

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 437 of 2005

TOTAL KENYA LIMITED1ST
PLAINTIFF

CAR MAX LIMITED2ND
PLAINTIFF

VERSUS

KENYA AIRPORTS AUTHORITY1ST DEFENDANT

UCHUMI SUPERMARKETS LTD.....2ND DEFENDANT

RULING

The 1st Defendant/applicant seeks orders that the proceedings herein be stayed pending the hearing of an intended appeal against my ruling of the 16.9.2005 on the grounds that the Respondent would not be prejudiced and the appeal rendered nugatory.

Before the application was heard, Miss Wambani for the 2nd Defendant sought to have struck out paragraphs 9 and 10 of the Replying Affidavit of Franklin Juma on the grounds that the source of information is not disclosed contrary to Order 18 rule 3(1). It appears that the contents of these paragraphs are presumptions made and arising from the letter of the 3.8.2005 referred to by the deponent in paragraph 9 of his affidavit. The proviso to the said rule does allow statements, information and belief showing the sources and grounds thereof. The grounds thereof appears to be the letter referred to above. In the result I do not think that the paragraphs sought to be struck out offend the Order and rule.

Having said that, the issues raised in the Replying affidavit of the Respondent and affidavit of the 2nd Defendant are not relevant to this present application.

A court has jurisdiction to issue an order staying proceedings pending appeal of the requirements of Order 41 rule 4 have been observed and it is just to do so.

In the supporting affidavit of Oscar Amugo Angote to this application there is a statement that when the preliminary objection came up for hearing I disallowed it. This in fact is not correct as I did not in my ruling deal with the preliminary point. The order I made in the ruling was for the 1st Defendant/Respondent to take action under Section 15(3) of the Kenya Airports Authority Act and stayed these proceedings for 14 days to enable it to do so. It may well be that the Applicant is dissatisfied with that order and as a result may wish to appeal against it. However, if the action I suggested was not undertaken then the matter is redundant and I cannot see that refusal to grant a stay will render any appeal against that direction nugatory.

The question arises as to whether my decision gave rise to a preliminary decree or an order. This question was given consideration in **Mandavia v Singh [1965] EA 118**. The learned Court of Appeal at page 123 states as follows:-

“A finding or decision in limine which permits the suit to proceed is not a preliminary decree...A

decision of a court on a preliminary issue framed on a plea of res judicata is not a preliminary decree and is, therefore, not appealable.

A fortiori, in this matter, as no decision has been made on the preliminary point, there is nothing to appeal against.

What the Applicant should do is refer this matter back to me for the purpose of concluding the preliminary objection and stating what if any action it has taken to carry out my proposal that an application be made for an order under Section 15(3) of the said Act.

In the result, I do not see that any appeal will be rendered nugatory and therefore, decline to order a stay of proceedings as proposed.

Dated and delivered at Nairobi this 2nd day of March, 2006

P. J. RANSLEY

JUDGE