



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL SUIT NO 84 OF 1994

ELEGANT FREIGHTERS LTD PLAINTIFF

VERSUS

FREIGHT CONSULTANTS LTD DEFENDANT

AND

IMPERIAL BANK LTD 1ST GARNISHEE

STANDARD CHARTERED BANK LTD 2ND GARNISHEE

RULING

This is an application stated to be brought under Order XXII and Order IXL Rule 4 of the Civil Procedure Rules (hereinafter referred to as “the Rules”) and Section 3A of the Civil Procedure Act (Cap 21). In it, the Applicant who is the Defendant in the suit seeks the following orders:

“2. THAT the Defendant be granted leave to appeal against the court’s order of 18 th December, 2003

3. (Not relevant now)

4. THAT the enforcement and/or confirmation of the Garnishee Order Nisi (as granted by the court’s order of 18 th December, 2003 be stayed pending the hearing and determination of the intended appeal

5. (Costs).”

At the hearing of this application, the Advocates for the parties present agreed and the court recorded a consent order granting the Defendant leave to appeal as sought in prayer two above. However, I have sought to note this matter in this Ruling as it is Central in the decision of the application as will be seen shortly. At this point, I would only mention that the Defendant has not yet filed an appeal as envisaged by Order XLI Rule 4 (4) of the Rules. The court is, therefore, concerned mainly with prayer 4 of the application.

The matters leading to the application are settled. The Plaintiff obtained Judgment against the Defendant in this suit way back in February, 2002. In execution of the decree emanating from that Judgment the Plaintiff instituted Garnishee proceedings. After the usual processes, I confirmed the Garnishee Nisi issued earlier and in effect gave the Plaintiff a green light to execute the decree by attaching and recovering the money thereunder from the Defendant’s Bankers. That is the order sought to be stayed by

the present application.

As I mentioned earlier, the Defendant has not yet filed its appeal. Mr Mutiso who appeared for it recognized the need for filing appeal before seeking stay of execution and he embarked to show me that this was an exceptional case in which the court could grant stay of execution before an appeal had been filed. According to him the Defendant had not filed its appeal as it needed leave which leave was only granted when this application came up for hearing. According to him, there was a lacuna in the Rules “as there was no provision for filing appeal without leave.” In the circumstances he sought to rely on Section 3A of Cap 21 (the inherent powers of the court). He referred the court to the case of **Industrial & Commercial Development Corporation vs Otachi (1977) KLR 101** which deals with instances when the inherent powers of the court could be invoked. In the alternative, Mr Mutiso argued that Order XXII of the Rules which deals with attachment of debts was a complete code which empowers the court to stay orders made thereunder. He referred me to the case of **Noor Khan vs Ramji Kanji & Company and Others (1966) E A 506** in which the Honourable Justice Farrel held that “Order XXII of the Rules constituted a complete code in respect of attachment of debts and ousted the general rules contained in Order XXI of the Rules which might otherwise apply and the latter rules had no application to the attachment of debts.” (See the head note to the Ruling). He further argued that the money in issue was under garnishee and was, therefore, safe and the Plaintiff was at no risk and would suffer no prejudice if the application was granted.

Mr Mutiso also suggested that the Plaintiff was in financial throes and would not refund the money in issue were the appeal to succeed.

I find it very difficult to accept the submissions of Mr Mutiso. What is sought by Mr Mutiso’s client is essentially a stay of execution pending the hearing of the appeal. Such an application is usually brought under Order XLI Rule 4 of the Rules. Order XXII of the Rules which Mr Mutiso referred to deals with attachment of debts and has no provision for staying an order once attachment is made to enable one appeal. The case of **Noor Khan** is, therefore, not relevant to the decision of this application.

The next question is whether Mr Mutiso was correct in his contention that his client could make this application without having filed an appeal. It was common ground that one was required to file an appeal before seeking stay of execution pending the hearing and determination of the appeal. Was Mr Mutiso correct in saying that since his client required leave to appeal he could seek stay of execution pending the hearing and determination of his appeal even before it had filed a Notice of Appeal? (See Order XLI Rule 4 (4) of the Rules). I do not think so. As Mr Majanja properly pointed out one did not need to wait for leave to appeal before lodging his Notice of Appeal (See Rule 74 (4) of the Court of Appeal rules under the Appellate Jurisdiction Act (Cap 9)). This was, therefore, not a special case to warrant the invoking of the inherent powers of the court as was argued. The case of **I.C.D.C. vs Otachi** is also irrelevant to the decision of this appeal. As this was the main point urged before me, I do not see the need to go into the other issues which were minor and not central to the decision relating to this application.

In the result, I do not think that the Defendant has complied with the conditions outlined in Order 41 Rule 4 to entitle it to an order for stay and I consequently dismiss its application dated 30th December, 2003 with costs to the Plaintiff.

Dated and delivered at Nairobi this 14th day of July, 2004.

ALNASHIR VISRAM

JUDGE