



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kwach, Shah & Owuor JJ A)

CIVIL APPLICATION NO NAI 135 OF 2003 (69 OF 2003 UR)

WESTMONT POWER KENYA LTDPLAINTIFF

VERSUS

BOSLEY FREDERICK & MOHAMED ALI

T/A CONTINENTAL TRADERS & MARKETING.....DEFENDANT

(Application for a stay of execution of the decree of the High Court
of Kenya at Nairobi pending the hearing of the appeal against the

decision of the High Court Nairobi (Kuloba, J) given on

3rd April, 2003 in HCCC No 1700 of 2001)

RULING

On 5th October, 2001, two plaintiffs, Bosley Frederick and Mohamed Ali allegedly trading under the firm name and style of Continental Traders & Marketing (the plaintiff) filed a suit against Westmont Power Kenya Limited (the defendant) claiming a sum of US\$950,000/= plus interest thereon at the rate of 25% per annum from 22nd June, 2000 until date of payment in full. The cause of action as pleaded in the plaint was based on an alleged oral agreement made on or about 30th day of June, 1999 between the plaintiffs and the defendant whereby the defendant was to pay to the plaintiffs a sum of US\$ 1,450,000 /= net free of taxes for "certain consultancy services".

At some stage soon after filing of the suit the summons and a copy of the plaint were allegedly served on the defendant by registered post and judgment was entered in default of appearance on 26th November, 2001.

The defendant alleged that the plaintiffs' advocate sent a registered letter to it and that the relevant envelope contained a blank copy of an A4 size paper. It appears that that *ex-parte* judgment was set aside and defence was filed by the defendant on 26th February, 2002.

The defendant also filed a counter-claim along with the defence seeking repayment of US\$700,000/=. The essence of the defence was that the relationship between the plaintiffs and the defendant was

illegal, corrupt, unlawful, *ultra vires* and was incapable of enforcement. Particulars of the alleged fraud and illegality were pleaded. Although these could have been pleaded in a better manner the same were there. It was also alleged that the plaintiffs had not registered the firm name of Continental Traders & Marketing. The Personal Identification Number (PIN) and the number of Value Added Tax (VAT) registration certificate as given by the plaintiffs were not the plaintiffs' but belonged to different entities. It was alleged that the cheques relied upon by the plaintiffs in support of proof of their claim were written out by employees of the defendant under coercion and in blank.

A reply to defence and defence to counterclaim was filed on or about 14th March, 2002 and issues were joined. All particulars of fraud and illegality were denied in the reply to defence which document, strangely enough, avers that "if indeed the defendants (sic) received blank pieces of paper instead of summons and plaint then that was as a result of oversight or mistake on the part of the process server."

In this state of affairs the plaintiffs applied for summary judgment by invoking in aid order XXXV rule 1 of the Civil Procedure Rules. The application was heard by Kuloba J, who reserved the ruling of nearly four months.

On 3rd April, 2003 he delivered the ruling whereby he declined to give leave to the defendant to defend and entered summary judgment against it in the sum of Shs 76,000,000/= with costs and interest. After extraction for the decree on 29th April, 2003, but before taxation of costs, the plaintiffs applied, under a certificate of urgency, on 30th April, 2003, for orders to execute the decree before taxation, and to garnishee the judgment sum from Kenya Power & Lighting Company Limited which company allegedly owed some moneys to the defendant. Garnishee order *nisi* was made on 30th April, 2003 and leave to execute before taxation was also given on the same day.

The defendant is now before us seeking a stay of execution of the decree issued by the superior court under rule 5(2)(b) of the Rules of this Court.

The arguments advanced are that the intended appeal is arguable and that if Kenya Power & Lighting Company Limited pays out the decretal sum to the plaintiffs it will go out of the reach of the defendant should the intended appeal succeed as the plaintiffs were not registered partners of any firm at the time of filing of suit and that they have issued false PIN and VAT registration number.

First issue we have to decide is whether the intended appeal is arguable.

It is quite unusual to enter summary judgment when serious allegations of fraud and other wrong doings are made. Such issues can only be decided during a proper trial and not on conflicting affidavits. This point is certainly arguable. The learned judge preferred to take what he termed a "pragmatic as opposed to a legalistic approach" in deciding the application for summary judgment. A pragmatic approach would involve dealing with matters with regard to their practical requirements or consequences. It is certainly arguable whether a cause of action based, not on cheques, but on an oral agreement can properly be the subject of an application for summary judgment when facts are in issue.

The second issue is clear. If the plaintiffs have given false PIN and VAT registration numbers there must be something amiss. If the plaintiffs are licenced to carry on consultancy business they ought to have a proper PIN and VAT registration numbers. The plaintiffs do not deny giving such false numbers. The alleged services rendered are stated to be "lobbying services". We do not know what these services could be. Nor do we know if such services qualify for remuneration under any law.

In the result the application is allowed and an order for stay of execution of the decree in HCCC NO

1700 of 2001 is granted pending the hearing and determination of the intended appeal. For avoidance of doubt we order that the pending garnishee proceedings are also stayed.

Dated and delivered at Nairobi this 6th day of June, 2003

R.O. KWACH

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JUDGE OF APPEAL

A.B.SHAH

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

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true copy of the original.

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