

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NUMBER 212 OF 2011

CLEMENT MUTURI KIGANO..... PLAINTIFF

VERSUS

SHENGLI ENGINEERING CONSTRUCTION GROUP COMPANY LIMITED.....DEFENDANT

R U L I N G

The subject matter of this ruling is the motion dated 21st November, 2017 taken out by the Defendants/Applicant. In the aforesaid motion the Defendant sought for an order for stay of all proceedings in this suit pending the hearing and determination of the intended appeal filed by the Defendant. The motion is supported by the affidavit of Samir Inamdar. When served with the motion, the Plaintiff filed a replying affidavit he swore to oppose the application.

When the motion came up for inter-parties hearing, Learned counsels appearing in the matter recorded a consent order to have the motion disposed of by written submissions. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the motion. I have further considered the rival submissions. It is the submission of the Defendant/Applicant that on 31st March, 2017, this court delivered a ruling in which the court dismissed the Defendant's motion dated 19th May, 2016 in which the Defendant had sought for this suit to be struck out and dismissed on the basis that liability for the loss and damage pleaded in the amended plaint could not be attached to the Defendant.

The Defendant stated that it has now filed an appeal before the Court of Appeal seeking to impugn the dismissal order. This court has been asked to stay further proceedings until the appeal is heard and determined. The Defendant further submitted that it would be able to show the Court of Appeal that the suit discloses no reasonable cause of action and that the same is frivolous, vexatious and an abuse of the court process and ought to have been struck out and or dismissed. This court was urged to grant the order because failure to do so will render the pending appeal nugatory.

The Plaintiff is of the submission that the Defendant's application is bereft of good grounds to justify the grant of an order for stay. The Plaintiff further argued that the Defendant has not shown the prejudice it would suffer if the order is denied. The Plaintiff also averred that stay of proceedings is a serious, grave and fundamental interference with the right that a party has to conduct his litigation towards the trial on the basis of substantive merits.

Having considered the material placed before this court and the rival arguments, it is clear in my mind that if the order for stay is denied, the substantive hearing of the suit will proceed. The Defendant has stated that its appeal will be rendered nugatory.

I have already set out the background of this application while considering the arguments of the parties. Basically, the Defendant had applied to have this suit struck out and or dismissed because liability could not be assigned to it. This court saw no merit in the application.

The Defendant has now appealed against the order dismissing its motion to the Court of Appeal. In the circumstances, can it be said that the appeal will be rendered nugatory? I do not think so. I am convinced that the Defendant still retains the right to challenge the order even after the suit has been heard and determined. I am not convinced that the appeal will be rendered useless.

In the end, I find no merit in the motion. It is dismissed with costs abiding the outcome of this suit.

Dated, signed and delivered at Nairobi this 20th day of July, 2018.

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J K SERGON

JUDGE

In the presence of

..... for the Plaintiff

..... for the Defendant