



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

Civil Suit 1107 of 1990

KENBOX INDUSTRIES LTD.....PLAINTIFF

VERSUS

RAMESH SHAH.....DEFENDANT

R U L I N G

1. The application before me is the Chamber Summons dated 18/03/2008. The same is brought under Order 41 Rule 10 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the law. The Applicant seeks stay of any execution and or proceedings until the reference filed in the Court of Appeal is heard and determined. In the alternative, the Applicant prays that the court grants it an order of maintenance of the status quo pending the hearing and determination of the reference filed before the Court of Appeal.

2. The application is supported by the sworn affidavit of **RAMESH SHAH**, the Defendant/Applicant and also based on the following grounds:-

- (a) *Notice to show cause proceeding are fixed for hearing on the 19th March 2008.*
- (b) *The reference before the court of Appeal is fixed for hearing on the 12th June 2008.*
- (c) *If stay of proceeding/execution is not granted the reference before the court of appeal will be rendered nugatory.*
- (d) *The pending reference has high chances of success.*
- (e) *The Plaintiff can be compensated by way of costs.*

3. In his affidavit, Mr. Shah says that his application to file Notice of Appeal out of time was dismissed by the Court of Appeal (Bosire JA) on the 15/02/2008, and that being dissatisfied with the said ruling, he filed a Reference under the provisions of Rule 54(1) (6) of the Court of Appeal Rules. As at the date of swearing of the affidavit on 18/03/2008, the Reference was due for hearing on 12/06/2008. At the same time, the Notice to Show Cause was fixed for hearing on 19/03/2008. By this application, the Applicant seeks stay of the NTSC pending the hearing and determination of the Reference before the Court of Appeal. The deponent says that it is in the wider interest of justice that his application be allowed.

4. The application is opposed. The Replying Affidavit is sworn by **DIPSANG DARBAR** dated 11/04/2008. He says that the instant application is an attempt by the Applicant to resurrect and re-agitate

his previous application dated 12/10/2004 which application was heard on 21/02/2005 and dismissed with costs on 25/02/2005. That application was brought under the same Order 41 Rule 10 of the Civil Procedure Rules and was filed in court on 12/10/2004 seeking, inter alia:-

- ***that this Honourable Court be pleased to grant stay of any execution proceedings until the appeal filed in the Court of Appeal is heard and determined***

- ***that in the alternative this Honourable Court be pleased to grant an Order of maintenance of status quo pending the hearing and determination of the appeal.***

Earlier on, the Applicants had been granted a temporary stay of fourteen (14) days which expired on 10/10/2004.

5. The deponent of the Replying Affidavit also says that the Applicant's application to the Court of Appeal for leave to file Notice of Appeal out of time being Court of Appeal Civil Application Number NAI 232 of 2007 was dismissed by a single Judge of the Court of Appeal, hence the Reference to the full Bench against the same. The deponent says that the Reference has no chance of succeeding; further that even if the said reference were to succeed, the Applicant would not be prejudiced in any manner since there is not at the moment, any stay of execution pending appeal in this case. The deponent also says that an application being Court of Appeal Application Number NAI 340 of 2004 seeking extension of time to file and serve a Notice of Appeal and Record of Appeal in respect of the judgment entered herein on 10/06/2003 was eventually dismissed by a full Bench of the Court of Appeal on 27/04/2007 and that thereafter, the Applicant was served with a NTSC; that the Applicant's attempt to stop the execution for reasons that there were two applications pending before the Court of Appeal, were refused by the court on 17/05/2005. The deponent says further that he strongly believes that what the Applicant is constantly trying to do is to frustrate the Respondents efforts to obtain and enjoy the fruits of the judgment that was entered against the Applicants on 10/06/2005. Mr. Darbar says that the decretal sum is in excess of Kshs.76,000,000/= and accrues interest at the rate of Kshs.274,539/= per month of Kshs.9,151/= per day. The deponent prays that the Applicant's application be refused with costs to the Respondent.

6. Briefly, the genesis of the dispute between the parties was an agreement made between the parties in March 1989 wherein the Applicant agreed to supply and the Respondent agreed to purchase a large number of jukeboxes and flipchart machines and spare parts for both items on terms that were specified in the agreement. Shortly after the agreement was entered into the Applicant allegedly breached the contract resulting in the filing of the instant suit by the Respondent in which the Respondent claimed special damages of over Kshs.27 million. The Applicant denied the claims against him and made a counterclaim of over Kshs.45 million against the Respondent.

7. After many years of gathering dust on the registry shelves, the suit was finally fixed for hearing before Ransley J (as he then was) on 26/05/2003. Both the Applicant and his advocate did not turn up for hearing, so the case proceeded *ex parte* and judgment was delivered on 10/06/2003 in favour of the Respondents. The Applicant's counterclaim was dismissed. On 16/07/2003, the Applicant filed an application to set aside the *ex parte* judgment but the application was dismissed on 27/03/2004 after hearing it on its merits.

8. It was after that dismissal that the Applicant filed a Notice of Appeal to the Court of Appeal against the judgment of 10/06/2003 and thereafter on 20/12/2004 the Applicant filed his application for extension of time to file the notice of appeal and record of appeal out of time. Bosire JA heard the Applicant's application for extension of time and rejected it on grounds that the delay in bringing the application was inordinate and that the delay had not been adequately explained by the Applicant. It is against the ruling of the learned JA that the Applicant has made a Reference to a full Bench of the Court of Appeal.

9. When this application came up for hearing before me on 22/07/2008, Mr. Wagara for the Applicant did not appear, but Mr. Shah was present in court. The reason given for Mr. Wagara's absence was that he was indisposed, though counsel holding his brief said he had been given no documents in support of Mr. Wagara's illness. Counsel holding brief also told the court that he had not personally spoken to Mr.

Wagara about the latter's condition. Mr. Sarvia for the Respondent opposed the application for adjournment and argued that the application was yet another attempt by the Applicant to frustrate the Respondent's attempts at enjoying the fruits of a lawfully obtained judgment. The court refused to grant the adjournment sought after hearing the arguments. The Applicant thereafter told the court that he wished to personally proceed with the application, his counsel's absence notwithstanding. He asked the court to grant him the orders sought.

10. Mr. Sarvia for the Respondents reiterated the averments of the Replying Affidavit and urged the court to find and to hold that the instant application is res judicata the earlier application filed in court on 12/10/2004 brought by the Applicant under the same provisions of the law and for orders very similar to the present orders. Mr. Sarvia also argued that the Applicant was in the habit of waiting until the very last minute to come up with this or that application in order to prevent the Respondent from proceeding with execution and that the instant application was filed principally to forestall the hearing of the NTSC which was scheduled for the 19/03/2008.

11. I have carefully considered the application as filed, the grounds in support thereof as they appear on its face and in the sworn affidavit of the Applicant, the Replying Affidavit and the annexures thereto. I have also considered the submissions made by counsel for the Respondent. After that scrutiny, I have reached the conclusion that the Applicant's application can not succeed for reasons of res judicata. The Applicant filed a similar application on 12/10/2004. The application was heard on its merits and dismissed. The Applicant did not appeal against the ruling dismissing the said application. For this reason, I would dismiss the Applicant's application with costs to the Respondent.

12. Even if I were to consider the application upon the other grounds raised by the Applicant, I am not satisfied that the Applicant has made out a case for grant of the orders sought as provided under Order 41 Rule 10 of the Civil Procedure Rules. That particular rule is infact irrelevant to the application. The rule deals with Notice of Appeal after lodging of a Memorandum of Appeal. This court is not dealing with any appeal by the Applicant. I also find that though Section 3A of the Civil Procedure Act gives this court wide discretion to make such orders as may be necessary for the ends of justice, such discretion must be exercised judiciously. In my view, the history of this case shows that the Applicant was not genuine in bringing the instant application; that the application is an abuse of the process of the court. The court cannot aid the Applicant in the circumstances.

13. In the result, I have no option but to dismiss the Applicants application dated 16/03/2008 with costs to the Respondent.

Dated and delivered in Nairobi this 18th day of November, 2008.

R.N. SITATI

JUDGE

Delivered in the presence of:-

..... For the Plaintiff

.....For the Defendant