IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: GITHINJI, MAKHANDIA & SICHALE, JJ.A.)

CIVIL APPEAL NO. 49 OF 2011

BETWEEN

TANZANIA ROADS AGENCY .....APPELLANT

AND

KUNDAN SINGH CONSTRUCTION LTD…..... 1ST RESPONDENT

KENYA COMMERCIAL BANK LIMITED..... 2ND RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Mombasa (Azangalala, J.) dated 20th July, 2010

in

H.C.C.C. No.8 of 2010)

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JUDGMENT OF THE COURT

The Judge of the superior court (***F.A. Azangalala, J***., as he then was) faced two applications dated 30th and 31st March, 2010 respectively. In the application dated 30th March, 2010 and mounted by ***Kundan Singh Construction Limited***, "*the 1st respondent*" two prayers were sought in the alternative. The first prayer was to the effect that the plaint be struck out and the suit be dismissed with costs. In the alternative it prayed that the suit filed by ***Tanzania National Roads Agency***, "*the appellant*" and the accompanying application dated 22nd March, 2010 be stayed pending the hearing and determination of ***Milimani H.C.C.C. No.164 of 2009,*** "*the Milimani case.*" On the other hand, ***Kenya Commercial Bank Limited,*** "*the 2nd respondent*" in its application dated 31st March, 2010 also sought the same prayers and in the alternative as well. The gravemen of the two applications are the same namely, that, the issues raised in the suit and the accompanying application giving rise to this appeal, "*the Mombasa case*" were directly and substantially in issue in the Milimani case; that the Mombasa case contravened the provisions of ***section 6*** of the Civil Procedure Act and that the application and the suit were therefore *sub-judice* and or *res judicata.*

The application by the 1st respondent was supported by two affidavits sworn by one, ***Opkar Singh Obhi*** who described himself as a director whereas that of the 2nd respondent was sworn by one, ***Isaac Njoroge,*** its legal manager.

Opkar Singh Obhi in his supporting affidavit expounded and elaborated on the above grounds. Suffice to add that the appellant's action in filing the Mombasa case without any rhyme or reason constituted not only a flagrant breach of ***section 6*** of the Civil Procedure Act but was also actuated by intention to forum hunt. That the suit and the application were calculated to mislead and deceive the court into believing that the subject-matter of the Mombasa case was not directly and substantially in issue in the Milimani case. That the appellant was well aware or at lest ought, *inter-alia*, to be well aware of the fact that there was currently in existence an interim injunction issued in the Milimani case on 13th March, 2009 restraining the 2nd respondent from paying the 1st respondent on any demand for payment on the bank performance guarantee for Kshs.2,746,387,500/- or any other sum pending the hearing and determination of this suit.

As for ***Isaac Njoroge,*** his supporting affidavit gave the factual background and origin of the dispute. Apparently the appellant entered into a contract with the 1st respondent for the upgrading of Mbeya-Makongolosi road in Tanzania. On 1st August, 2007 at the request and instance of the 1st respondent, the 2nd respondent issued a Bank "*Performance Guarantee No GoK E86046077250C*" to the appellant to pay any sum or sums not exceeding Tshs.2,746,387,500/- in the event that the appellant sent a written demand to the 2nd respondent for payment of the said guarantee accompanied by a written statement alleging breach of the contract by the 1st respondent. On 6th September, 2007, again at the instance of the 1st respondent, the 2nd respondent issued an "advance payment of Tshs.1,098,555,000/- to be paid by the appellant to the 1st respondent under the conditions of the contract, being an irrevocable undertaking to repay the said amount to the appellant in the event that it receives a written demand from the appellant accompanied by a written statement alleging breach of the contract by the 1st respondent. A similar undertaking was again given by the 2nd respondent for USD3,478,145 on similar terms and conditions on 6th September, 2007. That on 12th March, 2009, the 1st respondent filed the Milimani case against the appellant and 2nd respondent on the said guarantees and at the same time filed an application for injunction and obtained interim orders of injunction which had been extended from time to time. That whilst the Milimani case was still pending, the appellant mounted the Mombasa case in which the issues raised were directly and substantially in issue in the Milimani case. That if at all the appellant had any claim against the 2nd respondent with regard to the said guarantees, then the same should have been raised and ventilated fully in the Milimani case and not by way of a fresh and separate suit as the appellant had endeavoured to do here. In the premises the superior court at Mombasa lacked jurisdiction to entertain the Mombasa case by dint of ***section 6*** of the Civil Procedure Act and on that basis, the Mombasa case should be struck out with costs to the 2nd respondent. In the alternative, the case ought to be deemed as ***res judicata*** and be dismissed with costs as well. Again by dint of ***section 1A*** and ***1B*** of the Civil Procedure Act, the plaint and all subsequent proceedings ought to be struck out or stayed pending the hearing and determination of the Milimani case.

As expected the two applications were seriously contested. The appellant filed similar grounds of opposition to the two applications maintaining that the applications were bad in law, ***frivolous*** and ***vexatious***. They were premised on wrong principles of law in that the two suits were not similar and parties thereof are not litigating under the same title, that the issues raised in the case were not similar nor were they substantially the same. That the two suits were distinct and therefore incapable of being struck out . They were neither frivolous, vexatious nor an abuse of the process of court. The cases raised clear and distinct issues of fundamental weight which need to be investigated by the court and a decision rendered thereon. That the cases raised weighty matters of both municipal as well as international commercial law, upon which the decision should only be arrived at after a full hearing. That the orders sought were draconian and not available in the circumstances of the two cases.

The two applications came before ***Azangalala, J.*** for plenary hearing on 11th may, 2010 when the parties respectively agreed to canvas the same by way of written submissions. In a reserved ruling delivered on 29th July, 2010, the learned Judge allowed both applications in the terms of the alternative prayers thereof. In essence, he stayed the Mombasa case and the accompanying application pending the hearing and determination of the Milimani case. It is this

holding that provoked this appeal. Seven grounds were advanced to wit:-

> *"1. The trial Judge of the superior court erred in law by making a finding that the CHIEF EXECUTIVE, TANZANIA ROADS AGENCY is the same as TANZANIA ROADS AGENCY.*

2. *The trial Judge erred in law by making a finding that the cause of action in HCCC NO.164 of 2009, MILIMANI COMMERCIAL COURT, NAIROBI and HCCC NO.8 OF 2010 Mombasa IS THE SAME.*

3. *The trial Judge of the superior court erred in law by issuing a blanket stay of proceedings without taking into account the circumstances of the superior court case.*

4. *The trial Judge of the superior court erred in law by failing to realize that the law governing International Bank Guarantees is a separate regime of law which could not be combined with a claim based on a normal construction contract.*

5. *The trial Judge of the superior court erred in law by failing to exercise the sufficient jurisdiction granted by the law to do justice by preserving the status nquo.*

6. *Trial Judge of the superior court erred in law by failing to consider the weighty submissions of the Appellant.*

7. *The trial Judge of the superior court erred in law by failing to apply the overriding objectives of* ***sections 1A*** *and* ***1B*** *of the Civil Procedure Act by applying the plain and literal meaning of* ***section 6*** *of the Civil Procedure Act,"*

When the appeal came before us for hearing, the appellant was represented by ***Mr Joseph Munyithya*** whereas the 1st and 2nd respondents were represented by ***Mr O.P. Nagpal*** and ***Philip Nyachoti***, learned counsel respectively.

Mr Munyithya submitted that parties in the two cases were not the same. In the Milimani case, the 1st defendant was the chief executive of the appellant. That was not the case with the Mombasa case. Counsel further submitted that the issues in the Milimani case were not the same as Mombasa case. The Milimani case was about obtaining an interim measure pursuant to ***section 6*** of the Arbitration Act. The prayers in that case were couched in temporary terms, whereas the Mombasa case was about enforcing demand guarantees. The cases could not in the circumstances be said to be dealing with the same issues. Counsel also faulted the learned Judge for issuing a blanket order of stay, yet he had demonstrated the urgency of the suit and indeed the accompanying application for injunction so that the assets are not disposed of. Counsel concluded his submissions by stating that, taking everything into account the learned Judge misinterpreted the confines of ***section 6*** of the Civil Procedure Act. He also did not consider the overriding objective in the Civil Litigation. Finally, he conceded that the Milimani case had proceeded and was at the enforcement stage as he spoke.

In response, Mr Nagpal submitted that whether the suits are similar or not has to be determined on the basis of the pleadings. Through his written submissions in the superior court which he relied on fully in this appeal, he had been able to demonstrate the overlap between the two cases. He submitted further that nothing turned on the issue of the appellant and its Chief Executive. They were one and the same thing. The appellant could only act through its chief executive. He also conceded that the Milimani case was nearing conclusion. Indeed there had been an application for its dismissal whose ruling was expected in October, 2013.

Mr Nyachoti, on the other hand submitted that the Milimani case was the same as the Mombasa case. The certificate of urgency filed in support of the injunction application in Mombasa case was the same as that in the Milimani case. The annextures in the application were

the same as those in Milimani case. The issues raised were therefore substantially the same or similar in both cases. The description of the parties were similar in both cases. That being the case there can be no issue of different identities of the parties. Both pleadings refer to contracts entered into in 2007. The affidavits filed in both cases have been sworn by the same people. He further submitted that there was no distinction between the chief executive and the organization he works for. In the premises he sought that the appeal be dismissed.

We have anxiously pondered over the record of appeal, the rival submissions of the parties to this appeal as well as the law and having done so, we are satisfied that the appeal can be effectively disposed of on the narrow ground of the same having been overtaken by events. In other words, we need not consider the merits of the appeal at all.

Both parties have agreed that despite the order staying proceedings in the Mombasa case issued by ***Azangalala, J.***, the subject of this appeal, the Milimani case has run its course exhaustively.

According to the appellant, the Milimani case had progressed to the point where enforcement of the decree was anticipated. However, according to the 1st respondent, an application for the dismissal of the said suit had been made, canvassed ad ruling thereon was expected sometimes in October, 2013. Thus which-ever way one looks at it, progress has been made in the Milimani case towards its conclusion so that even if this Court was to allow or dismiss the appeal, such an outcome will have no impact or effect at all on the Milimani case. If anything there is a high risk of such eventuality turning into a legal absurdity. For instance, if we were to allow the appeal, effectively, we will be saying that the two cases should proceed to hearing simultaneously but separately. However, as we already know, the Milimani case has been herd and is pending either enforcement of the decree or a ruling on an application for its dismissal presumably for want of prosecution. So that at the e4nd of the day, we would have issued an order in vain and court orders are never issued in vain.

On the other hand, if we were to dismiss the appeal, we would effectively have given a seal of approval of the learned Judge's order staying the proceedings in the Mombsasa case pending the hearing and final determination of the Milimani case. Again such an order will be in vain as the Milimani case has been herd and is pending conclusion either way. In the premises there is hardly anything left in the proceedings to stay. We will be doing what one may say closing the stable when the horse has already bolted.

To avoid such an absurdity and since this appeal has to be determined either way, by either dismissing it or allowing it, and since the appeal for all intents and purposes has been overtaken by events, the best result that commends to us in this appeal is to have it dismissed. As the advocates involved have in a way or another actively participated in getting the two cases murky, each party shall bear its costs of this appeal. It is so ordered.

Dated and delivered at Mombasa this 14th day of October, 2013.

E. M. GITHINJI

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

….....

JUDGE OF APPEAL

F. SICHALE

….....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

REGISTRAR