REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 596 of 2004

FRANCIS NJAKWE GITHIARI . ..…….....
…….1ST PLAINTIFF

NJAMA LIMITED …… ……..…….....
…….2ND DEFENDANT

VERSUS

HON. DANIEL TOROITICH ARAP MOI T/A MOI EDUCATIONAL CENTRE ……..
……..……. DEFENDANT

RULING

The defendant has brought this application, seeking a stay of the proceedings in this suit, pending the hearing and determination of his intended appeal, from the Ruling dated 5th April 2006.

By the ruling in contention, this court dismissed the plaintiff's application for summary judgement. However, even though the defendant was successful in that application, he was nonetheless dissatisfied with a part thereof. In particular, it is the defendant's belief that the court ought not to have dealt summarily with the interpretation of Section 14 (3) of the Constitution, on the issue of the application of the defence of limitation of actions, in relation to the holder of the office of the President of the Republic of Kenya. It was the defendant's view that the court also ought to have made a distinction between the claims against the President in that capacity, and the claims against the President in his capacity as the proprietor of a registered business.

Another issue which the defendant wishes to challenge, on appeal, is the decision on the question as to whether or not there was a legal justification for the defendant to give to Mr. Abraham Kiptanui, a Special Power of Attorney, to swear an affidavit on his behalf.

As a first step towards the defendant's intended appeal, he filed a Notice of Appeal on 12th April 2006. Two days later, on 14th April 2006, the defendant wrote to the court, applying for the typed proceedings and the ruling against which he intends to appeal.

Whilst he pursues his right of appeal, the defendant asks this court to stay any further proceedings, because it is said that otherwise, the defendant would suffer substantial loss.

In contrast, the respondent would not, if stay is granted, suffer any prejudice which could not be compensated by an award in costs and interest, submitted the applicant.

In answer to the application, the plaintiffs submitted that the intended appeal was frivolous. The court was informed that the defendant had previously filed three other Notices of Appeal, but had never lodged

any appeal. Therefore, the plaintiff believes that there was no genuine desire, on the part of the defendant, to lodge any appeal.

Meanwhile, as regards the defendant's desire to challenge the ruling on the provisions of Section 14 of the Constitution, the plaintiffs say that the defendant was wrong to allege that the issue was not fully canvassed by both parties.

And, as regards the challenge to the decision regarding the admissibility of evidence tendered by Mr. Abraham Kiptanui, on the strength of the Special Power of Attorney, the plaintiffs' say that the defendant would not be prejudiced, even if the trial did proceed pending the intended appeal. The reason for that contention was, that in the plaintiffs' assessment, the decision on that specific point was obiter dicta.

The plaintiffs also believe that should the proceedings carry on, the only loss which the defendant could possibly suffer would be on costs, as the defence herein was premised on many other grounds, apart from that of limitation. Therefore, If the trial did proceed, the defendant should be in a position to invoke all the other defences available to him, as none of the trial issues, which were identified by the court, in the ruling of 5th April 2006, touched on limitation.

It is contended that by opposing the application for summary judgement, the defendant wanted a trial. Therefore, the plaintiffs' submit that the defendant ought to let the trial proceed on 27th July 2006, as scheduled, instead of stalling it through an order for stay.

Finally, the plaintiffs faulted the defendant for failing to provide security, in the event that this court was minded to stay the proceedings.

I have given due consideration to this matter. First, I wish to make it crystal clear that I consider myself to lack the requisite jurisdiction to assess the strengths or weaknesses of the Ruling which I delivered on 5th April 2006. I think that the only court which has the authority to assess the said ruling would be the Court of Appeal.

On my part, I had every reason to arrive at the decision I made. Therefore, I believe that the decision is the correct one. However, I do also acknowledge the fact that I am not infallible. Human as I am, there will come occasions when my decisions, which I will have delivered through a ruling or a judgement, will be found, by the Court of Appeal, to have been wrong. Of course, I hope that such occasions would be few.

But, in the meantime, whenever any party chooses to exercise his right of appeal, I must ensure that if he does so, the said unalienable right is not encumbered, or rendered nugatory.

In this case, the defendant may have failed to file appeals on the three earlier occasions when he had filed notices of appeal. I therefore fully appreciate the plaintiffs' concern that the defendant may actually not have a genuine desire to appeal. But, I also note that on the said three earlier occasions, the defendant did not ever seek orders for the stay of proceedings. As far as I can see, this is the first application for stay of proceedings. Therefore, I think that it would be wrong of me, to accept the plaintiffs' contention (which is unsupported by any material), to the effect that the defendant's sole desire was to delay the proceedings herein.

I have taken into account the fact that the claim herein is for a sum in excess of Kshs.226,000,000/-. If the case did proceed to trial, there is every possibility that the defendant may be held liable. If that decision was arrived at before the intended appeal was heard and determined, the defendant may find himself staring into the face of a Decree for a substantial sum. In those circumstances, if the Court of Appeal were to later allow the appeal, the entire exercise of the trial would have been in vain. Also, the net effect would be that, on the one hand the defendant was liable to the plaintiffs, whilst on the other hand, the Court of Appeal may have determined, say that the whole suit was barred by limitation.

Another possible scenario is one in which the defendant is unable to have Mr. Abraham Kiptanui testify

on his behalf, at the trial, in view of the ruling dated 14th April 2006. If that were to happen, and later the Court of Appeal ruled that there was nothing wrong with Mr. Kiptanui testifying, pursuant to the Special Power of Attorney, the defendant would have been prejudiced.

In my considered opinion, the foregoing constitutes sufficient cause to grant a stay of these proceedings. In arriving at that conclusion I have exercised my unlimited discretion, but in a judicial manner. My decision has been informed by the decision of the HON. RINGERA J. (as he then was) in **RE: GLOBAL TOURS & TRAVELS LIMITED [2000] LLR 1061,** whereat he expressed himself thus;

"From a textual analysis it appears that the court has a discretion to order stay of proceedings pending appeal from its order or decree and such discretion is unfettered. The strictures, that sufficient cause be shown and that no order for stay should be made unless the court is satisfied that substantial loss may result to the applicant and that the application has been made without unreasonable delay and further that such security as may be ordered for the due performance of the order or decree has been given, are on a plain reading of the rule, applicable only to applications for say of execution."

I have absolutely no doubt in my mind that those words aptly and correctly summarise the legal position. One need only read the provisions of Order 41 rule 4 (2) of the Civil Procedure Rules to confirm that the strictures cited in the ruling above, are only applicable to applications for stay of execution.

It follows therefore that in an application such as the one before me, which is for stay of proceedings, there is no mandatory requirement for the applicant to provide security as a prerequisite for the grant of the order.

In this application, I have also taken into account the fact that if these proceedings were stayed pending the hearing and determination of the defendant's intended appeal, the plaintiffs will have to wait much longer before they could prosecute their case. Such a delay is prejudicial to the plaintiffs.

But all the same, the said prejudice, when weighed against the pros and cons of a stay in these proceedings, is less than the difficulties which the judicial system would be exposed to if this court proceeded with the trial whilst the intended appeal was still outstanding. To my mind, if the trial did proceed on 27th July 2006, or at any other time whilst the intended appeal was still unresolved, there would be real danger of the court being put into disrepute, due to possible inconsistent decisions on the same points, in the same matter.

Accordingly, I find merit in the application dated 26th April 2006. Therefore, I order that there shall be a stay of proceedings in this suit pending the hearing and determination of the defendant's intended appeal.

As regards costs, I order that the same shall abide the outcome of the intended appeal. If the said appeal is successful, the costs of this application shall be awarded to the defendant. However, if the said intended appeal is, for any reason, not successfull, whether by omission or commission, the costs of the application dated 26th April 2006 would be awarded to the Plaintiffs.

Dated and Delivered at Nairobi this 21st day of June 2006.

FRED A. OCHIENG

JUDGE