



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 1061 OF 1990

MARK OMOLLO AGENCIES & 2 OTHERS PLAINTIFF

VERSUS

DANIEL KIOKO KAINDI & ANOTHER DEFENDANT

RULING

The applicant by a Notice of Motion dated 25th November, 2003 seeks a stay of proceedings in the High Court in order to prosecute his appeal in the Court of Appeal.

The application is supported by an affidavit of one H M Parekh sworn on 4th November 2003.

The grounds set out in the body of the application and the affidavit include:-

- (1) That the respondent be granted leave to amend the plaint and the applicant having objected to the same of the grounds inter alia that the cause of action had been barred by the law of limitation the applicant had instituted an appeal against the decision to allow the amendments and that the appeal is still pending.**
- (2) That if the hearing took place in the High Court in the mean time this would be an abuse of the court process.**
- (3) That if the hearing took place the intended appeal would be rendered nugatory. The hearing was initially scheduled for 2nd and 3rd December 2003 but the hearing has so far not taken place.**

The application was opposed on the grounds including

- (1) That the application was only intended to stay the hearing on 2nd and 3rd December, 2003 and since the hearing did not take place the application has been overtaken by the events.**
- (2) That the applicant has not complied with the preconditions set out under O 41 rule 4.**
- (3) That the issue of limitation is still incorporated in the defence and therefore the appeal would not be rendered nugatory since the applicant could still appeal against the judgment if the hearing took place and that there has been delay in filing the application.**

The applicant relied on the case of GLOBAL TOURS & TRAVELS LTD IN W C 43/2000 where Justice Ringera considered the fate of a petition and the right of appeal and held that it would not be right to

proceed with the hearing of a petition while an appeal had been duly instituted touching the same matter. O 41 rule 4 (2) reads:-

No order for stay of execution shall be made under subrule

(1) unless

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

Turning to the facts of the matter before me and the points for determination the facts and points are unique in that it is actually not a stay of execution which is being sought and my finding is that what is being sought is a stay of proceedings and the monetary conditions set out in (a) and (b) above do not apply to applications for stay of proceedings. They only apply to applications for stay of execution. The applicant seeks a stay of hearing so that a major legal point he intends to pursue on appeal is determined. If the hearing were to proceed on the basis of the amended pleadings this would render the appeal nugatory. I consider that the applicant is correct in that if fresh causes of action were to be added and the matter proceeds to full hearing the intended appeal would certainly be rendered nugatory. The fact that he could still file an appeal against the ultimate judgment would not in the opinion of the court make any difference to the intended appeal being nugatory because the Court of Appeal Rules require the institution of an appeal against each order or decree and there is no clear provision for consolidation. In addition proceeding with the hearing while an appeal is pending would constitute an abuse of the court process.

For the three reasons set out above I would allow the application and the proceedings in the High Court are accordingly stayed.

Costs shall be in the cause.

DATED and delivered at Nairobi this 25th day of March, 2004.

J G NYAMU

JUDGE