REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO.1851 OF 1999

DESBRO POLYMERS LIMITED) ………………… PLAINTIFFS

VERSUS

INDUSTRIAL DISTRIBUTORS LIMITED)

SUMAN SENNIK) ….……. DEFENDANTS

R U L I N G

On 3rd November 2000, both parties consented to these three applications being heard together. These are application dated 8th June 2000, application dated 21st August 2000 and the application dated 28th September 2000. The three applications were therefore heard together. This was after the Applicant in all these applications had withdrawn application dated 27th June 2000. This ruling is therefore in respect of the three applications that were heard together. The application dated 8th June 2000 is seeking three orders and these are:

> *"1. That this Honourable Court be pleased to grant stay of proceedings herein pending the hearing and determination of the intended appeal.*
>
> *2. That this Honourable court be pleased to grant any other or furt her orders as it may deem fit.*
>
> *3. That the costs of this application be provided for".*

These orders are sought on grounds that a Notice of Appeal has already been lodged in the Court of Appeal; that unless the application is granted the Plaintiffs will apply for judgment and execution and lastly that the Applicants have an arguable appeal and if stay is not granted it will be rendered nugatory. It is supported by an Affidavit sworn by the learned counsel for the Applicant plus one annexture namely the Notice of Appeal.

The application was opposed and the Respondents/Plaintiffs filed a Replying Affidavit sworn by Hilesh Shah, a director of the 2nd Plaintiff which stated in brief that this application is bad in law and misconceived as the Plaintiffs had already obtained judgment by then; that the chances of success of the appeal is not condition precedent to the granting of the orders sought; that there is no evidence to show the alleged loss, that the question of stay of the proceedings had been heard fully and decided upon; that the Defendants could have filed their Defence under protest pending the hearing and determination of this intended appeal; that the Defendants/Applicants have not furnished any security for the same stay; that the Affidavit sworn by the Applicant/Defendants advocate should be struck out as it offends the rules of pleading, it having been sworn by an advocate whereas it is sworn on disputed facts.

The application dated 21st August 2000 is seeking for a stay of execution pending the determination of the application dated 27th June 2000. It is also seeking costs. As this application is seeking stay of execution pending the hearing and determination of an application which was withdrawn by the Applicant, I do not see much use going into the details of this application save to say it was also opposed.

The application dated 28th September 2000 is brought under Order IXA Rule 10, Order XLIV Rules 1 and 2, Order XLIVl Rule 5 and Order L Rule 11 of the Civil Procedure Rules as well as under Section 3A of the Civil Procedure Act. It is seeking orders as follows:

> *"1. THAT this Honourable court do see fit to review the interlocutory judgment of the Deputy Registrar entered on 15 th June 2000 and set aside the same.*
>
> *2. THAT if the interlocutory Judgment is set aside then leave be granted to file the application for stay of proceedings.*
>
> *3. THAT costs of this suit be provided for'.*

There are seven grounds for the same application which are in brief that there is an error apparent on the face of the record in that there was a claim for a declaration which must be proved by formal proof, that the claim was not for a liquidated sum; that the Plaintiff, in abandoning the prayer to obtain judgment in default of defence in fact did amend the Plaint and this was done without the leave of the court. That as there was uncertainty caused by prayer 1 which was for a declaration and prayer 2 for specific performance, the Deputy Registrar should not have entered exparte interlocutory judgment; that the claim is joined with damages as in prayer 3 and so the Deputy Registrar cannot give final judgment under such circumstances and that the prayers in the Plaint were beyond the jurisdiction of the Deputy Registrar and so he had no powers to enter such an interlocutory judgment. There is an Affidavit sworn by SUMAN SENNIK, the second Defendant/Applicant to which is annexed one exhibit and an Affidavit of Rustam Hira, the learned Advocate for the Defendants/Applicants.

This application was opposed by the Respondent/Plaintiff and a Replying Affidavit was sworn and filed. It was sworn by JAGDISH DEVSHI SHAH. The Plaintiff/Respondent through that Affidavit maintains that prayers (a) and (b) of the claim show that the suit is not a declaratory suit but is a suit for liquidated damages in the sum of K.shs 50,730,000/50, together with interest thereon which sum was according to the Respondent set out in prayer (a) and would be ascertained in prayer (b); that the order for stay was rejected by the court; that the Defendant, after the ruling of the court rejecting application for stay, failed to file Defence within the time required by the law, that the exparte interlocutory judgment was only entered in respect of liquidated damages only and the rest of the claim was to proceed to formal proof, that prayer c seeking damages was not found necessary and was thus withdrawn as the amount for which judgment was entered was found sufficient for the claim; that the Respondents were under no obligation to inform the Applicant of the withdrawal of the prayer c; that upon the same withdrawal of prayer for General Damages, the Respondents applied to the court to approve costs computed at K.shs 873,015.00 under Rule 68 of the Advocates (Remuneration Order). The Respondent/Plaintiff proceeds to say that the same costs were approved by the court; that on 11th August 2000, the Respondents gave notice of judgment to the Applicant requiring the Applicant to pay the decretal amount within 10 days of the date hereof. It is after that that the application dated 21st August 2000 was filed. He maintained that there is no arbitration proceedings pending in this matter and the Applicants have not at any time denied owing the Respondents the amount demanded. They state that they would suffer great prejudice if the judgment is set aside as the Applicants are truly indebted to them. This affidavit had several annextures to it.

I have considered the applications, the relevant Affidavits and annextures to them. I have also considered the able submissions by the learned counsels. I do not think Notice of Motion dated 21st August 2000 is capable of consideration any longer as it was mainly seeking that a stay of execution be granted pending the hearing and determination of the application dated 27th June 2000. As that application was withdrawn by the Applicants on 3rd November 2000, no stay of execution can be granted as prayed in the Notice of Motion dated 21st August 2000 pending the hearing and determination of what

no longer exists. I will dismiss the application dated 21st August 2000. That leaves only two applications to be considered i.e. Notice of Motion dated 8th June 2000 seeking stay of proceedings pending the hearing and determination of the intended appeal, and application dated 28th September 2000 seeking a review and setting aside of the interlocutory judgment entered on 15th June 2000 and seeking a further order mainly that if the interlocutory judgment is set aside then leave be granted to file the Defence out of time, for the proper disclosure of the facts subject to the application for stay of proceedings.

A brief history of this matter may help in understanding these two applications.

The Respondents filed this suit against the Applicants on 10th December 1999. On 25th January 2000, the Applicants applied for orders to stay this suit till final determination of the arbitration of one Ashwin Patel. That application was heard on 10th May 2000 and a ruling delivered on it on 22nd May 2000. The application was dismissed with costs. On 8th June 2000 the first application herein was filed seeking stay of the proceedings pending the determination of the appeal which was preferred against the dismissal of the application dated 24th January and filed on 25th January 2000. That application of 8th June 2000 was on 12th June 2000 fixed for hearing on 26th June 2000. Before that application could be heard, the present Respondents applied for interlocutory judgment and the same was entered by the learned Deputy Registrar on 15th June 2000. The interlocutory judgment reads in the material part as follows:

> *"……. I enter interlocutory judgment against the said Defendants as prayed in the Plaint. The award of costs shall await Judgment upon the remainder of the claim when the suit will be set down for formal proof".*

In the Plaint, the following were the prayers and I quote:

> *"(a) A declaration that the sum of K.shs 48,513,105.00 being half of the amount due and owing from the Company to the Kenya Revenue Authority plus charges accrued for delayed remittance and that the sum of K.shs 2,216,895.50 being half the amount due to the Company's Auditors and others all amounting to K.shs 50,730,000.50 is due and owing from the Defendants under the provisions of the said Agreement plus interest thereon at the rate of 24% per annu m from 25 th November 1999 till payment in full.*
>
> *(b) An order that the Defendants specifically perform clause 7(1) of the Agreement and consequently pay over the sum set out in (a) above to the Plaintiffs.*
>
> *(c) Damages for breach of contract. (d) Costs of this suit toge ther with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant.*
>
> *(e) Any further or other orders that this Honourable Court may deem fit to grant.*

As the interlocutory judgment entered was entered as prayed in the Plaint, it means that judgment was entered in terms that a declaration as sought in prayer (a) was granted and specific performance as prayed in prayer (b) was also granted. I do not on my part with respect agree with Mr. Dhanji, the learned counsel for the Plaintiff/Respondent that these two prayers were understood to be prayers for liquidated sum of money. It is true that once a declaration is made as sought in prayer (a) and an order for specific performance of the agreement is made as sought in prayer (b), the amount that is due becomes specific but not by way of liquidated damages, it so becomes specific just like specific damages would after proof become ascertained but not before proof. In my mind, the Applicants rightly expected that the worst that they could face was interlocutory judgment followed with a formal proof. This may have contributed to their failure to take early action to file defence.

Further, I note that interlocutory judgment was applied for before withdrawing the claim for Damages for Breach of Contract and the application was made when the application for stay of proceedings dated 8th June 2000 was still pending but had been fixed for hearing on 26th June 2000. The application for judgment was filed on 14th June 2000, and Judgment entered the next day 15th June 2000. Much as I do not want to read everything in all these, I do feel that there could have been confusion created with the

Defendant continuing to entertain a feeling that his application for stay of proceedings was yet to come up for hearing and was to take care of such matters as applying for and obtaining exparte Judgment.

There are other complaints which, I have also considered such as the activities of the Respondent soon after obtaining Judgment such as the time taken to issue notice of the exparte judgment to the Applicant, which was issued about two months later and only after Certificate of costs had been obtained. The Applicant explains his position about lack of draft Defence on record by saying that that will mean their submitting to the jurisdiction whereas they maintain that they should be referred to arbitration and have appealed to the court of Appeal on that aspect. I do not agree with the Applicants that that reason could have stopped them from filing a draft Defence just to reveal their defence. Further it is my humble opinion that if a Defendant files a Defence pursuant to a court order, that party would not be said to have compromised his position under the Arbitration Act.

I have considered the entire application before me. For the above reasons, I find this to be a suitable case for the exercise of my discretion. The Judgment entered on 15th June 2000 is hereby set aside. Defendants to file their defence within TEN days of the date hereof. On the application for stay of proceedings pending appeal, the law allows me to stay the proceedings for other reasons. Mere fact that an appeal has been preferred is no ground for granting stay of proceedings. I do feel however, that the legal aspects of this case are such that it is only fair and proper that the Court of Appeal's views should be obtained. At the same time, it would be unfair if the proceedings were to be stayed completely as that would mean, in case the Appeal does not succeed that a lot of time of the parties will have been wasted. I do accept that there was some delay in bringing this application, but clearly the delay cannot be said to have been inordinate. The application to refer the matter to arbitration was dismissed on 22nd May 2000 and this application was filed on 8th June 2000, some sixteen days later. I do not consider that period inordinate.

Doing the best I can in these circumstances, I will order that all proceedings necessary to prepare the case for full hearing such as filing Defence, Reply to Defence, exchanging documents, discoveries etc. should proceed. However the hearing of the case will await the outcome of the Appeal. Orders accordingly. The Applicant is to pay the costs of these three applications.

Dated at Nairobi this 18th day of May 2001.

ONYANGO OTIENO

JUDGE