



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, J. MOHAMMED & KANTAI, JJ.A.)

CIVIL APPEAL (APPLICATION) NO. 129 OF 2014

BETWEEN

DAMCO LOGISTICS KENYA LIMITED APPELLANT

AND

BASH HAULIERS LIMITED..... RESPONDENT

(Being an application for stay of proceedings pending Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Kimondo, J.) dated 16th April, 2013

in

HCCC No. 311 of 2011)

RULING OF THE COURT

In a plaint filed at the High Court of Kenya, Nairobi, the respondent **Bash Hauliers Limited** as plaintiff, claimed from the applicant, **Damco Logistics Kenya Limited**, a sum of money arising from freight and transport charges it said it was owed by the applicant. The applicant delivered a defence where it questioned jurisdiction of the Kenyan courts to entertain the suit but went on to deny the respondents' claim. An application which was filed to strike out the defence and also one to strike out the plaint are not part of what we are asked to consider in this Ruling.

By an application dated 20th December, 2012 filed at the High Court of Kenya the applicant prayed *inter alia* to be granted leave to amend its pleadings in terms of a draft defence where it was to raise a set-off and counter-claim in terms of a draft defence annexed to that application. That application was opposed and was heard by G.K. Kimondo, J, who in a Ruling delivered on 16th April, 2013 found it without merit and dismissed it. Those findings provoked an appeal being Civil Appeal No. 129 of 2014 which is pending before this Court and has not been heard. What is before us is the applicants' Motion premised on **Rule 5(2) (b)** of this Court's rules and the inherent powers of the court. It is prayed in the main that we order a stay of **High Court Civil Case No. 311 of 2011** pending hearing and determination of the pending appeal. In the grounds set out in support of the Motion and in the affidavit in support thereof sworn by **Terry Ngure**, the applicant's Legal Officer, it is stated that the applicant's application to amend the statement of defence was refused by the High Court which also refused to stay hearing of the suit pending appeal; that the applicant is aggrieved by those findings thus the appeal; that the pending appeal

has high chances of success as, according to the applicant, amendment of pleadings should be freely allowed; that if the High Court suit is heard it would render the appeal nugatory and that the applicant stood to suffer substantial loss if the proceedings in the High Court were not stayed.

The respondent filed a replying affidavit through its director, **Omar Ahmed Bashammakh** where the merits of the application is raised and, in particular, at paragraphs 4, 5, 7, 8, 9 and 10 thereof it is deposed:

“4. THAT I have been advised by the Respondent’s advocate on record, TAIB ALI TAIB BAJABER, which information I verily believe to be true, and confirm that it is not possible at all, by any stretch of the imagination to comprehend how the applicant’s suit or appeal will be rendered nugatory should they succeed in their appeal as their subject matter is a completely different cause of action for alleged negligence that can be and ought to have been filed separately and independently of the respondent’s suit.

5. THAT I have been advised by the respondent’s advocate on record, TAIB ALI TAIB BAJABER, which information I verily believe to be true, that on perusal of the record of appeal, that the ruling which is now the subject of this appeal was delivered on the 16th of April 2013, more than two years ago, and the delay in lodging of this application is unconscionable.

6. THAT I have been advised by the respondent’s advocate on record, TAIB ALI TAIB BAJABER, which information I verily believe to be true, that the appellant on the day the ruling dated 16th April 2013 was delivered, unsuccessfully sought a stay of proceedings, from the High Court.

7. THAT I have been advised by the respondent’s advocate on record, TAIB ALI TAIB BAJABER, which information I verily believe to be true, that the appellant thereafter went to sleep and has unreasonably and inexplicably waited more than two years before approaching this honourable court on 12th March 2015, seeking to stay the High Court proceedings.

8. THAT I have been advised by the respondent’s advocate on record, TAIB ALI TAIB BAJABER, which information I verily believe to be true, that after the respondent had fixed Nairobi HCCC No. 311 of 2011 two years after the ruling, with the appellants full knowledge and with the respondent’s witnesses present in Court on 2nd March 2015, did the appellant seek to adjourn the hearing of the High Court proceedings, prompting this stay application. The appellant advocate had to be implored by the judge and further given a time frame within which they had to file this application.

9. THAT from the above facts, it is evident that this application is an afterthought, was not filed expeditiously and clearly it is only the respondent who has suffered and continues to suffer more prejudice by this tactical delay by the appellant.

10. THAT I have been advised by the respondent’s advocate on record, TAIB ALI TAIB BAJABER, which information I verily believe to be true, that from the perusal of the Memorandum of Appeal on pages 1-3 and the Ruling of the superior court on pages 284-289 in the appellant’s record of appeal, it is evident that the applicant cannot establish that it has a prima facie arguable appeal.”

In arguments before us when the Motion came for hearing on 15th July, 2015 **Mr. John Mbaluto**, learned counsel for the applicant submitted that the pending appeal was not frivolous but was arguable because, stated counsel, amendment of pleadings should be freely allowed and the learned judge had thus erred in

refusing leave to amend. Learned counsel continued by stating that delay in bringing the Motion to this Court after leave to amend was refused by the High Court was not inordinate and that, in any event, delay was not a factor to be considered in an application like the present one.

Mr. Taib Ali Taib, learned counsel for the respondent, in response, seemed to delve into issues that are the province of the bench that will hear the appeal. We must be careful not to travel that path as such a journey may embarrass the bench that will eventually hear the appeal which is pending before the Court.

The principles to be considered in an application for stay pending appeal are now well settled. An applicant, to be successful, must demonstrate that the appeal, or intended appeal, is arguable which is the same as saying that it is not frivolous. Such an applicant must also show that the appeal, or intended appeal, if successful would be rendered nugatory if stay was not ordered. See, for instance, such pronouncements of this Court on those principles in cases such as **Reliance Bank Ltd v Norlake Investments Ltd. (2002) 1 EA 227.**

Upon our considerations of the Motion, the affidavits, the submissions of counsel and the law we take the following view of the matter warning ourselves, again, that this is an interlocutory application where the appeal is pending and, in this matter, even the original suit at the High Court has not been heard.

Whether or not leave should be freely granted by a trial court under all circumstances is an issue that will be determined by the bench that will hear the appeal. That point is obviously arguable. But how will the appeal be rendered nugatory when both parties before the High Court had filed their pleadings, discovery undertaken and the suit readied for hearing? We are unable to agree with the applicant that the appeal would be rendered nugatory if stay is not granted and for this reason we find no merit in the application which we accordingly dismiss with costs to the respondent.

Dated and Delivered at Nairobi this 16th day of October, 2015.

E. M. GITHINJI

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR