



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 464 OF 2011**

**VISTA HOLDINGS INTERNATIONAL LIMITED ..... PLAINTIFF**

**VERSUS**

**SPAN IMAGE (K) LIMITED ..... DEFENDANT**

**RULING**

1. For determination by the Court is the application by the Defendant dated 9<sup>th</sup> August, 2012. The application is brought under to the provisions of **Order 42 Rule 6** and **Order 51 Rule 1** of the *Civil Procedure Rules*, **Sections 1A, 1B, 3, 3A and 63(e)** of the *Civil Procedure Act*. the Applicant seeks the following prayers inter alia:
  - “1. Spent;
  2. Spent;
  3. **THAT the Honourable Court does grant an order for stay of these proceedings pending the hearing and determination of this application;**
  4. **THAT the Honourable Court do grant an order for stay of any further proceedings in the High Court pending the hearing and determination of the intended Appeal from the aforesaid ruling of this Court issued on 25<sup>th</sup> July, 2012;**
  5. **THAT the costs in this application be provided for”.**
2. The application is predicated upon the grounds that the Applicant has been granted leave and intends to appeal against the decision of this Court delivered on 25<sup>th</sup> July, 2012. It is contended that the intended appeal would be rendered nugatory and a mere academic exercise should the proceedings not be stayed. It is further averred that the Applicant stands to suffer irreparable and irreversible harm and that no prejudice shall be occasioned to the Respondent should the application be granted as prayed.
3. The application is supported by the Affidavit of **Mohamed Ali Taib** sworn on 13<sup>th</sup> August, 2012. It is deponed to therein that the Applicant stands to suffer substantial and irreparable loss and that the application is made without undue and unreasonable delay. It is further contended that the Applicant will suffer prejudice and miscarriage of justice, with consequences of irredeemable damage if the application is not allowed, such would render the appeal nugatory if it is successful.
4. The application is opposed. In the Replying Affidavit of **Faisal Maolin** sworn and filed on 15<sup>th</sup>

October, 2012, he contends that the Orders sought are outrageous in the circumstances and aimed at defeating the ends of justice and denying the Respondent the fruits of its successful claim as against the Applicant. In contending that the Application should be dismissed, the Respondent avers that the application is made in bad faith, that valuable judicial time will be lost and that the Applicant will suffer no loss that will render the appeal nugatory, which cannot be compensated for damages.

5. **Order 42 Rule 6** provides as that no appeal shall operate as an automatic stay of proceedings or execution pending the intended appeal. It is the onus of the aggrieved party or intended appellant to make application under the said provision of the *Civil Procedure Rule*. The grounds upon which the Court will consider such an application are provided under **Rule 6(2)**. It is provided inter alia:

**“(2) No order for stay of execution shall be made under subrule (1) unless—**

- a. ***the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and***
- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.**

In exercise therefore of its mandate under **Section 63(e)** of the *Civil Procedure Act* as regards the issuing of interlocutory orders and pursuant to the provisions set out under **Order 42 Rule 6(2)(a)** and **(b)**, the Court has the power to issue stay orders pending appeal should the Applicant satisfy the conditions set out under the said provisions of the *Civil Procedure Rules*.

6. As regards **Rule 6(2)(a)**, Musinga, J (as he then was) in **Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368 of 2001** held *inter alia*:

**“...substantial loss” is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted (emphasis added) and that applicant is therefore forced to pay the decretal sum.”**

The loss that the Defendant stands to suffer has been illustrated in the Grounds and Affidavit in support of the application. The substantial loss, as enunciated in the Affidavit, detailed from the sharing of directors and common shareholders amongst the Applicant and Respondent Companies. It is also contended that the Company would stand to suffer substantial and irreparable loss given the substantial value and income generating ability of the Applicant Company. Even though the “*substantial loss*” as described by the Applicant is not quantified, the same would be deemed to be relative (see **Daniel Chebutul Rotich & 2 Others v Emirates Airlines**) but nonetheless may be assessed by the consequences that the Applicant may stand to suffer.

7. The common interests shared and the fact that the parties are engaged in agreements to cross-distribute shares, supposedly contributes to the substantial loss that the Applicant may stand to suffer. In my view and within the purview of **Rule 6(2)(a)**, the Applicant has not established the substantial loss that it stands to suffer should the Application be dismissed. It has only made an appeal to the Court that it stand to suffer irreparable and substantial loss without any proof of what is the extent of the loss it will suffer. There is no evidence before Court of any pecuniary loss to the Applicant. Further, agreements as to the cross-distribution of shares are matters as between shareholders of the companies and the Court is loth to interfere with company related matters. Hence the Applicant has not satisfied the ambit of **Rule 6(2)(a)** under **Order 42** of the *Civil Procedure Rules*.
8. As regards **Rule 6(2)(b)** in relation to security for costs, the Court in **Kenya Tanzania Uganda Leasing Co. Ltd v Mukenya Ndunda [2013] eKLR** (Mabeya, J.) held as follows:

**“As I stated in the case of KENYA COMMERCIAL BANK LIMITED Vs SUN CITY PROPERTIES LIMITED & 5 OTHERS [2012] eKLR “in an application for stay, there are always two competing interests that must be considered. These are that a successful litigant**

*should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced.*

**... In a bid to balance the two competing interests, the Courts usually make an Order for suitable security for the due performance of the Decree as the parties wait for the outcome of the Appeal. I do not see, why the same should not be applicable in this case.”**

For the Court to issue an order for stay pending appeal, the Applicant would have to furnish security for the due performance of the decree. The Court has perused the pleadings which are inclusive of the application and the Affidavit in support of the application. Nowhere does the Applicant aver that it intends to furnish to Court security for due performance of the Decree. It submits, however, it is willing to abide by any order of the Court on such terms that may be deemed proper and just and what the Court may consider reasonable in the circumstances.

9. The Applicant further relied on the dicta by Ringera, J (as he then was) in **Re: Global Tours & Travel Limited (2000) LLR** as quoted with approval in **Francis Njakwe v Daniel Toroitich Arap Moi T/A Moi Education Centre (2006) eKLR**, where it was stated that:

**“The strictures, that sufficient cause be shown and that no order for stay should be made unless the court is satisfied that substantial loss may result to the applicant and that the application has been made without unreasonable delay and further that such security as may be ordered for the due performance of the order or decree has been given, or on a plain reading of the rule, are applicable only to applications for stay of execution.”**

This Court nevertheless finds that the interpretation by the Judge in **Re: Global Tours & Travel Limited** (supra) may have been a misrepresentation of the provisions of **Order 42 Rule 6(2)(b)** of the *Civil Procedure Act*. The Order itself is entitled **“Stay in Case of Appeal”** and goes further to provide that security has to be furnished before the Court can consider an application for stay pending appeal. The unfettered jurisdiction of the Court as reiterated in **Re: Global Tours & Travel Limited** (supra) is to be exercised cautiously, and in tandem with the provisions of **Sections 1A and 1B** of the *Civil Procedure Act* as read together with *Article 159(2)* of the *Constitution*.

10. The Court has the obligation and mandate to ensure that justice is dispensed in an expeditious, fair and cost effective manner, and in consideration of achieving the ends of justice. The Court adopts the Ruling of the Court of Appeal in **Case No. 30 of 1988 Gitahi & Another v Warugongo; LLR. No. 4387** which decision referred to the English case of **Rosengrens Ltd v Safe Deposit Centres Limited [1984] 3 All E.R 198**, and in which Platt, JA held *inter alia*:

**“There is therefore no ground upon which to distinguish the Rosengren’s case. The aim is to make sure, in an even handed manner that the appeal will not be prejudiced and that the decretal sum is available if required. The Respondent is not entitled, for instance, to make life difficult for the Applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at Court rates...[In] our view, the principles set out in Rosengren’s case are eminently worth adopting.”**

11. In light of the foregoing, and in consideration of the circumstances of the instant suit, and the principles as set out in **Gitahi & Another v Warugongo** (supra), this Court finds that the application dated 9<sup>th</sup> August, 2012 is without merit, to the extent that the conditions as set out under **Order 42 Rule 6(2)(a)** have not been established by the Applicant. The same is dismissed with costs to the Respondents.

**DATED and delivered at Nairobi this 15<sup>th</sup> day of July, 2014.**

**J. B. HAVELOCK**

**JUDGE**