



Africa Management Communications Ltd v Airtel Networks Kenya Ltd (Civil Suit 166 of 2014) [2022] KEHC 152 (KLR) (Commercial and Tax) (25 February 2022) (Ruling)

Neutral citation: [2022] KEHC 152 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 166 OF 2014
A MABEYA, J
FEBRUARY 25, 2022**

BETWEEN

AFRICA MANAGEMENT COMMUNICATIONS LTD PLAINTIFF

AND

AIRTEL NETWORKS KENYA LTD DEFENDANT

RULING

1. Before Court is the defendant's Notice of Motion dated 15/3/2021 brought, inter-alia, under Order 42 Rule 6 of the *Civil Procedure Rules, 2010*.
2. The defendant sought to stay these proceedings pending the determination of Nairobi Civil Appeal Number E103 of 2021 Airtel Networks Kenya Limited vs Africa Management Communications Limited.
3. The background to the application is that the defendant was aggrieved with the ruling of this Court delivered on 25/2/2021. It sought leave to appeal which leave was granted. The record of appeal was lodged promptly and the defendant now awaits directions by the registrar of the Court of Appeal on the hearing and disposal of the appeal.
4. The defendant contended that its appeal is arguable and if it were to be successful it would fundamentally affect these proceedings; that the present application and appeal have been lodged promptly and that the plaintiff has threatened to commence execution proceedings.
5. In opposition the plaintiff filed a replying affidavit sworn by its Managing Director, Emmanuel Chola Mwaba, on 9/4/2021.
6. He averred that the stay of proceedings sought herein are against an order of this Court dated 25/2/2021 which dismissed the defendant's application for being res judicata and sub judice; that



the defendant's appeal is purely limited to the said dismissal order of 25/2/2021. That, it is therefore mischievous for the defendant to seek to stay the entire proceedings because it has appealed against that order.

7. That the mere fact that a party has preferred an appeal per se is not a sufficient ground to stay proceedings. The only decree capable of being executed and which a stay of execution has not been filed against is the one dated 25/7/2014 which was duly reinstated by the Court of Appeal. That if the stay orders are granted, it would have the effect of suspending the judgment of the Court of Appeal that reinstated the decree of 25/7/2014 which can only be suspended by the Court of Appeal.
8. The plaintiff contended that since the grant of the decree in 2014, the defendant has filed several applications in order to curtail the rights of the respondent to realize the fruits of its judgment which applications have all been dismissed.
9. The defendant filed a supplementary affidavit sworn on 26/4/2021 in response to the plaintiff's replying affidavit. Amongst other contentions, it was averred that the defendant's appeal had been admitted and directions on the hearing and determination thereof issued on 15/4/2021; that the consequence of the Court of Appeal allowing its appeal would be to either set aside the ex-parte judgment herein and or strike out the entire proceedings.
10. The court has considered the respective parties' contestations and the submissions on record. The issue for determination is whether the Court should grant a stay of proceedings pending the determination of Nairobi Civil Appeal Number E103 of 2021 Airtel Networks Kenya Limited vs Africa Management Communications Limited.
11. The Court delivered a ruling on 25/2/2021 in which the defendant's application was struck out for being res judicata as well as sub judice. Further, the Court found that the plaintiff was merely mis-described but it did not mean that it was a non-juristic person.
12. The defendant is now seeking to stay the proceedings herein pending the determination of its appeal against the said ruling.
13. To that effect, the defendant provided a copy of the memorandum of appeal filed in the bundle "LM" in the defendant's supporting affidavit sworn on 15/3/2021.
14. No doubt this Court has jurisdiction to stay proceedings where circumstances necessitate such an eventuality. See *Ezekiel Mule Musembi vs. H. Young & Company Machakos CA No. 24 of 2018*.
15. The special circumstances here are that; leave to appeal have been granted to the defendant to appeal, a record of appeal has been lodged before that Court, with the new found efficiency in that Court, that appeal may be disposed off as soon as possible.
16. The other special circumstance is that, this Court made a finding in its ruling of 25/2/2021 that the plaintiff as it stands is still not a juristic person. It directed the plaintiff to amend its plaint so that the proceedings that would follow would be by or against a juristic person. To-date, no such application has been filed.
17. To my mind, if the proceedings herein are not stayed, and the Court of Appeal overturns this Court's ruling of 25/2/2021, the proceedings herein would become naught. It would have been an exercise in futility. There would have been a waste of precious judicial time as well as unnecessary expenses.
18. All that a Court is called to do at all times is to do justice to the parties before it. The defendant has an undoubted right to appeal to a higher court, which it has exercised. The plaintiff on the other hand has an undoubted right to realize and enjoy the fruits of its judgment. However, while the Court



appreciates the delay so far occasioned by the many applications that have come up since 2014, the plaintiff itself seems to be in no hurry to enjoy the said fruits.

19. I say so because, since it was obvious to this Court that the plaintiff was not a juristic person in its ruling of 25/2/2021, the Court directed that the mis-description in the plaint be rectified. The reason for such directive is that, suppose the suit herein is settled through execution with the plaintiff's mis-description. Later on, the 'real plaintiff' with the correct name lodges a proper suit, what will the Court's tell that 'real plaintiff'?
20. To my mind, for the foregoing reasons, the application dated 15/3/2021 is meritorious and is hereby allowed as prayed.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF FEBRUARY, 2022.

A. MABEYA, FCIArb

JUDGE

