



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL DIVISION – MILIMANI
CIVIL CASE NO.1475 OF 2000

IRARU HOLDINGS LIMITED.....PLAINTIFF

VERSUS

CANADIAN FOODGRAINS BANK1st DEFENDANT

TRANSAMI (KENYA) LIMITED (now known as

SDV TRANSAMI(K LIMITED and SOCIETE GENERALE

DE SURVEILLANCE.....2ND DEFENDANT

(SGS) KENYA LIMITED.....3RD DEFENDANT

RULING

On 15th October, 2003, Mwera J. granted the Plaintiff's Application to stay these proceedings. The Application was made under Section 223(a) of the Companies Act (Cap.486) which reads:-

“223. At any time after presentation of a winding-up petition and before a winding-up order has been made the company or any creditor or contributory may:-

(a) Where any suit or proceeding against the company is pending in the High Court or the Court of Appeal, apply to the Court in which the suit or proceeding is pending for a stay of proceedings therein.

(b) .and the Court to which application is so made may as the case may be stay or restrain the proceedings accordingly on such terms as it thinks fit.

The stay of further proceedings was granted till Nyeri Winding-up Cause No.6 of 2002 is heard and determined. The Nyeri winding-up cause to date remains undetermined. These proceedings are therefore stuck. These state of affairs has prompted the third Defendant to make the present application primarily seeking an order that Mwera J's order of stay of proceedings in this case be varied and/or set aside. The application is expressed to have been brought under Section 3A of the Civil Procedure Act and Order L Rule 1 of the Civil Procedure Rules.

The grounds for the application are that it is now more than one year since the said order was made and yet the Plaintiff has done nothing to get the Nyeri Winding-up cause heard and determined or dismissed for want of persecution and keeping this case pending is prejudicial to the Defendants. The application is supported by an affidavit sworn by Counsel for the 3rd Defendant/Applicant. The application is opposed

and there is a replying affidavit sworn by one Lawrence Muriithi Mbabu the Managing Director of the Plaintiff. The Applicant is supported by the 2nd Defendant who has filed a replying affidavit sworn by one Wami Mwangi the Regional Legal Manager of the 2nd Defendant.

The application was canvassed before me on 22nd April 2005 by Mr. Gitonga Learned Counsel for the 3rd Defendant Ms Malik Learned Counsel for the 2nd Defendant and Mr. Njeru Learned Counsel for the Plaintiff. The basic argument of Mr. Gitonga and Ms Malik is that the parties have faithfully observed the order of stay granted by Mwera J on 15th October 2003 to date. However, it appears as if the Plaintiff is not keen to have the Nyeri Winding-up cause finalized expeditiously and unless the Court intervenes this case will remain in our records indefinitely with the result that witnesses may relocate which will be detrimental to the Defendants.

The gist of the Plaintiff's case is that the order of Mwera J. staying proceedings in this case was in accordance with the Law and the Learned Judge in fact appreciated that the Winding-up proceedings at Nyeri would take a considerable time. In the Plaintiff's view, the delay is not inordinate and the 2nd and 3rd Defendants have not demonstrated that they have been prejudicial by the delay. In any event the 3rd Defendant's application is a disguised appeal and has been brought contrary to the order it seeks to vary or set aside and has in any case no basis in law.

In the light of the above arguments, should I vary or set aside the order of my Learned brother Mwera J.? Before determining this question, let me state at the outset that I do not consider this application as constituting a breach of the order staying further proceedings in this case. A party who seeks the aid of the Court to expedite proceedings pending before the Court can never be guilty of contempt or abuse of the Court process. I have no difficulty at all in holding that any party to this case is entitled and indeed has a duty to apply to prevent abuse of the process of the Court.

There is no doubt in my mind that that order by my Learned brother Mwera J., staying further proceedings in this case was a perfectly regular valid and lawful order and was made of course with jurisdiction. Having said so, I ask myself, what the position would be if the Plaintiff and the Petitioner in the Nyeri Winding-up cause make no move at all!. Are the Defendants absolutely without remedy? Surely the answer cannot be in the affirmative. In my view, the fact that Mwera J. did not grant leave to the parties to apply did not mean that there was no such liberty to apply which in my view is the course of action the 3rd Defendant has taken.

In my view to set up a framework of action in this case will not be tantamount to a variation of the order of Hon. Mr. Justice Mwera made on 15th October, 2003 and will not offend the provisions of the Companies Act. In the result I make the following orders:

- 1. The Plaintiff is given 60 days within which it should set in motion proceedings to conclude the winding up cause No.6/2002 at the Nyeri High Court.**
- 2. In default of one (1) above the 2nd and 3rd Defendants to move the Court in this case as they deem fit.**
- 3. Costs of this application shall be in the cause**
- . 4. Each party has liberty to apply.**

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF MAY 2005.

F. AZANGALALA

JUDGE

