REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

Civil Case 249 of 2005

COMMUNICATIONS CARRIER LTD. ……………………………. 1st PLAINTIFF

COMMCARRIER SATELLITE SERVICES LTD. ……………....2ND PLAINTIFF

VERSUS

TELKOM KENYA LIMITED …………………...…………..………..DEFENDANT

R U L I N G

This is an application by the plaintiff for Stay of Execution of the order which directed them to pay to the Defendant, the sum of U.S. $50,000 within two weeks, as a precondition for the grant of an injunction.

It was the plaintiff’s understanding that if they did not pay the sum stipulated, the injunction would not take effect. Such a development would occasion irreparable loss to the plaintiffs, so it was said, especially when it was borne in mind that the court had earlier held that the plaintiff’s had demonstrated a prima facie case. The said prima facie case was to the effect that the contract dated 20th December 2002 was valid. By so holding, the court is said to have concluded that the defendant had failed to demonstrate that it’s relationship with the plaintiffs was governed by an oral contract. In the circumstances, the plaintiff held the view that if any conditions were to be imposed for the grant of the injunction order, the terms thereof should have been pegged to the contract dated 20th December 2002.

Secondly, the plaintiffs feel that it was wrong for the court to have directed them to pay money directly to the defendant. As far as the plaintiffs were concerned, if any money was payable, the same should have been paid into court, as opposed to the defendant. It was submitted that the court may ultimately decide that no money was payable to the defendant, and therefore, it would then have been wrong for the defendant to already have received such money, in the interim period.

Finally, the plaintiffs submitted that if this court was not minded to stay execution, it should, at least, extend the period for compliance. To that end, the plaintiffs sought an extension of a further forty-five (45) days, over and above the two (2) weeks, which the court had given. In that regard, the plaintiffs indicated that they earned about U.S. Dollars 10,000 every month. It is for that reason that the plaintiffs felt that an extension of forty-five days would be realistic, in enabling them to raise the necessary funds.

In the meantime, the plaintiffs had already filed a Notice of Appeal. And, it is their contention that the said appeal has a high chance of success. Therefore, it was submitted that the plaintiffs were entitled to the order for Stay of Execution, so as not to render the intended appeal nugatory.

When responding to the application, the defendant submitted that the same was incompetent, as it did not meet the High Court requirements, as enshrined in Order 41 rule 4 (1) and (2) of the Civil Procedure Rules. The defendant submitted that the factors addressed by the plaintiffs were only applicable in scenarios wherein the applications for Stay of Execution were being canvassed before the Court of Appeal, under rule 5(2) (b) of the Court of Appeal Rules.

Essentially, the defendant is correct. In **NATIONAL BANK of KENYA LIMITED -V- JIVRAJ RAISHI & BROTHERS LTD & 2 OTHERS, CIVIL APPLICATION No.153 of 2002** (at Kisumu), the Court of Appeal addressed itself thus:

"**However, we are satisfied beyond any peradventure, having listened to the parties' rival submissions that the intended appeal, whatever may be its ultimate fate, is not frivolous, but is, indeed weighty and arguable.**

Would the applicant's intended appeal be rendered nugatory if we denied it the interim relief sought? It is the duty of the Court to safeguard the interests of both parties. The plaintiffs, of course, are entitled to the enjoyment of the fruits of their success in the superior court. On the other hand, the applicant is also entitled to have its interests secured so that in the event of its intended appeal succeeding the recovery of the sum now about Shs.500,000,000.00 would not be in vain. All these conflicting interests must be weighed and considered against each other."

The issues articulated by the plaintiffs are well captured in the above-cited decision. However, while it is the role of the appellate court to ascertain whether or not an appeal was arguable, it would be cumbersome for a Judge who had just delivered a verdict, to sit on appeal over his own decision. How would he be expected to come to the conclusion that the said verdict would be likely to be upset? If he did come to that conclusion, one would wonder why he did not simply arrive at a different decision, instead of waiting for his verdict to be overturned.

But, at the same time, a Judge of the High Court well recognizes that he is not infallible. Therefore, he is aware that there are times when his decisions may be overturned, on appeal. It is inherent in that realization, that even though a Judge may believe his decision to be right, he may nevertheless grant an order for stay of execution, pending an appeal. In considering an application for stay of execution, the Court is guided by the provisions of Order 41 rule 4 (2) of the Civil Procedure Rules, which provides as follows;

"**No order for Stay of Execution shall be made under subrule (1) unless –**

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."

In the light of the foregoing, when the plaintiffs alluded to irreparable loss, in the event that no stay was granted, they were well within the contemplation of Order 41 rule 4 (2), above.

The defendant also submitted that by complaining about the quantum of the sum to be deposited, as well as the short period of time for the said deposit to be made, the plaintiffs were essentially seeking review, as opposed to an order for Stay.

In my understanding, the defendant is not correct, in that regard. At no time did the plaintiffs ask this court to reduce the amount which the plaintiffs were required to pay to the defendant. They only pointed out, that, in their understanding, the basis for arriving at the sum was erroneous. I believe that by so doing, the plaintiffs were trying to demonstrate that their appeal was not only arguable, but weighty. In that respect, although the submission may have some merit, but, as I have already indicated, it is not for me to assess the strength or weaknesses of a decision which I have just made. If I were to do so, I would

probably put forward further arguments or reasons to buttress the decision already made: that would be improper.

But, in any event, the plea by the plaintiffs for an extension of time for the payment of U.S. Dollars 50,000, in the event that the court was not minded to stay execution, would not by itself be inconsistent with the application.

Having heard the application, I promptly directed as follows;

"**(1) Ruling will be delivered on 2nd February 2006 at**

2.30 p.m.

(2) In the meantime, it is directed as follows:

(a) The plaintiffs shall have a further period of THIRTY (30) DAYS to raise the sum of U.S. Dollars 50,000.

(b) The parties are to proceed to arbitration forthwith and the arbitral proceedings should be concluded within SIXTY (60) DAYS. The arbitrator is to file his award within the said period of SIXTY (60) DAYS.

(3) The sum of U.S. Dollars 50,000 shall constitute the security contemplated by O.41 rule 4 (2) of the Civil Procedure Rules. Therefore, for it to remain as security, it shall be paid into a joint interest-earning account, in the names of the advocates for the parties herein.

(4) The plaintiffs are required to continue paying the bills raised by the defendant, during the period when the substantive ruling is awaited."

Thereafter, I made it clear that the bills cited in the order numbered (4), above, did not include any arrears. The said bills were those to be raised as from 28th November 2005, and which were to be calculated on the Kensat rates. Finally, I did give to all the parties herein, the liberty to apply.

In effect, I did already grant the prayers sought in the application. I did so, because I acknowledge the need to safeguard the interests of all the parties, as was emphasized in **NATIONAL BANK OF KENYA LTD. -VS- JIVRAJ RAISHI & BROTHERS** (Supra).

It is hereby emphasized that although the plaintiffs are appealing against the court's decision requiring them to pay U.S. Dollars 50,000 as a pre-condition for the injunction, I hold the view that the said condition was warranted. However, the plaintiffs have an inalienable right of appeal, and I acknowledge that fact. But, I also acknowledge the fact that the plaintiffs may well fail in their said appeal. If their appeal did fail, the plaintiffs would be told to pay the sum, already ordered. Therefore, it was for that reason that the quantum of the security envisaged by Order 41 rule 4 (2) of the Civil Procedure Rules, was set at U.S. Dollars 50,000.

Finally, the costs of this application shall remain in the cause.

Dated and Delivered at Nairobi this 2nd day of February 2006.

FRED A. OCHIENG

JUDGE