



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS
CIVIL CASE NO 1675 OF 2001

SHANTILAL VAGHJISHAH 1ST PLAINTIFF

GIRISH VAGH JISHAH 2ND PLAINTIFF

VERSUS

NYANZA SPINNING & WEAVING

MILLS LIMITED DEFENDANT

RULING

On 9th June, 2003 Nyamu J dismissed the defendant's application dated 11th April, 2003 by which the defendant sought the following orders:-

1. That the Plaintiffs do produce for inspection by its advocates and its designated officers the following documents: -

(a) List of directors of Spoonbill Limited

(b) Documents that is to say, vouchers, cheques, telex or any other means by which \$100,000 was paid to the Plaintiffs showing the names of the payer/s, the date, amount and account from and into which it was paid and details of the whole account of the Plaintiffs evidencing that they have not received a prior or further \$150,000.

(c) Copies of any registration certificates, consignment notes or any documents evidencing mode of postage or delivery of letters from the Plaintiffs dated 6/7/98 and 30/10/98.

2. A time frame be set within which the Plaintiffs should avail for inspection the subject documents and the Defendant be allowed to make copies thereof

3. The costs of this application be paid by the Plaintiffs in any event.

The defendant has appealed against the said order vide NAIROBI C A No 293 of 2003. On 9th June, 2003 Nyamu J granted to the defendant stay pending a formal application for leave.

The defendant then subsequently filed this application for stay of these proceedings pending the filing,

hearing and final determination of the appeal. The application is made by Notice of Motion under Order 41 Rule 4 (1) of the Civil Procedure Rules, Section 3 A of the Civil Procedure Act and all enabling provisions of the law and powers of the court.

Mr Wasuna argued the Notice of Motion for the defendant and Mrs Muriu opposed the same for the Plaintiffs. The Notice of Motion was based on the grounds in the body of the application and on the supporting affidavit of MITESH FULCHAND SHAH sworn on 13th June, 2003. Annexed to the said affidavit were several exhibits. The Plaintiffs filed Grounds of Opposition.

Mr Wasuna in his oral submission, in court submitted that the defendant's appeal is arguable. The defendant requires the subject documents for better preparation of its defence and if stay is not granted the suit will be disposed of and if the appeal is allowed any orders made therein will be superfluous as the hearing will have been completed. The appeal will be nugatory and will not have served its purpose.

In Mr Wasuna's view if stay is granted there will be no loss to the Plaintiffs save for loss of time in disposing of the suit.

Mr Wasuna relied on ***NAIROBI (MILIMANI) HC WINDING UP CAUSE No 43 of 2000 (Unreported) In the matter of Global Tours and Travels Limited and In the matter of the Companies Act***. In this case Ringera J held that the court has a discretion to order stay of proceedings pending appeal from its order or decree and that such discretion is unfettered. He said at page 5 of his Ruling that:-

“The sole question is whether it is in the inter est of justice to order stay of proceedings and if it is on what terms it should be granted.”

Mrs Muriu in her oral submissions relied on the grounds of opposition filed on 3rd October, 2003. She submitted that the defendant's application is brought in bad faith and the defendants have deliberately delayed to prosecute it. In the learned counsel's view the matter is ready for hearing; issues have been agreed, and filed, the Plaintiff's list of documents has been filed. Discovery is complete.

Mrs Muriu argued that the relief sought is discretionary and in the interest of justice the defendant's application should be disallowed. She argued that in these proceedings there is pending for hearing an application for leave to amend the defence to which application a proposed amended defence is annexed. This suggests that the defendant has all the documents in its possession for the proposed defence.

Mrs Muriu further submitted that the Plaintiff's claim is a money claim. If appeal is heard and allowed and the suit has been disposed of in the Plaintiff's favour then an order for refund will be made. In her view loss of time is extremely prejudicial to the Plaintiffs. She argued that the winding up cause No 43 of 2000; In the matter of Global Tours and Travels Limited, is irrelevant. Mr Wasuna in a brief reply stated that the defendant is not guilty of inordinate delay. He reiterated that if stay is not allowed, the defendant shall suffer prejudice as the obvious result will not necessarily be refund.

These were the submissions for and against the prayer for stay of proceedings pending the defendant's appeal.

The appeal by the defendant is against an interlocutory ruling of this court. The defendant believes that without discovery and inspection of the documents in question it cannot adequately prepare its defence and further that if the hearing takes place without the said documents it will be hampered in the effective prosecution of the defence. It will therefore suffer if the hearing proceeds and the appeal will be rendered nugatory. The results thereof even if they will be in its favour will be of no use to it as the hearing will have been completed.

I think the defendant's fears are well founded. It says it has an arguable appeal and in my view if it succeeds and the hearing has proceeded the results will be irrelevant. On the other hand if stay is allowed, and the Plaintiffs eventually succeed, all that they will suffer will be that they will have been kept out of their money for a little longer. This consequence is in my view less severe.

In coming to the above conclusion, I am aware that cases especially cases in a commercial court should be disposed of with expediency. But I do not lose sight of rights of all the litigants. One of these is the right to appeal. The defendant in the appeal is challenging a finding of this court that its application referred to at the beginning of this ruling is res judicata. The defendant further challenges the court's interpretation of the requirements of Order 10 Rule 17 (2). I find that the appeal is arguable.

In the result I hold that it is in the interest of justice to grant an order of stay of these proceedings pending the defendant's appeal. The Plaintiffs have liberty to apply to vacate this order if they can show that the defendant is not prosecuting its appeal expeditiously. The Plaintiff shall have the costs of this application.

Dated and delivered at Nairobi this 18th day of March, 2004.

F. AZANGALALA

JUDGE

18.3.2004