th October 2007, Mr. Benedict Wambua Kenzi, learned advocate for the plaintiff, applied for Stay of proceedings of the application dated 28th March 2007 pending the hearing and determination of the intended appeal against the court's ruling of 7th September 2007. The motion is said to be brought under Order XLI rule 4(1) and (2) of the Civil Procedure Rules. The learned advocate also invoked the inherent jurisdiction of the court saved under Section 3A of the Civil Procedure Act. The learned Advocate filed an affidavit he swore in support of the motion. When served with the motion, the defendants opposed the same by filing the replying affidavit of Maryam Seif Mohamed sworn on 5th February 2008.

Mr. Kenzi, learned advocate for the plaintiff urged this court to stay the hearing of the application dated 28th March 2007 which application seeks to have the learned advocate committed to civil jail for contempt of court pending the hearing and determination of the intended appeal.

The history leading to the filing of this motion can easily be traced from the facts deponed in the affidavits filed for and against the motion. Pursuant to leave granted to the applicant to institute contempt proceedings against Benedict Wambua Kenzi, the applicant filed an application notice dated 28th March 2007 in which the applicant beseeched this court to commit the learned advocate to civil jail for contempt of court. The learned advocate raised a preliminary objection stated in a notice dated 9th May 2007 against the application notice. The preliminary objection was heard and dismissed by this court in its ruling dated 17th September 2007. The dismissal order of course opened the way for the application notice to be argued. The learned advocate is dissatisfied with the dismissal order and has consequently filed a notice of appeal to challenge the same in the court of appeal. The learned advocate has now filed the motion date 19th October 2007 with the intention of obtaining an order staying the hearing of the application notice pending the hearing and determination of the intended appeal. It is the submission of the applicant that if the stay order is not given he shall suffer irreparable loss if the contempt proceedings are found to have merit in that he would be required to serve a custodial sentence.

Mr. Kibara, learned advocate for the Respondents urged this court to dismiss the motion on the basis that there is no order capable of being stayed. It is also argued that the order is not issuable under Order XLI rule 4 of the Civil Procedure rules. It is the argument of Mr. Kibara that an order of stay of proceedings can only be given under sections 6 and 7 of the Civil Procedure Act and through judicial review applications. Mr. Kibara further urged this court to find that the provisions of S.3A does not apply. This court was beseeched to impose conditions if it is minded to allow the motion.

I have carefully taken into account the rival submissions and I am convinced that the provisions of order XLI rule 4 are inapplicable in these proceedings hence those provisions were improperly invoked. What the applicant seeks is an order of stay of proceedings whereas order XLI rule 4 is in respect of an order of stay of execution pending appeal. I have already stated that the applicant has invoked the inherent

jurisdiction of this court. The court has an inherent jurisdiction to control its own proceedings as to prevent an abuse of process and accordingly can order stay of proceedings which are frivolous, vexatious or harassing or where the justice of the case requires. I have come to the conclusion that this court can stay proceedings in exercise of its inherent power under section 3A of the Civil Procedure Act. The question which must be settled is whether or not the motion is meritorious to warrant the grant of the orders? The learned advocate is saying that proceedings should be stayed because he is likely to suffer irreparably if in the end he is cited and committed for contempt. I have anxiously considered this argument and I am not convinced that the application has merit. I do not think the applicant will suffer substantial or irreparable loss. The motion at best is speculative. If in the end, the applicant is found to be in contempt of court he has the option to appeal against the decision in the court of Appeal. He also has the right to apply for stay of execution of the order either before this court or before the court of Appeal. I am convinced the applicant has filed the motion with the intention of delaying the expeditious disposal of the contempt proceedings. I find the motion to be manifestly groundless hence frivolous. For the above reasons I dismiss the motion dated 19th October 2007 with costs to the Respondents.

In order to avoid the matter procrastinating further, I direct that the application notice dated 28th March 2007 be fixed for hearing interpartes within 30 days from the date of this ruling.

Dated and delivered at Mombasa this 9th day of May 2008.

J. K. SERGON

J U D G E

In open court in the absence of the parties with notice.