REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 156 of 2004

DONHOLM RAHISI STORES…….....……..PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LTD & ANOTHER……DEFENDANT

R U L I N G

This is an application by the plaintiff, who is seeking an order for stay of proceedings, pending hearing and final determination of Civil Appeal No. 181 of 2005.

The primary reason for the application is that if the 2nd defendant was allowed to prosecute its application for leave to amend its defence, the same would greatly prejudice and compromise the plaintiff's appeal which is pending before the Court of Appeal.

The appeal in question was lodged by the plaintiff, who was dissatisfied with the ruling that was delivered by the Hon. Emukule J, on 31st March 2005. Prior to lodging the said appeal, the plaintiff filed an application before the Court of Appeal, for an injunction pending the hearing and determination of their appeal. The said plea for an injunction pending appeal was granted, so as to safeguard the money which is the subject matter of this suit.

It is now the plaintiff's case that the two applications which were filed by the defendants herein, would, if allowed to proceed to hearing before the plaintiff's appeal was heard and determined, defeat the substratum of the appeal would. Indeed, the plaintiff believes that by having the two pending applications disposed of, when the appeal was pending would not only cause the appeal to be overtaken by events, but would also be disrespectful to the Court of Appeal.

As I understand it, the two applications which were still pending are the 1st Defendant's interpleader proceedings which was commenced by the Chamber Summons dated 2nd February 2005; and the 2nd Defendant's application for leave to amend its Defence and Counterclaim, which application is dated 8th March 2005.

The counterclaim is currently only directed against the plaintiff. In effect, the 2nd defendant does not have any counter-claim, as of now, against the 1st defendant. However, the 2nd defendant is now convinced that there was need to amend its Defence and Counterclaim, so as to incorporate a counterclaim against the 1st defendant. The realisation by the 2nd defendant, that it needed to make a

specific claim against the 1st defendant, is said to have come about as a result of the plaintiff's submission that the interpleader action was bound to fail as the plaintiff was the only party who had made a specific prayer demanding the Kshs. 100 million, which is the subject matter of the suit herein.

In the light of the foregoing, the plaintiff contends that the Hon. Emukule J. erred in refusing to issue an injunction in favour of the plaintiff. Therefore, it is the plaintiff's belief that they have very good prospects in the appeal. The said prospects are said to find support from the fact that there are two applications still pending. Therefore, as far as the plaintiff is concerned, if this court were to allow the two applications to be disposed of whilst the appeal was still pending, the determination of the appeal would be pegged to the new developments.

On the other hand, the 2nd defendant feels that even if this court were to grant it leave to amend the Defence and Counterclaim, that development would not affect the plaintiff's appeal. It is the 2nd defendant's submission that the Court of Appeal only makes its decisions based on the matters which arose in proceedings that took place before the appeal was filed. For that reason, the 2nd defendant feels that the plaintiff's appeal would not be influenced by developments which occurred after the appeal was filed.

But the plaintiff counters that argument by saying that the Court of Appeal does not engage in academic exercises, for the sake of it.

To my mind, even though I did handle a reasonable number of matters before the Court of Appeal, prior to my becoming a judge, it would be presumptuous of me to take a position regarding the manner in which the Court of Appeal would deal with the appeal which is pending. It is not for me to determine or even guess whether or not the Court of Appeal would arrive at a decision that was influenced by developments which took place after the appeal was lodged. Therefore, it is not within my jurisdiction to express an opinion on that aspect of the matter, for the Court of Appeal has every right to decide whether or not their decision would be uninfluenced by the latest developments on the matter in issue.

The other issue that was taken up by the 2nd defendant was to the effect that the plaintiff had no right to try and stop them from suing the 1st defendant.

In that regard, I do not think that by seeking a stay of these proceedings pending the hearing and determination of the appeal, the plaintiff was trying to stop the 2nd defendant from suing the 1st

defendant. All that the plaintiff is saying is that until the appeal is heard and determined, the 2nd defendant should hold its horses. And, once the appeal was determined, the 2nd defendant could always choose, if it so wished, to prosecute its application for leave to amend the Defence and counterclaim.

In other words, an order for stay of proceedings could only, at worst, delay the 2nd defendant's intended action. A stay of proceedings cannot, by itself, completely shut out the 2nd defendant from suing the 1st defendant. The only thing which could stop the 2nd defendant from enjoining the 1st defendant, as a defendant to the counterclaim, would be an order of this court, declining to grant leave to the 2nd defendant.

For now, the 2nd defendant says that it had already sought a declaration to the effect that it was entitled to the benefit of the guarantee issued by the 1st defendant. Thereafter, when the 1st defendant filed an interpleader application, the 2nd defendant re-assessed its position, so as to lodge a counterclaim against the 1st defendant.

To my mind, that change of mind, on the 2nd defendant's part is what is causing the plaintiff concern. It is suggestive of the uncertainty on the part of the 2nd defendant, as regards the strength of the counterclaim, in its present format.

Having given due consideration to this matter, I must first say that I accept the plaintiff's contention that the final orders made by the Court of Appeal, on Civil Appeal No. 181 of 2005 will have a direct bearing on this matter. If the appeal were to be allowed, the temporary injunction which had been issued on 22nd March 2004 would be reinstated. Such an injunction order would remain in force until the suit was heard and determined.

On the other hand, if the appeal were dismissed, there would be no injunction in favour of the plaintiff pending the hearing and determination of the suit.

In my considered opinion, it would be prudent to await the decision of the Court of Appeal before the parties herein can take any further actions in this case. Once the Court of Appeal gives its verdict, the same will inform the action which the 2nd defendant, as well as the other parties to this case will undertake, and the procedure to be adopted in the said undertaking.

In arriving at this decision I have formed the considered opinion that the authority which the 2nd defendant cited to the me has no application to this matter. The said authority is the decision by the Court of Appeal in **SILVERSTEIN V CHESONI [2002] 1 KLR 867**. In that case the Court of Appeal was dealing with an application pursuant to the provisions of Rule 5 (2) (b) of the Court of Appeal Rules; in which the application sought to stay the proceedings before the High Court pending the hearing of the applicant's intended appeal. In arriving at the decision, the Court expressed itself thus, at page 871:-

"**It is now trite law that an applicant under rule 5 (2) (b) must satisfy the Court that:**

(i) his intended appeal is an arguable one, or put another way, the intended appeal is not frivolous;

(ii) unless the Court grants an order of stay to him, his intended appeal, if successful, will be rendered nugatory.

An applicant such as the one before us is obliged to prove not only one, but both of these requirements before he can hope to obtain an injunction or an order of stay from the Court."

Insofar as that decision was founded on rule 5 (2) (b) of the Court of Appeal Rules, it is not applicable to an application before the superior court.

On my part, I found the following words, of the Hon. Ringera J. (as he then was) instructive.

"**As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion it should be exercised rationally and not capriciously or whimsically. The sole question is whether it is in the interest of justice to order a stay of proceedings and, if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilisation of judicial time and whether the application has been brought expeditiously."**

That is a quotation from RE: GLOBAL TOURS & TRAVELS LTD [2000] LLR 1061

Bearing those factors in mind, I am aware that there is vital need to optimise the utilisation of judicial time. Therefore, it did occur to me that even if the decision by the Hon. Emukule J. were to be upset by the Court of Appeal, it would not have any bearing on the 2nd defendant's application for leave to amend the Defence and counterclaim. I told myself that the success of the plaintiff's appeal could only put in

place an injunction order pending the hearing and determination of the appeal.

But then again, I noted that the appeal itself was founded, partially, on the plaintiff's contention that the learned judge of the superior court had failed to appreciate the legal significance of the pending application by the 2nd defendant, to amend its Defence and counterclaim.

Bearing that fact in mind, I came to the conclusion that if the 2nd defendant were to amend its defence and counterclaim, so as to expressly incorporate a claim of KShs. 100 million, from the 1st defendant, there was a possibility that the Court of Appeal may be influenced by that development.

For now, the Court of Appeal has given an injunction to restrain the 1st defendant from releasing the sum of KShs. 100 million to the 2nd defendant or any other party, until the Civil Appeal No. 181 of 2005 is heard and determined.

Whilst awaiting the determination of that appeal, I find it prudent to withhold any actions which might effect changes to the facts currently prevailing. To my mind an order for stay of proceedings is more in consonance with the interim injunction issued by the Court of Appeal. Therefore, as the parties await the determination of Civil Appeal No. 181 of 2005, I order that there will be a stay of proceedings in this case.

Finally, I award to the applicant the costs of this application.

Dated and Delivered at Nairobi this 22nd day of June 2006.

FRED A . OCHIENG

JUDGE