



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, NAMBUYE & OUKO, JJ.A)**

**CIVIL APPLICATION NO. NAI 212 OF 2012**

**BETWEEN**

**CYBERCOM LIMITED ..... APPLICANT**

**AND**

**KENYA PIPELINE COMPANY LTD ..... 1<sup>ST</sup> RESPONDENT**

**DATALOGIX LIMITED ..... 2<sup>ND</sup> RESPONDENT**

***(Being an application for stay of proceedings pending the hearing and determination of an intended appeal against the Ruling and Order of the High Court (Mabeya, J.) dated 9<sup>th</sup> May, 2012***

***in***

***HCCC NO. 490 OF 2004)***

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**RULING OF THE COURT**

The applicant in the present application intends to challenge on appeal to this Court the decision of the High Court (Mabeya, J.) made on 9<sup>th</sup> May, 2012 in which its application for leave to amend a holding defence was disallowed. In the meantime, it has brought this motion on notice for an order to stay further proceedings in the High Court pending the filing, hearing and determination of the intended appeal.

The genesis of this dispute leading to the institution of HCCC 490 of 2004 was a contract awarded by the 1<sup>st</sup> respondent, (Kenya Pipeline company Limited, KPCL) to the applicant (Cybercom Limited) for the provision by the latter of Information Technology (IT) Consultancy and Project Management Services. In the course of implementation of the project, the applicant awarded a tender to its subsidiary, Datalogix Ltd, (the 2<sup>nd</sup> respondent). A dispute arose between KPCL and the applicant following the award. Clause 15.4 of the original contract between KPCL and the applicant provided that in the event of a dispute and where the dispute could not be resolved in an amicable manner, the dispute would be referred to arbitration, for final settlement.

The 2<sup>nd</sup> respondent instituted High Court Civil Case No. 490 of 2004 against KPCL to restrain it by an order of injunction from awarding the tender for the provision of consultancy to other parties, or, in the alternative, an order for the payment of Kshs. 250,307,300/= for breach of contract. The KPCL filed a

defence and a counter-claim by which it claimed from the applicant and the 2<sup>nd</sup> respondent jointly and severally Kshs. 115,429,583/= allegedly obtained by the two companies fraudulently.

Pursuant to clause 15.4 of the contract aforesaid, the applicant filed an application under **section 6** of the Arbitration Act, 1995 for orders that the counter-claim against it be stayed and that the dispute be referred to arbitration. It also filed a statement of defence under protest (a holding defence). Warsame, J, (as he then was), in his ruling of 31<sup>st</sup> May, 2007 dismissed the application, for, in his view, the application was an attempt to split the dispute between the court and the arbitrator as the 2<sup>nd</sup> respondent was not a party to the contract containing an arbitral clause and that if the application was to be allowed, there was imminent conflict of decisions with an embarrassing result.

Intending to challenge that decision on appeal to this Court, the applicant instituted a motion under the court's **Rule 5 (2) (b)** for stay of further proceedings in HCCC No. 490 of 2004 between the applicant and KPCL. This Court (Tunoi, as he then was, Bosire and Aganyanya, JJ.A) agreed with the High Court that indeed what the applicant sought in the dismissed application was to split the action with one limb involving the applicant and KPCL going to arbitration and the other involving KPCL and the 2<sup>nd</sup> respondent remaining in court. This, they found, would be against public policy and was likely to breed multiplicity of suits. For those reasons, they similarly dismissed the application for stay.

Having reached the end of the road in the attempt to have the dispute referred to arbitration, the applicant returned to the High Court with another application for leave to amend its holding statement of defence. According to a draft defence, the applicant intended to counter-claim against KPCL the sum of Kshs. 2,061,234.76 in contract sum, Kshs. 79,408,483/= as contract expenses, interest and costs.

The application was placed before Mabeya, J. who, relying on the oft-cited cases of **Joseph Ochieng & 2 others Vs. First National Bank of Chicago** [1995] Civil Appeal No. 149 of 1991 and **Eastern Bakery Vs. Castelino** [1958] EA 461, on the jurisdiction of the court to amend pleadings, held that:

**“Having considered the affidavit on record, the rival submissions and the authorities, I do not think that the application has been brought in bad faith. This is so because, the applicant has properly explained the steps it has taken, albeit mistakenly, ever since it was joined in these submissions (sic). I am also satisfied that the claims sought to be impleaded in the proposed counterclaim is genuine and has not been plucked from the air. Indeed, it has a basis on the contract between the parties and certificates in which withholding tax has been paid. To my mind, the real issue in contention and on which this court proposes to decide the application is whether the proposed amendments have been caught up by limitation.”**

Having so observed, the learned Judge found that time began to run, for purposes of ascertaining whether the cause of action in the counter-claim was statute-barred, on 5<sup>th</sup> February, 2003 when KPCL suspended the consultancy; that time to bring an action against KPCL expired 6 years from that date; 6 years from 5<sup>th</sup> February 2003 would be 4<sup>th</sup> February, 2009, yet an amendment to the defence was being sought in March 2012. With that, the learned Judge dismissed the application for amendment. The applicant had on its part argued that time begun to run when it was joined in the proceedings in October, 2006. It is the refusal of leave to amend the defence that the applicant intends to challenge on appeal.

In the meantime, the applicant has applied by a motion on notice under **Rule 5 (2) (b)** aforesaid that the proceedings before the High Court in H.C.C.C. No. 490 of 2004 be stayed until the intended appeal is filed, heard and determined. That application is the subject of this ruling.

The applicant, through its counsel, Mr. Wagara has argued, within **Rule 5 (2) (b)** that the intended appeal is arguable and that if the proceedings in the High Court are not stayed, the High Court will proceed to determine the dispute on the basis of the plaint and a holding defence and without the benefit of the applicant's counter-claim, yet the claim involves a large sum of money; that the applicant cannot bring an independent and fresh suit based on the counter-claim in the face of the finding by the High Court that the claim was statute-barred, a finding the applicant intends to challenge on appeal.

Mr. Wanyonyi, learned counsel for KPCL supported the finding of the learned High Court Judge that the cause of action in the proposed counter-claim was statute-barred and that nothing prevented the applicant from filing it at the same time with the holding defence. Counsel submitted that since the applicant has the freedom to bring the claim separately, the appeal cannot be rendered nugatory if the proceedings in the High Court were to go on.

For this application to succeed, it must satisfy two conditions; that the intended appeal is not frivolous and that the intended appeal will be rendered nugatory if the proceedings in the High Court are not stayed. See **Githunguri Vs. Jimba Credit Corporation Ltd & Others** [1988] KLR 838.

From the three grounds contained in the draft memorandum of appeal and the submissions, the main question on appeal will be whether the cause of action in the counter-claim is statute-barred. That question, in our view, is not frivolous.

Secondly, if the trial in HCCC No. 490 of 2004 were to proceed before the appeal is heard and determined the applicant will be highly prejudiced. The High Court has found that the applicant's cause of action in the proposed counter-claim is statute-barred. Before that question is resolved on appeal, the High Court will make a decision without the counter-claim and any attempt to file a fresh suit will be met with the plea of *res judicata*.

For that reason, we think the appeal, if successful, will be rendered nugatory should the proceedings in the High Court go on.

We allow the application and direct that an order staying further proceedings in HCCC No. 490 of 2004 be and is hereby issued pending the filing, hearing and determination of the intended appeal.

As the applicant complains that delay in filing the appeal is due to failure by the High Court to supply the proceedings, the Registrar of High Court is directed to supply the proceedings as soon as practicable.

**Dated and delivered at Nairobi this 24<sup>th</sup> day of April 2015.**

**E.M. GITHINJI**

.....

**JUDGE OF APPEAL**

**R.N. NAMBUYE**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**