



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 371 OF 2009

ELIZABETH WANJIKU KARIUKI.....1ST PLAINTIFF

PAULINE NJOKI KANGI.....2ND PLAINTIFF

ANNA JULIA WAMBERE KANGI.....3RD PLAINTIFF

- VERSUS -

K-REP BANK LTD.....1ST DEFENDANT

PETER KINYANJUI MUKOMA.....2ND DEFENDANT

NANCY WAMBUI NJUGUNA.....3RD DEFENDANT

JOSEPH MURIITHI MIANO.....4TH DEFENDANT

PETER GATHIE T/A REGENT AUCTIONEERS.....5TH DEFENDANT

CHIEF LAND REGISTRAR.....6TH DEFENDANT

RULING

1. The application before me for consideration is the one dated 27th May 2020.

2. Some background is necessary. This case was filed by three plaintiffs against six defendants. Amongst those defendants that were sued is Peter Kinyanjui Mukoma deceased. That defendant died on 17th June 2013. This court was moved by the plaintiffs by application dated 14th January 2020 seeking the substitution of the personal representatives of the deceased 2nd defendant, namely Miriam Muthoni Kinyanjui and Kenneth Karimi Kinyanjui. This court by its Ruling dated 4th May 2020 granted the prayers for substitution of those personal representatives. As far as I can discern those personal representatives are not represented by the law firm of Mungai Kalande & Co. Advocates, the advocates who filed the application under consideration. The said law firm represented the deceased 2nd defendant throughout the time this case has been on record up to 3rd December 2019 when that law firm successfully obtained leave to withdraw themselves from this case.

3. The obvious question that arises is whose application dated 27th May 2020 is before me. It cannot be of the deceased 2nd defendant a dead person cannot instruct counsel. And since the personal representatives of the deceased's estate have not come on record in this matter that law firm cannot say to be acting for them. Further that law firm did withdraw from this action.

4. On the above ground alone the application dated 27th May 2020 is incompetent and will be dismissed. It is filed on behalf of a deceased person and not through the deceased's personal representatives.

5. Notwithstanding the above finding I will proceed to consider the merits of the application.

6. The application seeks stay of these proceedings pending appeal against the Ruling of 4th May 2020, the Ruling that substituted the

personal representative in place of the deceased 2nd defendant. The application before me, as stated before, is filed on behalf of the deceased 2nd defendant. The affidavit in support of the application on sworn by Miriam Muthoni Kinyanjui, one of the personal representatives of the deceased. Some of the depositions in that affidavit are:

“4. That the advocates for the plaintiff filed an application on 15th January 2020 seeking to substitute the Administrators of the Estate with the deceased and also for extension of time.

5. That this Honourable Court delivered a ruling on 4th May 2020 whereby the court substituted the Administrators of the estate with the deceased 2nd defendant.

6. That this Honourable court in the ruling delivered on 4th May 2020 also revived this suit that had already abated as against the 2nd defendant.

7. That the 2nd defendant/applicant being aggrieved by the ruling of this Honourable Court has already lodged a Notice of Appeal against the said ruling. Annexed hereto and marked “MMK 1” is a copy of the filed Notice of Appeal.

8. That the Appeal has high chances of success and will be rendered nugatory and futile unless the orders sought herein of stay of proceedings are granted by the court.

9. That the 2nd defendant is apprehensive that the plaintiff will proceed with the hearing of this suit as against the 2nd defendant which is now scheduled for 28th July 2020.”

7. The application is opposed by the plaintiffs. The plaintiffs oppose the application to stay these proceedings on the grounds that this case is part heard and it has been pending before court since the year 2009; that the personal representative Miriam Muthoni Kinyanjui had filed an application to be allowed to substitute the deceased 2nd defendant; that the law firm Mungai Kalande & Co. Advocates have been on record for the deceased 2nd defendant and have participated in the trial, engaging in cross examination of the witnesses who testified and; that the applicant failed to demonstrate how she/he will be prejudiced by the suit proceeding to hearing.

ANALYSIS

8. This case was filed in the year 2009. It is now 20 years since it was filed. The trial of this case finally commenced on 28th May 2019. Mr. Mungai advocate, from the firm Mungai Kalande & Co. Advocates, was on that day, and all other subsequent hearings, present and represented the 2nd defendant.

9. I am inclined to concur with the plaintiffs’ opposition that the applicant stands no chance of being prejudiced if stay is not granted in view of being previously represented by counsel during the trial. I do not wish to set out the said advocates full involvement in this case but will state that it has been substantial. On 27th November 2019 a consent was recorded between the plaintiff and the said advocate representing the 2nd deceased defendant when it was consented before court that the 2nd defendant (though deceased) would file and serve its defence by close of business that day. The record of this file does not show that that consent was set aside. It therefore still subsists. How then will the applicant be prejudiced. What irreparable harm will result to the applicant if this case does proceed for hearing. The only loss I can foresee if stay is not granted is the costs of litigation. In my view if the pending appeal does succeed such loss can adequately be compensated. A case in point is a case of **Superior Court of Justice Ontario, Noble v Noble, 2002 CanLII 22480 (ON SC)** thus:

“In my view, if the respondents ultimately succeed on appeal, they may be compensated with costs of proceedings should they later be considered unnecessary. I adopt the rationale in 820099 Ontario Inc. v. Harold E. Ballard, supra, where Montgomery J. dismissed a motion for stay of execution pending appeal. In that decision, he considered the submission that the only harm to the applicant if a stay is denied is that legal and accounting expense will be incurred in unwinding the transaction and money would be wasted. At 243, he cited the case of Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co. (1923), 55 O.L.R. 127 9 C.A. where Middleton J.A. wrote at 132:

..... In all cases in which the stay will impose little suffering upon the respondent, and this can be compensated by payment of actual damages which admit of easy and substantially accurate computation and in which on the other hand grievous loss and irreparable harm will be done the appellant if the stay is refused, the operation of the judgment ought to be stayed. The principle then is the same as that applied in the case of the application for an interim injunction – the balance of convenience, with an added factor of the greatest weight, the actual adjudication that has taken place, and which must be regarded as prima facie right.

[18] In my view, the expenses of the litigation may be compensated with costs and that does not constitute irreparable harm. Irreparable harm is irreparable harm and not mere inconvenience.”

10. In my view bearing in mind what is stated above the balance of convenience, or inconvenience, lies in permitting the proceeding of this case, which presently is awaiting the further defence hearing to go on. The application for that reason is dismissed with costs.

CONCLUSION

11. The Notice of Motion application dated 27th May 2020 is dismissed with costs to the plaintiffs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the plaintiffs:

For the 1st & 5th defendant;

For the 2nd defendant(deceased):

For the 3rd defendant:

For 4th defendant:

ORDER

This decision is hereby virtually delivered this 24th day of June, 2020.

MARY KASANGO

JUDGE