



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: TUNOI, O’KUBASU & GITHINJI, JJ.A.)

CIVIL APPLICATION NO. NAI. 164 OF 2010

BETWEEN

TRADE WINDS EXPRESS LIMITED

BARRY MICHAEL TOMLINSONAPPLICANTS

AND

EUROCRAFT AGENCIES LIMITED.....RESPONDENT

(Application for stay of proceedings pending the hearing and determination of an intended appeal from an order of the

High Court of Kenya at Milimani Commercial Courts, Nairobi (Khaminwa, J.) dated 16th October, 2009

in

H.C.C.C. NO. 543 OF 2003)

RULING OF THE COURT

This is an application under **Rule 5 (2) (b)** of the Court of Appeal Rules for an order that the proceedings in the *High Court Civil Suit No. 543 of 2003* be stayed pending the hearing and determination of the intended appeal against the ruling delivered on 16th October, 2009.

The two applicants are the defendants in H.C.C.C. No. 543 of 2003 and the respondent is the plaintiff in the suit. The respondent, Eurocraft Agencies Ltd. (Eurocraft), avers in the plaint, among other things, that the 2nd applicant Barry Michael Tomlinson (Barry); his wife Sue M. Tomlinson and his son Mark Tomlinson are the shareholders of the Trade Winds Express Ltd. (Trade Winds) the 1st applicant; that the two applicants are also shareholder of the Eurocraft; that at the material times Barry was the Managing Director of both Euro Craft and Trade Winds; that by a concession agreement dated 1st March, 1995, Kenya Airport Authority granted a concession to Eurocraft to undertake ground handling and aircraft handling services at Jomo Kenyatta International Airport and Moi International Airport; that Eurocraft did not have necessary resources and equipment to fully and effectually undertake the concession agreement; that, as a result, Eurocraft hired equipment from Trade Winds and Trade Winds provided manpower resources and accounting services to Eurocraft; that during the tenure of Barry as Managing Director of Eurocraft, Barry in breach of his fiduciary responsibility as director of Eurocraft on diverse days between 1995 and 2000 without authority, caused or authorized payment by Eurocraft to Trade Winds of a total of Shs.76,509,743.55; that Trade Winds on collusion or connivance of Barry obtained that sum for purposes of unjustly enriching Trade Winds; that in breach of his fiduciary duty Barry appointed his son as signatory to Eurocraft's bank account without its approval; that both Eurocraft and Trade Winds had a common firm of auditors; that Eurocraft approved the annual accounts for the period in question on assurances and representation by Barry that the accounts were correct; and, lastly, that the irregular payments to Trade Winds came to light following an independent audit after resignation of Barry as Managing Director of Eurocraft.

Eurocraft claims, *inter alia*, Shs.76,509,743.55 against Trade Winds and Barry, and, in the alternative, an account of all transactions and payment of all sums found due to Eurocraft and general damages against Barry for breach of fiduciary duty.

Trade Winds in its Defence and counter-claim denied that the sum claimed was irregularly paid and counter-claimed for Shs.13,512,728.75 the total sum that Eurocraft failed to pay for maintenance services and for services rendered. Similarly, Barry in his defence denied any wrong doing.

Sometime in March, 2009, Eurocraft filed an application under **Order XIX Rule 1 & 2** of *Civil Procedure Rules* (CPR) seeking four main orders, namely, that the court do appoint an independent firm of auditors to examine, verify and report on true accounting position between Eurocraft and Trade Winds; that the independent accounting firm be authorized to make all necessary inquiries and examine all books of accounts and documents; that the report of auditors be conclusive as to the accounting position, and, that, the cost of auditors be borne initially by parties jointly. The application was opposed by both defendants in the suit. However, the superior court (Joyce Khaminwa, J.) allowed the application on 16th October, 2009.

The applicants immediately lodged a notice of appeal and thereafter made an application in the superior court for stay of proceedings in the superior court pending appeal. The application was heard by Njagi, J. who was satisfied that some of the points the applicants intended to raise in the appeal were not frivolous and were arguable, but dismissed the application because the applicant did not, in his opinion, satisfy the court that the appeal could be rendered nugatory unless stay was granted.

The applicants have now filed *Civil Appeal No. 207 of 2010* against the ruling of Joyce Khaminwa, J. allowing the application for accounts.

The applicants are required to satisfy the court, among other things, that the appeal is arguable and secondly that, unless the order of stay is granted, the appeal, if ultimately successful would be rendered nugatory.

We will first consider whether the appeal already filed is arguable **Order XIX Rule 1** CPR under which the application for accounts was brought provides:

“where a plaintiff prays for an account or where the relief sought or the plaintiff involves the taking of an account, if the defendant either fails to appear or does not after appearance by affidavit or otherwise satisfy the court that there is a preliminary question to be tried and order for the proper accounts with all necessary inquiries and directions usual in similar cases shall forthwith be made”. (emphasis ours).

The applicants contended, in the superior court, *inter alia*, that the dispute between the parties is not in essence an accounting matter; that the suit raises allegations of fraud and abuse of office against Trade Winds and Barry which allegations had been denied *in toto*; that the court was the proper

entity to determine that allegation; that the preliminary issue should be tried and determined prior to further accounts being taken. The applicants identified the preliminary questions to be tried as:

- (a) **The precise nature of the agreements between the parties.**

- (b) **Whether the defendants were entitled to charge the plaintiff for services rendered.**

- (c) **Whether the plaintiff paid any monies to the 1st defendant that it was not entitled.**

- (d) **Whether the approval of the plaintiff's accounts by its board of directors was final and conclusive as to their contents.**

- (e) **Whether the 2nd defendant breached his fiduciary duties to the plaintiff.**

We have considered the grounds of appeal enumerated in paragraph 23 of the affidavit sworn by Barry in support of the application in light of the submission of Mr. Ohaga, learned counsel for respondent, *inter alia*, that the order for accounts was sought to facilitate trial and that the auditor would be called as a witness at the trial. We have also taken into account the finding of Njagi, J. that the intended appeal raises arguable points.

The applicants maintain that their liability to the respondent in the suit should be tried and determined before an order for accounts could be made. The applicants further dispute the respondents right to accounts under **Order 19 (1)** CPR. We appreciate that since appeal has now been filed it would be pre-emptive and pre-judicial to the applicant to consider the merits of the appeal in detail. Suffice be to say that having regard to the pleadings, the grounds on which the applicants resisted the application for accounts, the findings of Njagi, J. in the application of stay of proceedings and the ground of appeal, we are satisfied that the appeal is indeed arguable.

As to whether the appeal would be rendered nugatory, if stay is not granted, Barry deposes, among other things, that there will be no point in pursuing the appeal after auditors are appointed; that the auditors will determine all preliminary questions regarding any possible liability of the applicants; that if the auditors find that the applicants are liable the applicants reputation and business would be negatively affected and that the respondent would suffer no prejudice, if stay is granted.

In addition, Mr. Kiragu Kimani, learned counsel for the applicants contended that granting an order of stay would promote the overriding objective of judicial process in that precious judicial time and resources would be saved; the applicants would get an impartial and fair hearing in the superior court and costs would be saved.

In **Butt vs. Rent Restriction Tribunal** [1982] KLR 417 this Court said that as a general rule, the court ought to exercise its best discretion in such a way as to prevent the appeal, if successful from being rendered nugatory. We have also considered the reasoning of the court in **Unga Ltd. vs. Amos Kinuthia & Gabriel Mwaura t/a Budget Spray Works** – *Civil Application No. Nai. 175 of 1997* (unreported).

In this case, the appeal has already been filed. If stay is not granted, the auditors would take accounts and file them in court. The applicants would be required to pay half of the fees of the auditors. And if the accounts are filed in court, it is probable that the suit would be determined before the appeal is heard. If the appeal is ultimately successful it would be impossible to re-wind the clock and the whole purpose of the appeal would have been defeated. The appeal would have been rendered futile. In that event, the Court will not have furthered the overriding objective of the appeal and the suit which, among other things, is to facilitate the just resolution of the appeal.

In the peculiar circumstances of the dispute, it is just to grant the order of stay.

In the result, we allow the application and grant a stay of proceedings in terms of the application. Costs shall be costs in the appeal.

Dated and delivered at Nairobi this 10th day of December, 2010.

P. K. TUNOI

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JUDGE OF APPEAL

E. O. O’KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR



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