REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 294 of 2006

ATUL SHAH……..……1ST PLAINTIFF

ROBERT FOULER……..……..……2ND PLAINTIFF

VERSUS

BHARAT DOSHI……..……..…….. 1ST DEFENDANT

ASHIT SHAH……...……..…….2ND DEFENDANT

RULING

The application under consideration is by the Plaintiff's in this suit. It is a Notice of Motion dated 8th May, 2007 expressed to be brought under Order XLI rule 4 and Order L rule 1 of Civil Procedure Rules and Section 3A of Civil Procedure Act. It seeks an order to stay proceedings herein pending the hearing and determination of the Plaintiffs appeal already filed in the Court of Appeal **CIVIL APPEAL NO. 36 OF 2007,** against the decision of this Court dated 27th November, 2006.

Four grounds are cited as the basis of the application as follows:

1) The Plaintiff's herein having been dissatisfied with the decision of this Court given on 27th November, 2006 (Hon. Lady Justice M. Kasango) filed a Notice of Appeal on 28.11.2006 and consequently filed the appeal in the Court of Appeal on 12/03/07 in C. A. 36 of 2007 and the record of Appeal was duly served upon the Defendants Advocates on 14.03.2007.

2) Unknown to the Plaintiffs and while the show cause proceedings were going on before this Court, the Defendants on 03.08.2006 filed a Chamber Summons Application dated 01.08.2006 to strike out this suit and the same was never served upon the Plaintiffs until 08.01.2007(five(5) months after filing and almost two(2) months after the Ruling of 27.11.2006 which application is now fixed for hearing on 10.05.2007

3) The prosecution of the Defendants aforesaid application and/or taking of further proceedings herein will render any success of the Plaintiffs appeal nugatory.

4) The Plaintiffs also stand to suffer severe prejudice and substantial loss and damage of their

case based on the findings on Hon. Lady Justice Kasango of 27.11.2006 on facts which were not for her determination then which goes to the merits of the case.

The application is supported by affidavits sworn by ATUL SHAH dated 8th May, 2007 and **ROBERT FOULSER** dated 24th January, 2007.

The application was strongly contested. The Respondents filed grounds of opposition dated 23rd July, 2007 in which six grounds are raised in the following terms.

1) The application is incompetent and does not lie.

2) The application has been brought after an inordinate and unreasonable delay.

3) The application is without merit, and is calculated to dealy the expeditious determination of this matter, which delay shall prejudice the Defendants greatly.

4) The Plaintiffs would not suffer any prejudice if the suit proceeds.

5) It is in the interests of fairness and Justice that this application be dismissed and that the Defendnats be at liberty to prosecute their application to have the suit struck out.

6) The Applicants do not have an arguable appeal.

Mr. Kopere's argument is that he filed an application dated 2nd June, 2007 in which the Plaintiffs sought security for their costs from the 1st Defendant. The application went before **Hon. Waweru, J** who gave an order directing the 1st Defendant to provide security for costs to the Plaintiffs or alternatively show cause why such security should not be provided.

The substantive application, was heard by **Kasango, J** who dismissed the application discharged the 1st Defendant and released the security which had been given. The Plaintiff's have already lodged an appeal in the Court of Appeal against **Kasango J's** ruling on grounds the learned Judge delved into the merits of the entire suit. Mr. Kopere contends that as the "**show cause"** proceedings against the 1st Defendant were going on, the Defendants filed an application on 3rd August, 2006 seeking to strike out the entire suit. That application was not served until 51/2 months after it was filed and most significantly, 21/2 months after **Kasango, J's** ruling. Mr. Kopere contends the application to strike out the suit is coached in similar words as the learned Judge's ruling Kopere argues that in light of the similarity between the learned Judge's ruling and the pending application to strike out the plaint and more particularly, in light of the learned Judge's finding on the merits of the case, which findings went beyond the permitted parameters, if the application is canvassed or suit heard with those findings as to the merits of the case on record, the Plaintiff's will suffer prejudice. Counsel relied on the case of **JIWAJI V. SAHEB & ANOTHER [1990] KLR 732** where **Bosire, J** as he then was, held:

"***1. The court can only order a Defendant to furnish security where any one or a combination of the grounds set out in order XXXVIII rule 1 of the Civil Procedure Rules (Cap 21 Laws of Kenya***

established.

2. The wording of order XXXVIII rule 1 of the Civil Procedure Rules (Cap 21) does not permit the inclusion of grounds other than those set out in it when considering whether a defendant should furnish security.

3. The Court when considering an application under order XXXVIII rule 1 of the Civil Procedure Rules (cap 21 Sub Leg) should not at all be concerned with the merits of the Plaintiff's claim."

Mr. Nyaoga on his part submitted that it was very strange that the Plaintiffs were applying to stay

their own proceedings instead of pursuing it. Mr. Nyaoga submitted further that the pending appeal only seeks to set aside Kasango, J's decision in which the learned Judge declined to grant security to the Plaintiffs, pending the determination of the entire suit. Learned Counsel argued that if the suit was heard no prejudice would be suffered by the Plaintiffs and that the appeal itself would not be rendered nugatory in any way.

Mr. Nyaoga submitted that it was true that his firm filed the application to strike out the suit long before **Kasango, J** delivered her ruling. Counsel submitted that the similarity in the language was not strange since the Judge, just like lawyers, had similar training in law and in legal language. Counsel relied on the case of **STANDARD LIMITED & OTHERS VS WILSON KALYA & ANOTHER C. A NO. 369 OF 2001 NAIROBI** at page 4 where **Kwach, Omolo** and **Bosire JJA** ruled:

"***If the High Court proceeds to assess damages in this particular matter, that alone would not render the success of this appeal nugatory. If the appeal succeeded, the order to be made would automatically render the proceedings in the High Court unnecessary but an appropriate order for costs would remedy that. Once more, we would repeat what we said in the Silverstein application. We said there:***

"The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of Rule 5 (2) (b) of the Court's own rules…..each case must depend on its own facts and the facts of this particular case before us, as were the facts in the earlier case, do not show that the appeal will be rendered nugatory if we do not grant a stay."

Counsel also relied on the case of **KCB VS BENJOH AMALGAMAED LTD. C.A NO. NAIROBI 50 OF 2001** where **Gicheru, Lakha** and **Owuor JA** observed:

"***We remind ourselves that each case depends on its own facts and we find it difficult to be persuaded that the appeal on the facts of the present case would be rendered nugatory if stay is not granted. The appeal may be heard and, if successful, the proceedings in the superior court would be determined in accordance therewith."***

Counsel relied on the case of **AMERICAN LIFE INSURANCE (CO) LIMITED VS DAVID OYATTA NAIROBI HCCC NO. 168 OF 2004** where **Visram, J** observed:

"***Order XLI Rule 4(2) sets out conditions which must be fulfilled to entitle one to an order for stay of execution. It is curious that the sub-rule does not apply the same conditions to an application for stay of proceedings pending appeal. What are the conditions for stay of execution pending appeal? To answer this question, I can do no more than reproduce the contents of Order.***

It is very hard to see how the Appellant's appeal would be rendered nugatory if the proceedings in the Lower Court are stayed. Mr. Saende's argument that if the proceedings in the Lower Court are allowed to go on, and his client's appeal succeeds, there would have been a waste of judicial time. This is a sensible argument but the law is not, as was pointed out in the Silverstein case, always concerned with sense. The Proceedings in the Lower Court may continue and even be determined but if the Appellant were to succeed in its appeal the proceedings in the Lower Court will be rendered unnecessary and the court hearing the appeal may make an appropriate order for costs to remedy that situation."

I have considered the divergent views expressed by both counsel to this application together with the cases cited.

The Applicants wish to stay these proceedings to enable them challenge this Court ruling by **Kasango, J** dated 27th November, 2006. The Applicant's argument is that the learned Judge exceeded the parameters of consideration in regard to the issues to be taken into account and the principles to be applied while determining the application for security for costs made under Order XXXVIII rule 2 of the Civil Procedure Rules . Mr. Kopere's view was that the learned Judge considered issued of merit of the Plaintiff's case and made specific findings to the effect that the Plaintiff had no ***prima facie*** case.

Mr. Kopere's view was that with such specific findings on record, his clients stood to suffer prejudice if the proceedings proceeded to be heard.

Mr. Nyaoga was amazed at the application arguing that it was very strange for a Plaintiff to seek to stay its own case. It is agreed by both parties that the case of **JIWAJI VS SAHEB AND ANOTHER**, Supra, laid out the principles to be had while determining an application for security for costs. Holding No.3 supra, clearly states that the merits of the case should not be considered.

JIWAJI'S case, supra, is a persuasive authority. The principles set out in it are doubtless to say good guidance to a court considering an application under Order XXXVIII rule 1 and 2 of Civil Procedure Rules. Infact **Kasango, J** set out the same principles in her ruling in question. It is true as Mr. Nyaoga pointed out that the Application did not point out the sections of **Kasango, J's** ruling which they found offensive to them. However I have read the ruling. At page 11 of the same I find an observation by the learned Judge as follows:

"***That to my view means that either by affidavit or the pleadings the Plaintiff ought to firstly show that the Defendant is likely to leave the jurisdiction of the Court and it is also important for the Plaintiff to make out a prima facie case in order to satisfy the Court that the orders sought can be granted.***

But I think the greatest blow to the Plaintiffs showing a prima facie case is the letter written by Kodak whereby Kodak disowned the Plaintiff in respect of their authority to transact business on their behalf. I therefore find that a prima facie case is not made."

I do not wish to sit on appeal over my learned sisters ruling. However, Mr. Kopere's argument that considerations other than those required to be had in determining the application before the Court were included in the learned Judge's ruling is not without merit. Whether the Plaintiffs will succeed in their appeal against the ruling is not for me to say. The point is, the Applicants appeal is not frivolous. The findings made in the ruling are far reaching ones and if they are allowed to remain on record, they are likely to influence the final outcome of the pending application to strike out the Plaintiff's plaint or the suit. I agree with Mr. Kopere that in light of the importance of the findings made in my learned sisters ruling, the proceedings should not be allowed to proceed until the appeal is heard.

The Plaintiffs seek, inter alia the production of all books of account of Kodak Agency business held by the Defendants in prayer A of their plaint. The learned Judge alluded to the demerits of the entire Plaintiffs case when she observed that the Plaintiffs had not shown a ***prima facie*** case that the orders sought in their plaint could be granted. On the basis of a letter by Kodak Company in which Kodak disowned the Plaintiff in respect of their authority to transact business on their behalf. That finding delved into the merits of the case. More importantly there was already on the record an application by the Respondents dated 1st August 2006, seeking to strike out the suit on the grounds the same was frivolous, vexatious and otherwise an abuse of the Court process.

I have perused the application itself and indeed ground (c) on the face of the application provides that:

"The plaintiffs had neither capacity nor authority from Kodak to make an offer of business prospect to the Defendants."

I agree with Mr. Kopere that with a specific finding on record that the Plaintiffs lacked capacity and authority to transact, the Plaintiffs stood to suffer prejudice if the proceedings were allowed to continue.

Given the importance of the learned Judge's finding and it's bearing to the Defendants pending application and the suit the proceedings should be stayed. It is not necessary to go into details of this ground since I have already come to the conclusion that the proceedings should be stayed.

The upshot of this application is that the Applicants application dated 8th May, 2007 is allowed with costs in the cause on condition the Applicants pursue their appeal before the Court of Appeal with diligence.

Each party is at liberty to apply.

Dated at Nairobi this 30th Day of November, 2007.

LESIIT, J.

JUDGE

Read, signed and delivered in the presence of:

Non attendance

LESIIT, J.

JUDGE