



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI**

Civil Appli 70 of 2009 (UR 41/2009)

DELTA CONNECTION LIMITED APPLICANT

AND

DELTA AIRLINES INCORPORATED RESPONDENT

(Application for stay of execution and stay of further proceedings pending the hearing and determination of an appeal from the ruling and order of the High Court of Kenya at Nairobi (Khaminwa, J.) dated the 2nd day of March, 2009

in

H.C.C.SUIT. NO. 770 OF 2008)

RULING OF THE COURT

The applicant herein, **DELTA CONNECTION LIMITED**, took out a notice of motion under **Rule 5(2)(b)** of the Court of Appeal Rules seeking an order that:-

“The execution of the injunction Order and Ruling of the High Court of Kenya at Nairobi delivered by The Honourable Lady Justice Joyce N. Khaminwa and dated the 2nd day of March, 2009 in High Court Civil Suit No. 770 of 2008 – Nairobi be stayed pending the hearing and determination of the Appeal and that the proceedings in High Court Civil Suit No. 770 of 2008 – Nairobi be stayed pending the hearing and determination of the Appeal.”

The application which was supported by the affidavit of **SALLY NDEGWA** the General Manager of the applicant was brought on the following grounds:-

- 1. The applicant has filed a Notice of Appeal under the provisions of Rule 74 of the Court of Appeal Rules with respect to the Order and Ruling of the Honourable Lady Justice Joyce N. Khaminwa dated the 2nd day of March, 2009 in High Court Civil Suit No. 770 of 2008 – Nairobi and a Notice of Appeal has been lodged with the Registrar of the Superior Court.***
- 2. The applicant has appealed from the said Order and Ruling of the Superior Court and an Appeal has actually been lodged with the Registrar of the Court of Appeal, being Civil Appeal No. 44 of 2009.***
- 3. The applicant has an arguable appeal which should be heard and determined.***

4. The applicant's appeal will be rendered nugatory unless the execution of the Order of the Superior court is not stayed."

This application arises from the ruling of the High Court (*Khaminwa, J.*) delivered on 2nd March, 2009 in which the learned Judge granted the respondent its prayer sought in an interlocutory application for injunction. According to the ruling of the learned Judge, the respondent sought interlocutory orders to restrain the applicant herein from:-

(a) Infringing the plaintiff's "Delta" Trade Mark registered as number 2631 in class 39.

(b) Selling, offering for sale, distributing or marketing or in any manner disposing of airline tickets bearing "Delta" Trade Mark or any other name, mark, device or designation bearing a close resemblance thereto.

(c) Using the word "Delta" on its aircrafts tickets flight schedules, in flight magazines or any other printed material.

(d) Parting with possession, power, custody (other than to the plaintiffs or its agents) of or in any way alteration defacing or destroying the following articles or any of them:-

(i) Products signature or printed material which infringe the "Delta" Trade Mark.

(ii) All documents, files, packaging materials, cartons, printing blocks, brochures, prints, invoices, receipts, articles or equipment relating to importation, purchase, manufacture, sale or supply of products particularly but not limited to tickets, flight schedules, in flight magazines which are distributed, sold or marketed by the defendant under the name "Delta Connection" or relating in any way to the infringement of the plaintiff's Trade Mark."

The application for injunction was heard inter partes before Khaminwa J. on 4th February, 2009 when she heard submissions from Ms. Malik for the respondent herein, and Mr. Mugambi for the applicant herein. The learned Judge considered the rival submissions as supported by various authorities and in a reserved ruling came to the conclusion that the respondent herein had established a prima facie case which justified the granting of the injunction. In concluding her ruling the learned Judge said:-

"It is my view that the plaintiff has shown a prima facie case which has good chances of success. The exclusive right to use the registered trade mark "Delta" is granted by statute and there is protection of that right. It is also shown that the acts of the defendant in interfering with the already well established good will and reputation is harm that cannot be compensated in damages.

The balance of convenience is not in favour of the defendant who is trading on the name and goodwill of another.

In the circumstances, I allow the application and grant injunction as prayed in the application under prayer 3. Costs shall follow the event and are therefore awarded to the applicant."

Being aggrieved by the foregoing ruling, the applicant herein filed a notice of appeal on 10th March, 2009 and the appeal referred to earlier. But before the appeal is heard the applicant comes to this Court seeking a stay of those orders by the superior court. That is the application that came up for hearing before us on 29th April, 2009 when Mr. Muriuki Mugambi appeared for the applicant, while Mr. Fred N. Ojiambo Senior Counsel and Ms. N. Malik appeared for the respondents.

In his submissions, Mr. Mugambi sought to demonstrate that the applicant had an arguable appeal by giving the background to the dispute. He pointed out that the applicant is a local airline which commenced operations in March, 2004 while the respondent was incorporated in the U.S.A. and intends to commence operations in Kenya in June, 2009. It was Mr. Mugambi's contention that the respondent

obtained registration and **Trade Mark** in Kenya after the applicant had already started its operations and for that reason there could be no issue of infringement of the respondent's Trade Mark. Mr. Mugambi was of the view that the learned Judge was wrong in making what could be considered as final findings in an interlocutory application.

On the nugatory aspect of the application, Mr. Mugambi submitted that if the application is refused this would have devastating effect on the operations of the applicant in that the identity of the applicant, contracts, agreements and leases entered into by the applicant would be adversely affected.

On his part, Mr. Ojiambo made brief submissions in a bid to show us that this application was for dismissal. He argued that this Court has no jurisdiction to grant a stay of an injunction and to buttress his argument relied on this Court's decision in **CONSOLIDATED BANK OF KENYA AND 2 OTHERS V. DOLPHIN AUCTIONEERS AND 2 OTHERS** – Civil Application No. 195 of 2005 - (unreported).

This application as already stated, is brought under **rule 5(2)(b)** of this Court's Rules. The jurisdiction exercisable by this Court under that rule is now well settled. It is original and discretionary. For an applicant to succeed, he must satisfy the two guiding principles, first, that the intended appeal is arguable, that it is not frivolous and second, that unless a stay is granted the appeal or intended appeal, if it eventually succeeds, will be rendered nugatory – see **GITHUNGURI V. JIMBA CREDIT COPORATION LTD. (No. 2) (1985) KLR 838, J.K. INDUSTRIES LTD. V. KENYA COMMERCIAL BANK LTD. (1982-88) 1 KAR 1688** and **RELIANCE BANK LIMITED (IN LIQUIDATION) V. NORLAKE INVESTMENTS LIMITED** – Civil Application No. Nai. 98 of 2002.

While the foregoing will give guidance on how to deal with an application of this nature, we must consider the issue raised by Mr. Ojiambo to the effect that this Court has no jurisdiction to grant a stay of an injunction and more specifically, a prohibitory one. The relevant wording of **rule 5(2)(b)** of the Rule is as follows:-

“The Court may, in any civil proceedings where a notice of appeal has been lodged in accordance with rule 74, order a stay of execution, an injunction or a stay of any further proceedings.

In **CONSOLIDATED BANK OF KENYA V. DOLPHIN AUCTIONEERS & 2 OTHERS** (supra) this Court was faced with a situation similar to what we have in this application and having considered what was urged before it had the following to say in its ruling:-

“Having come to the conclusion that we have no jurisdiction under rule 5(2)(b) to grant the order sought we need say no more than that the Notice of Motion dated 12th July, 2005 is incompetent and we order that it be and is hereby struck out with no order as to the costs thereof.”

In the current application we set out at the commencement of this ruling the orders that the applicant seeks from this Court. It is clear that the applicant is seeking a stay of prohibitory injunctory orders which as stated in our decision in **CONSOLIDATED BANK OF KENYA V. DOLPHIN AUCTIONEERS & 2 OTHERS**, this Court has no jurisdiction to grant. Consequently, it does not fall for us to consider the issues of whether the intended appeal is arguable and whether the refusal to grant what is sought in this application would render such an appeal nugatory. As **rule 5(2)(b)** of this Court's Rules does not give us jurisdiction to grant a stay of a prohibitory injunction, this application is incompetent. We must, however, stress here that under **rule 5(2)(b)** of the Rules this Court has jurisdiction to grant the following orders:-

- (i) ***a stay of execution***
- (ii) ***an injunction***
- (iii) ***a stay of any further proceedings.***

Clearly ***“a stay of execution of an injunction”*** is not included in that provision, and we think a stay of an

injunction order cannot qualify as a stay of execution. Execution may of course result where a mandatory injunction is granted, and a stay of execution of such order would be appropriate. That is not the case here.

Having come to that conclusion we need say no more than that the notice of motion dated 16th March, 2009 is incompetent and we order that it be and is hereby struck out. The costs of the motion shall be in the appeal.

Dated and delivered at NAIROBI this 5th day of June, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR