REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE 678 OF 2004

ALLIANCE MEDIA KENYA LTD……PLAINTIFF

- V E R S U S

WORLD DUTY FREE COMPANY COMPLEX LTD t/a KENYA DUTY FREE COMPLEX……..….DEFENDANTS

R U L I N G

This application is brought by a Notice of Motion dated 10th February,2005. It is expressed to be made under O.XLI Rule 4 of the Civil Procedure Rules and all enabling provisions of the law. The main orders which the applicant seeks from this court are:

1. THAT there be a stay of the order of dismissing the plaintiff's application dated 15th December, 2005 pending appeal

2. THAT pending the lodging hearing and determination of the intended appeal the defendant/respondent, whether by itself, its agents or servants be restrained from presenting to court, advertising however in any way, filing or taking out or continuing winding up proceedings against the plaintiff/applicant in respect of a claim for US$308,500 or in respect of any other claim the defendant may make against the plaintiff in any way whatsoever.

3. THAT costs be in the cause

The application is predicated on the following grounds-

(a) That the plaintiff is aggrieved by the Ruling and Order of 27th January, 2005.

(b) That the plaintiff has filed a Notice of Appeal against the order dismissing the plaintiff's application for an injunction to issue.

(c) That the plaintiff will suffer irreparable harm unless there is a stay of the judge's order and its appeal will be rendered nugatory.

(d) That the plaintiff has since discovered that the defendant's legal status and ownership is subject to court proceedings in HCCC No.418 of 1998 KAMLESH PATNI v. NASIR IBRAHIM & 2 ORS.

(e) The balance of convenience is in favour of an order for status quo being granted.

The application is further supported by the annexed affidavit of SOPHIE KINYUA. On its part, the defendant/respondent filed, on 18th February, 2005, grounds of opposition dated 17th February, 2005,

and also a replying affidavit sworn by Arif Haziz, a director of the defendant/respondent on 17th February, 2005. The grounds of opposition are-

(ii) That the application dated 10th January, 2005 is technically defective in that it seeks to stop the Respondent from doing a statutory function i.e. to commence winding up proceedings against a company which is insolvent and accordingly the application contravenes the provisions of the Companies Act.

(i) That the application dated 10th January, 2005 is misconceived and bad in law and ought to be struck out with costs.

(iii) That there is no procedure and/or law for staying an order dismissing an application under the Civil Procedure Rules or Civil Procedure Act.

(iv) That the prayers sought in paragraphs 2 and 3 of the Notice of Motion are intended to circumvent the effect of the order of dismissal and to relitigate the already dismissed application.

(v) That the applicant's Notice of Motion neither seeks a stay of proceedings nor stay of execution as provided for under O.XLI of the Civil Procedure Rules and is therefore bad in law.

(vi) That the orders given by the court on 27th January, 2005 did not contain any positive order capable of being "executed" and as such there is no order whose execution the applicant's Notice of Motion can now seek to "stay"

(vii) That the applicant has not demonstrated what irreparable harm or damage they will suffer if a stay is not granted and in any event there can be none as the applicant's indebtedness to the respondent is not denied, and accordingly the applicant is a debtor in terms of the provisions of the Companies Act.

At the hearing of the application, Mr. Gitau appeared for plaintiff/applicant while Mr. Imanyara appeared for the defendant/respondent. Mr. Gitau submitted that the shareholding in the defendant company is suspect and therefore directorships acquired through such shareholding, and even the Annual General Meeting would not have the mandate to commence winding up proceeding or even reply to the applicant's affidavit.

If winding up proceedings are commenced the plaintiff's business partners will take it that the plaintiff is heavily in debt and unable to pay its debts and is now tottering on the brink of collapse. Nobody will want to deal with the plaintiff again.

Counsel further contended that even though it may be argued that the applicant will have another forum during the hearing of the winding up cause, the court's ruling completely destroyed the plaintiff's substratum and made it almost impossible for the plaintiff to respond to a winding up petition. He thereupon submitted that the court erred in making a definite finding at an interlocutory stage. Consequently, failure by this court to grant a stay pending appeal will not only destroy any defence the plaintiff may have to the winding petition, but will also render the appeal nugatory. At this juncture he relied for his submissions on several authorities, including RE GLOBAL TOURS & TRAVEL, W.C. No. 43 of 2000 in which a stay of further proceedings was sought and granted pending appeal from the court's order dismissing the applicant's application to strike out the respondent's petition to wind up the applicant. He also referred to SURETTA v. VADAG ESTABLISHMENT, W.C. NO. 28 of 1996 on the requirement to establish substantial loss. Counsel further cited NATIONAL IRRIGATION BOARD v. MWEA RICE GROWERS MULTIPURPOSE CO-OP SOCIETY & ANOR, Civil Application No. NAI 153 of 2001, and also SWANYA LTD. v. DAIMA BANK LTD.,

Civil Application No. NAI 45 of 2001, and requested that the application for stay pending appeal be granted.

Opposing the application, Mr. Imanyara for the defendant/respondent argued that O.XLI Rule 4 can only apply for a stay arising out of a decree or order, or a stay of proceedings arising out of a decree or order.

He further argued that this application is not applying for either stay of a decree or stay of proceedings and submitted that the application itself is a nullity. He then said that prayer No.2 in the application is substantially the same as the one which was dismissed, and that this was meant to circumvent the court's ruling which was now res judicata. The applicants cannot ask this court to reissue an order which the court has refused to grant.

Mr. Imanyara then sought to distinguish the authorities cited by Mr. Gitau. He said that the first two of those authorities apply only if the applicant applied for stay of the winding up proceedings which have already commenced and to which the applicant has filed a replying affidavit to the petition. He also contended that there was no evidence that the applicant will suffer any loss if the stay is not granted. Mr. Imanyara finally argued that there was nothing in the ruling, the subject matter of this application capable of being executed, and that a stay of execution ought to be in relation to a decree or order under O.XXI. A dismissal cannot be executed. He then submitted that the application had no merit and should be dismissed with costs.

In a short reply, Mr. Gitau said that what the applicant seeks is a stay of proceedings, not execution.

After hearing and considering the arguments of both counsel, I find it prudent to remind myself that on 27th January, 2005, this court dismissed the applicant's application to restrain the defendant from presenting to court, filing or taking out winding up proceedings against the plaintiff. Being dissatisfied with that ruling, the applicant intends to appeal to the Court of Appeal against the whole ruling, and to that end it filed a Notice of Appeal dated 3rd February, 2005. O.XLI Rule 4 (4) of the Civil Procedure Rules states as follows-

"For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that court notice has been given."

In this instance, notice has already been given. An appeal is therefore deemed to have been filed under the above rule.

After filing the appeal, the plaintiff came back to this court seeking a stay of the order dismissing the plaintiff's application and, more importantly, seeking an order to restrain the respondent from "… presenting to court… filing or taking out or continuing winding up proceedings against the applicant…" Arising out of this prayer, Mr. Imanyara raised three issues. These are, firstly, that after the dismissal of the applicant's application on 27th January, 2005, the court did not make any order in respect of which a stay could be sought; secondly that this prayer was substantially the same as that which was dismissed, and thirdly, that what the applicant should have applied for was a stay of winding up proceedings which have already commenced.

I agree with Mr. Imanyara that all that the court did on 27th January, 2005, was to dismiss an application for an order of injunction. Such a dismissal is not amenable to execution and is therefore not capable of being stayed. I find, therefore, that the prayer for a stay of the order dismissing the plaintiff's application dated 15th December, 2004 pending appeal cannot be stayed.

The second point arising from the application is the suggestion by Mr. Imanyara for the respondent that the prayer for restraining the plaintiff/respondent is the same as that which was dismissed and that it is, inter alia, res judicata. The short answer to this plea is that the application dated 15th December, 2004, had sought a restraining order of injunction. That application was dismissed on 27th January, 2005. For the avoidance of any doubt, the court has jurisdiction to grant an injunction pending the hearing of an appeal against the dismissal of an application seeking an injunction. In the case of ERINFORD PROPERTIES LTD. vs. CHESHIRE COUNTY COUNCIL [1974] 2 ALL E.R. 448, Megarry J. had this to say on that point –

"I cannot see that a decision that no injunction should be granted pending the trial is inconsistent either logically or otherwise, with holding that an injunction should be granted pending an appeal against the decision not to grant the injunction or that by refusing the injunction pending the trial the judge becomes

functus officio quad granting any injunction at all."

It can't be doubted that the court has jurisdiction to grant the injunction sought. Thirdly and lastly, Mr. Imanyara submitted that the authorities relied on by Mr. Gitau for the applicant apply only if the applicant has applied for a stay of the winding up proceedings. Prayer for order No.2 states –

"That pending the lodging hearing and determination of the intended appeal the defendant/respondent, whether by itself, its agents or servants be restrained from presenting to court, advertising however in any way, filing or taking out or continuing winding up proceedings against the plaintiff/applicant in respect of a claim of US$308,500.00 or in respect of any other claim the defendant may make against the plaintiff in any way whatsoever."

It may be that this prayer is not worded in such a poignant and crisp style as Mr. Imanyara would have preferred. However, with a little patience it is a lot easier to decipher its message than it is to fish out the biblical two grains of wheat from a bushel of chaff. To me, the operative words are-

"…to restrain the respondent from… presenting to court… filing or taking out or continuing winding up proceedings against the plaintiff/applicant in respect of a claim for US$308,500.00."

It is crystal clear to me that this plea incorporates the prayer for staying the winding up proceedings, and that the 1st two authorities cited by Mr. Gitau are therefore relevant.

The first of those authorities is Winding Up cause No.43 of 2000, RE GLOBAL TOURS & TRAVELS, in which it was held that under O.XLI Rule 4, the court has a discretion to order a stay of proceedings pending appeal from its order or decree and that discretion is unfettered.

Unfettered as its discretion might be, however, before the court can grant an order of stay, it must be satisfied, inter alia, that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay.

In so far as delay is concerned, the ruling against which the applicant wishes to appeal was delivered on 27th January, 2005. The Notice of Appeal in respect thereof is dated 5th February, 2005. (The date on which the Notice was received in court is not clear from the copy attached to the application). However, the Notice of Motion seeking an order of stay is dated 10th February, 2005, and was filed in court on 11th February, 2005. It cannot be doubted that there was no unreasonable delay in the making of the application and that this satisfies the second aspect of the requirement as to the timely making of the application. As to whether the applicant will suffer substantial loss unless the order is made will depend on some four variables. If the order of stay is not granted, there is the latent risk that the winding up process of the applicant company will proceed in the Superior Court parallel with the hearing of the appeal in the Court of Appeal. Such a process can lead to four possible consequences-

(a) both parties may win their respective battles in the respective courts, or

(b) both parties may lose those respective battles, or

(c) the applicant might win in the Court of Appeal, while the respondent loses in the Superior Court or

(d) the applicant might lose in the Court of Appeal while the respondent triumphs in the Superior Court.

Starting with the last variable, if the applicant loses in the Court of Appeal and the respondent wins in the High Court, the applicant company will be wound up without suffering any substantial loss except, perhaps, the costs of appeal. As for the second variable, if the applicant wins in the Court of Appeal while the respondent loses in the High Court, then again the applicant will not suffer any substantial loss as it will not be wound up. Thirdly, if both parties lose their respective matters in the respective courts, the applicant will not suffer any substantial loss as it will not be wound up. If, fourthly, the applicant wins its appeal in the Court of Appeal and the respondent gets the applicant wound up in the High Court, this

would spell disaster to the applicant as it might lead to the winding up of the applicant company while the Court of Appeal would be of the view that it should not be wound up. It would be even move disastrous if the winding up process were to be completed before the appeal is finalised and determined. This would clearly render the appeal nugatory. The only way to circumvent such an unsavoury situation would be by staying the winding up process pending the appeal. In my view, the potential disaster posed by continuing with the winding up process constitutes sufficient cause why a stay of the winding up proceedings should be stayed pending appeal. The issue as to whether there is an arguable appeal or not falls within the province of the Court of Appeal within the rules of that court.

For the above reasons, I think that it is just and equitable to order a stay of the winding up proceedings pending the appeal. It is so ordered. This order will, however, apply to winding up proceedings only in respect of the claim for US$308,500.00 but not in respect of any other claim the defendant may make against the plaintiff.

Costs in the cause.

Dated and delivered at Nairobi this 28th day of April 2005

L. NJAGI

JUDGE