



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: (KIAGE, GATEMBU & J. MOHAMMED, JJ.)**

**CIVIL APPLICATION NO. 51 OF 2014**

**BETWEEN**

**AKARIM AGENCIES COMPANY LIMITED ..... 1<sup>ST</sup> APPLICANT**

**AHMED SHEIKH ISSACK ..... 2<sup>ND</sup> APPLICANT**

**IBRAHIM S. I. KHANYARE ..... 3<sup>RD</sup> APPLICANT**

**AND**

**THE INTERNATIONAL AIR TRANSPORT ASSOCIATION.....  
..... 1<sup>ST</sup> RESPONDENT**

**MERCANTILE INSURANCE COMPANY LIMITED ..... 2<sup>ND</sup>  
RESPONDENT**

*(Being an Application for Stay of Execution of the Ruling and Order of the High Court of Kenya at Nairobi (F. Gikonyo, J) dated 11<sup>th</sup> March, 2014*

*in*

**H.C.C.C 15 OF 2014)**

\*\*\*\*\*

**RULING OF THE COURT**

1. The applicants seek an order, under the provisions of Article 159(2)(d) of the Constitution, section 3A and 3B of the Appellate Jurisdiction Act and Rule 5(2)(b) of the Rules of this Court to stay execution of orders given by the High Court (The Hon. Mr. Justice E. Gikonyo, J) on 11<sup>th</sup> March 2014 pending the hearing and determination of an intended appeal. The orders sought to be stayed are: an order of following and tracing of the applicants assets; an order of disclosure by the applicants of information and location of their assets to the value of Kshs.350, 000,000.00; a freezing order restraining the applicants from selling, disposing of, exchanging, mortgaging, transferring or dealing with their properties of every description within Kenya to the amount of

Kshs.350, 000,000.00 which will be sufficient to satisfy any judgment that may be obtained against them.

### **Background**

2. In their plaint presented before the High Court on 20<sup>th</sup> January 2014 the respondents sought judgment against the applicants jointly and severally for Kshs. 115,633,360.60 and US\$ 1,446,906.06; an order for accounts and inquiries to enable the respondents trace and recover the applicants' assets and a permanent injunction to restrain the applicants from dealing with their assets to the extent of the amount claimed.
3. The respondents' suit was founded on a passenger sales agency agreement dated 30<sup>th</sup> March 1994 on the basis of which the 1<sup>st</sup> respondent appointed the 1<sup>st</sup> applicant as agent to sell air passenger transportation services (air tickets). The respondents pleaded that the 1<sup>st</sup> applicant sold air tickets for the amount claimed but failed to account and remit the proceeds of sale and fraudulently diverted the same.
4. The applicants filed a defence to the respondents' suit denying the claim. In addition, the applicants counterclaimed against the respondents.
5. Simultaneously with the plaint, the respondents filed an application under the provisions of sections 1A and B, sections 3A and 63 of the Civil Procedure Act, Orders 39, 40 and 51 among other provisions that culminated, after hearing the parties, in the orders issued by the High Court on 11<sup>th</sup> March 2014 that are sought to be stayed.
6. The applicants say that they are aggrieved by the orders of the High Court; that they have filed notices of appeal in that regard; and that they have an arguable appeal that will be rendered nugatory unless we stay those orders.

### **Submissions by counsel**

7. At the hearing of the application before us, the parties were represented by learned counsel. Mr. Fredrick Ngatia appeared for the applicants. Mr. Allen Gichuhi appeared for the respondents.
8. Mr. Ngatia referred us to the application, the affidavit of Ibrahim Adam Mohammed in support, and the supplementary affidavit and submitted that the passenger sales agency agreement between the 1<sup>st</sup> applicant and the 1<sup>st</sup> respondent on the basis of which their relationship is founded has a dispute resolution mechanism that was not heeded by the respondents; that the respondents' claim, which is disputed, is for money had and received; that there is a valid insurance policy against which the 1<sup>st</sup> respondent can claim in the event of default by the 1<sup>st</sup> applicant; that in granting the impugned orders, the learned judge of the High Court erred in giving reliefs that were not sought. Counsel referred us to the decision of this Court in **IEBC and another vs. Stephen Mutinda Mule Civil Appeal No. 219 of 2013** for the proposition that cases must be decided on the pleadings and courts should not grant reliefs that are not pleaded. Counsel went on to say that the Judge also overstretched the equitable doctrine of trust and that there are numerous arguable points against the impugned ruling that will be pursued in the intended appeal.
9. Regarding the question whether the appeal will be rendered nugatory if we decline the orders sought, Mr. Ngatia submitted that the applicants are at the mercy of the respondents to allow invasion of their privacy by tracing; that once that is done the damage will, in the language of this Court in **Stanley Kangethe Kinyanjui vs. Tony Ketter and others Civil Application 31 of 2012** be irreversible and an award of damages or other remedy would not suffice; that it was not demonstrated by the respondents that if and when the applicants' liability for the amount claimed is established, the respondents would not be able to recover the amount decreed under the insurance policy. Mr. Ngatia referred us to the case of **Tea Board of Kenya vs. Gideon Asirigwa**

**Mbagaya Civil Application 115 of 2009** where this Court granted a stay of execution on the basis that security by way of bank guarantee was offered. Counsel concluded by saying that no damage or harm will be occasioned to the respondents by granting the orders sought.

10. Opposing the application Mr. Gichuhi referred us to the replying affidavit of Shem Nyamai and submitted that under the terms of the passenger sales agency agreement all monies collected by the 1<sup>st</sup> applicant for the transportation and ancillary services sold under that agreement are the property of the 1<sup>st</sup> respondent; that such monies must be held by the 1<sup>st</sup> applicant in trust for the 1<sup>st</sup> respondent and that the 1<sup>st</sup> applicant is required under the agreement to maintain records and details of all transactions effected under the passenger sales agency agreement.
11. Mr. Gichuhi further submitted that based on the financial statements on record, the 1<sup>st</sup> applicant is technically insolvent; that two sets of figures are shown in respect of the liabilities of the company and that the respondent was therefore constrained to seek the 1<sup>st</sup> applicant's records; that the respondents' application also sought orders for any other relief and on that basis the court gave 14 days for provision of security and that the respondents have furnished an undertaking as to damages as directed by the High Court.
12. According to Mr. Gichuhi the applicant has not demonstrated how the freezing orders will render the intended appeal nugatory. Citing the decisions of this Court in **Debonair Travel Ltd and another vs. Mohammad Hassam Pondor Civil Application No. 106 of 2008** and **Bulk Medicals Limited vs. Paramount Universal Bank Ltd and others Civil Application 113 of 2009** Mr. Gichuhi submitted that it has not been demonstrated that the success of the intended appeal will be rendered nugatory unless the stay is granted; that the orders sought to be stayed cannot in any event be executed without further reference to the High Court and no prejudice will be occasioned to the applicants if the application is declined.

### **Our decision**

13. We need not restate the well known principles that guide this Court when considering applications of this nature. The applicants' complaints against the decision of the High Court include the grievance that the court granted orders that were not sought; that it delved into matters that were not pleaded; that the orders granted for freezing and tracing are drastic and invasive and that the circumstances did not justify the granting of those orders. We are unable to say that the intended appeal is frivolous. We think the intended appeal is arguable.
14. On the question whether the intended appeal will be rendered nugatory, we have taken into account that the substantive relief sought by the respondents in the plaint before the High Court is for a liquidated amount; that in the event of the applicants liability for the amount claimed under the passenger sales agency agreement being established, the respondents are secured under a policy of insurance. In those circumstances, we have come to the conclusion that we should grant the order of stay as sought in prayer 2 of the application. The orders given by the High Court on 11<sup>th</sup> March 2014 in respect of the respondents' motion dated 17<sup>th</sup> January 2014 are hereby stayed pending the hearing and determination of the intended appeal.
15. The costs of the application will abide the outcome of the appeal.

**Dated and delivered at Nairobi this 27<sup>th</sup> day of June, 2014.**

**P. O. KIAGE**

.....

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

/ewm