



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL SUIT NO. 313 OF 2002**

**AFROFREIGHT FORWARDERS LTD. .... PLAINTIFF**

**VERSUS**

**EXPRESS KENYA LTD. .... DEFENDANT**

**R U L I N G**

The Notice of Motion before the Court was filed on 15th January, 2003 and is brought under the provisions of Sections 6, 7 and 3A of the Civil Procedure Act and Order 50 rule 1 of the Civil Procedure rules. The prayers sought are as follows:

*“1. That there be a stay of proceedings in this matter pending the hearing and determination of HCCC. NO.2108 OF 2000 (NRB) EXPRESS KENYA LTD. – VS – AFRO FREIGHT FORWARDERS LTD. a suit between the parties herein”*

*2. That costs of this application be paid by the plaintiff Respondent”.*

The plaintiff is the Defendant in HCC.2108 OF 2000 PENDING AT Nairobi a suit filed earlier than the present. In that suit the Defendant filed a claim for demurrage accruing as a result of containers that were returned late by Afrofreight forwards Ltd. In the suit herein Afrofreight have filed a claim for Rail charges allegedly incurred on account of Express Kenya Ltd. There is no dispute that the two claims arise from the same contract as between the parties.

Mr. Ndegwa submitted and rightly so that the Afrofreight ought to have brought their claim through a counter-claim or set off. On her part, Mrs. Maina says the two claims are distinctly different. I have read the pleadings herein and note that the claim by Afrofreight forwarders Ltd. is for rail services rendered to the Defendant for various containerized consignments to Nakuru as per their contract.

In it's defence the defendant raises the issue of demurrage but denies the current claim. In their Reply to the Defence the plaintiff states that the two claims are unrelated. In my understanding of the claims are related in that in the suit HCC.2108/2000, the plaintiff in paragraph 3 and 4 refers to an agreement between the parties wherein Afrofreight were to arrange for rail transport of their containerized goods to Nakuru by railway and the return of the empty containers within the stipulated time, while in paragraph 3 of the plaint in HCC.313/2000 (Mombasa) the plaintiff's claim is for rail charges incurred by Afrofreight on behalf of Express for containerized goods they railed to Nakuru from Mombasa at their request. In the Defence, Express admits the arrangement for the rail transport but denies the amounts claimed. In paragraph 4, they aver that it was the plaintriff's duty to ensure they returned the containers in good time to avoid Demurrage. The amount of demurrage outstanding is given in paragraph 5. Section 6 of the Civil Procedure Act provides for the stay of a suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties.

In the circumstances I do allow the application. The suit HCC.313 of 2002 (Mombasa) shall be stayed pending the finalisation of the suit HCC.2108 OF 2000 Nairobi. Costs shall be to the Applicants herein.

**Dated and Delivered at Mombasa this 28th day of March, 2003.**

**P.M. TUTUI**

**COMMISSIONER OF ASSIZE**