



REPUBLIC OF KENYA

COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 40 OF 2013

PRINTING INDUSTRIES LIMITED.....1ST APPLICANT

MULTIPLE INDUSTRIES LIMITED.....2ND APPLICANT

AND

BANK OF BARODA KENYA LIMITED.....RESPONDENT

(An Application for stay of any further proceedings in Nairobi HCCC No. 335 of 2008 under Rule 5(2) (b) of the Court of Appeal Rules pending the filing, hearing and determination of an intended appeal from the Ruling and/or Orders of the High Court of Kenya at Nairobi (Havelock, J.) given on the 30th day of January, 2013

in

HCCC NO.335 OF 2008)

RULING

When this matter was placed before me for certification of urgency, I read through the file and I was satisfied that the same was not urgent. I therefore, declined to certify it as such.

It was brought back to me for hearing inter-partes on the issue of urgency.

According to *Mr. Kosgey*, learned counsel for the applicant, the notice of motion dated 15th February, 2013 is of extreme urgency. The same seeks an order of stay of any further proceedings in **Nairobi HCCC No. 335 of 2008** which is pending hearing before the High Court pending the hearing and determination of the intended Appeal.

The intended appeal is against the Ruling of Havelock, J. granting the respondent herein leave to re-amend its defence to include a counterclaim claiming a sum of Ksh 52,425,394.25/= from the applicants.

According to *Mr. Kosgey*, the hearing of the said suit could proceed any time now as there is a likelihood of it being prioritised in terms of getting an early hearing date. He submitted that if that were to happen, the consequences would be devastating as judgment might be entered in favour of the respondent.

On his part, *Mr. Murugara*, learned counsel for the respondent, in opposing the application submitted that there is no urgency whatsoever in the matter before the High Court. He told the court that first and foremost, the matter has not even been given a hearing date. Secondly, the applicants have already responded to the re-amended defence and counterclaim and the issue of prejudice does not occur at all.

He submitted that the respondent will have every opportunity before the High Court to defend their claim. Moreover, their intended appeal is purely against the exercise of discretion by the Judge of the High Court and the success of the same is doubtful.

My task here is to determine whether the notice of motion in question is urgent or not and I am not dealing with the merits or otherwise of the notice of motion in question. I must in the circumstances, eschew from making any comments whatsoever on the success or otherwise of the Notice of motion.

According to *Mr. Murugara*, if indeed the suit before the High Court proceeds, the respondents will have the opportunity to recall the witnesses if need be and also cross-examine the others that may be called to testify. There is therefore, no urgency in this matter and the application must be allowed to take its proper place in the registry.

I have considered carefully these submissions of both counsel. As stated earlier on, I had perused the record and I am well aware of the contents therein. My view of the matter is that firstly, there is no date in place for the hearing of the suit in question. I do not know how far the High Court diary has gone or what the waiting period is before a suit can be given a hearing date.

Secondly, in my considered view, the fact that a party has been allowed to amend or re-amend its pleading does not *ipso facto* translate to prejudice to the opposing party. I am informed that the applicant has already filed a reply to the counterclaim. Judgment is not given as a matter of course just because a party has made a claim. The claimant must still prove its case to the standard required by law.

There is no evidence of any hardship placed on the applicant's way that make it unable to effectively defend the counterclaim. Even after the matter goes through the motions of full hearing, if the judgment rendered thereafter is not in its favour, the automatic recourse to this Court on appeal would still be available to the applicant.

I am not persuaded that his matter is of such urgency as to jump the queue. I am also alive to the fact that we now have four fully operational benches dealing with Appeals and Applications and the waiting period before a matter can be given a hearing date has drastically reduced.

For the foregoing reasons, I find the notice of motion dated 15th February, 2013 not urgent and decline to certify it as such. Let the applicant be given a hearing date at the registry in the normal way. The costs of these proceedings will be in the notice of motion.

Dated and delivered at Nairobi this 10th day of May, 2013.

W. KARANJA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR