



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT HCCC 2 OF 2018 (CONSOLIDATED WITH MOMBASA HCCC 58 OF 2015)

KIKAMBALA HOUSING ESTATE LIMITED.....PLAINTIFF

-VERSUS-

AKASH DEVANI

MONA K DOSHI

KARIM ANJARWALLA

ATIQ ANJARWALLA

AMYN MUSSA

ANNE KIUNUHE

ROSA NDUATI-MUTERO

AISHA ABDALLA

DOMINIC REBELLO

ALEEM THARANI

(All trading as ANJARWALLA & KHANNA).....1ST DEFENDANT

BANK OF AFRICA KENYA LIMITED.....2ND DEFENDANT

RULING

1. By an Application dated 21/5/2020, the Plaintiff herein has sought orders that:-

1) (Spent)

2) That this Court be pleased to order stay of proceedings of the entire suit pending the hearing and determination of this Application.

3) That this Honourable Court be pleased to order stay of proceedings pending hearing and determination of the Appeal.

4) That the Honourable Court be pleased to issue any such order as it may deem meet and just

5) That the costs of this Application be provided for.

2. The Application is premised on the grounds set out therein, and is supported by affidavit sworn on 21/5/2020 by **Osman Erding Elsek** who is a director to the Plaintiff. The deponent avers that he is aggrieved by the ruling issued on the 30/4/2020 pursuant to the Application

dated 7/2/2020, which sought for this Court's recusal in handling the entire suit and the Plaintiff has lodged a Notice of Appeal dated 4/5/2020 against the aforesaid ruling.

3. The Plaintiff states that the instant Application is not a design to delay the progress of the entire suit, but rather, the Plaintiff feels that Justice will not be served if this Court continues conducting the entire suit as it has neglected to hear, and determine the Plaintiff's Applications dated 26/11/2018 and 8/11/2019, of which, the Plaintiff intends to lodge a substantive Appeal in the Court of Appeal demonstrating how this Court failed to hear and determine the said Applications. Further, the Plaintiff states that in his right conscious, this Court failed to deliver a just ruling on the manner the Defendants' advocate extracted the Court Order dated 2/11/2018 derived from the Partial Settlement Agreement dated 11/6/2018, and for that reason the Plaintiff intends to challenge the same at the Court of Appeal.

4. The Plaintiff states that it has no personal grudge or ill will whatsoever with the Court, and or the Defendant's together with their advocate on record and that all he seeks is a fair trial. However, there are minimal chances of getting justice in the entire suit as the Court has on several occasions expressed its satisfaction that the Plaintiff's Director has no trust in any advocate in Kenya and it has even gone to the extent of capturing the said words on the preamble of its direction issued on 3/2/2020. Consequently, the aforesaid words ring in the ears of this Court whenever the suit progresses before it.

5. It is the Plaintiff's case that Section 6 of the civil procedure Act allows this Court to stay further proceedings because in the event that the intend Appeal is successful, then the order issued by the Court of Appeal will be rendered nugatory. Further, Article 159 of the Constitution mandates this Court to administer Justice without undue regard to procedural technicalities.

6. The application is clear that the need for stay will dissipate once the file leaves the hands of the court and that the continued handling by the court will occasion to it prejudice

7. When served, the Defendant opposed the Application on the basis of a Replying Affidavit sworn on 27/5/2020 by **George Nyamai** who is the 2nd Defendant's Recovery Officer and together with the Statement of Grounds of Opposition dated 26/5/2020. It is averred that the instant Application is made in bad faith and is a ploy meant to frustrate the efforts made by the parties, and the Court to ensure that the matter is determined in a just, fair, and expeditious manner. Further, the deponent avers that the Plaintiff has refused to comply with the terms of the Settlement Agreement dated 11/6/2018 and has time and again breached various orders and directions issued by this Court in furtherance to compliance with the terms of the Settlement Agreement.

8. The Defendants aver that, as with the previous Application dated 7/2/2020, the Plaintiff Appeal is a mischievous attempt to forum shop in a bid to avoid compliance with the terms of the Settlement Agreement. This, it is argued, is because the Plaintiff has neither prima facie arguable case nor has it established sufficient cause of seeking an order for stay of proceedings. Consequently, it is contended that it is not in the interest of Justice to grant the orders sought and/or to exercise this Court's discretion in the favour of the Plaintiff.

9. The grounds relied on by the Defendants in the Statement of Grounds of Opposition can be summarized as follows:

a) That settlement agreements/consent judgments have contractual effect and can only be set aside on grounds which would justify setting aside or staying the performance of a contract.

b) That the Application is a gross violation of Article 48, 50, and 159(2) (b) of the Constitution as it impedes the right of access to Justice, the right to be heard without delay and the right to a fair trial.

c) That the Application has not satisfied the criteria set out under order 42 rule 6(1) and (2) of the Civil Procedure Rules.

d) That the Application is an abuse of the Court process and an obstruction of the exercise of judicial authority.

The Rejoinder

10. In response to the Defendant's Replying Affidavit, the Plaintiff filed a Supplementary Affidavit sworn on the 9/6/2020. In the said Affidavit, it is averred that the Plaintiff has been in the frontline in progressing the entire suit by requiring that the correct procedure to be adopted in the implementation of the Partial Settlement Agreement but it is the 2nd Defendants who have derailed the implementation of the Partial Settlement Agreement by focusing on securing their own interests, and not being concerned with the losses incurred by the Plaintiff because of the delay of issuance of leasehold title deeds by the Defendants for the suit property.

11. It is averred that the application dated 7/2/2020 sought different prayer from the prayer being sought in the instant Application, which is only seeks stay of proceedings. Therefore, the Plaintiff has enough reasons for the same to be allowed, and the Defendant has not demonstrated any prejudice they stand to suffer should the Application be allowed.

Submissions

12. On the 28/5/2020 when the Application came up for hearing, it was directed by this Court that the Application be dispensed with by way of written submission. The Plaintiff filed its submissions on the 18/6/2020 while the Defendants' submissions were filed on the 22/7/2020. Both the Plaintiff and the defendants reiterated the content of their respective affidavits in support and in opposition of the Application for stay of proceedings and cited to court what law they viewed to support respective positions.

13. On substantial loss that stands to be suffered, the Plaintiff submitted that the execution of the Partial Settlement Agreement dated 11/6/2018 and complying with the directions of this Court issued on the 3/2/2020 involves sums totaling to Kshs. 364,000,000/= which is quite a substantial amount to be subjected to the suit property with interest being enjoyed by Third Parties and the Plaintiff as well. The

Plaintiff cited to court the case of **Focin Motorcycle Co. Limited vs Ann Wambui & Another [2018] eKLR** where the court opined that a decretal amount of kshs 1,414,493/= was not an insubstantial amount. It further submitted that having filed a Notice of Appeal without undue delay and it will suffer substantial loss if the instant suit is not stayed pending hearing and determination of its Appeal.

14. **Mr. McCourt** Learned Counsel for the Defendants submitted that it is common ground that the parties entered into a Partial settlement Agreement on the 11/6/2018 following a Court annexed mediation, and the said Partial Settlement Agreement was adopted as an order of this court on the 2/11/2018. However, the Plaintiff has deliberately frustrated parties efforts to comply with the terms of the settlement Agreement by blatant disobedience of directions and orders issued by this Court.

15. Counsel submitted that the settlement agreement is in fact a consent Judgment or order with contractual effects and can only be set aside on grounds which would justify setting aside a contract. In the instant case, counsel argued, staying performance an enforcement of the parties' agreement was not available due to insufficient grounds having been furnished before this Court to enable it set-aside, vary, rescind and/or delay its implementation.

16. Mr. McCourt concluded his submissions on the note that there is no competent or valid appeal owing to the provisions of Section 75 of the civil procedure Act as read with Order 43 Rule 1 of the Civil Procedure Rules which require that for an appeal to be pursued from the decision like that said to aggrieve the applicant, leave must be sought before filing of the Notice of Appeal which leave has not been sought by the Plaintiff in this instance.

Analysis and Determination

17. I have considered all the material canvassed in respect of the Motion. My careful study and understanding of all papers filed and the issues raised in this Application leads me to the view and opinion that only one single issue isolate itself for determination, which is whether there should be stay of proceeding pending Appeal.

18. I do understand the remedy of stay of proceedings pending appeal to targeted at enabling access to justice by way of an appeal while at the same time obviating possible imprudent or inefficient application and employment of judicial resource in time. It seeks to avoid a situation where a court applies itself in a matter subject of an appeal only for such application to be rendered worthless when the appeal succeeds. Those are the objects to be served by the consideration of there being an arguable appeal. I start from the standpoint that an arguable appeal must be a competent appeal even though arguability should never be elevated to the real of an appeal that must succeed.

19. In this matter the ruling sought to be challenged on the intended appeal was upon an application seeking the recusal of the trial judge. Such application does not attract an appeal as of right but only with the leave of the court. In the file there is no evidence that before filling the notice of appeal and till now no application has been made for eave to appeal. My finding is that without a competent appeal, there cannot be an arguable appeal which is the cornerstone consideration for grant of stay of proceeding pending appeal.

20. On the merits, an applicant must establish an arguable appeal and disclose a substantial loss that would result if the stay is declined. It must also be shown that the application was brought without undue delay. It is the three thresholds I must establish to have been met by the applicant.

24. By its very nature an order of stay pending appeal is only intended to preserve the purpose and substratum of the appeal and so that the outcome is of real meaning to the litigants. It is that context that the arguability threshold is underscore. It thus follows that without an appeal there would be no basis to grant stay pending nothing just like there can never be a basis to grant stay pending a frivolous or just a tenacious appeal. In an application for stay of proceedings pending appeal the overall impression the court makes out of the total sum of the circumstances of the case matter. The court should be aroused almost to a compulsion that the proceedings should be stayed in the interest of justice.

21. It is noteworthy, that the Plaintiff who is acting in person in this instant Application states that this Court is already biased and that this Court ought to have recused itself from handling the entire suit for the Plaintiff to be assured of a fair hearing, and justice. The Plaintiff has even gone ahead to make a proposal to this Court at paragraph 20 of its Supporting Affidavit by stating as follows:

“ that I have no intentions of progressing with the Appeal of the Ruling of Hon. Justice P.J.O Otieno (M.R) dated 30/4/2020 whereby he did not recuse himself and in the event the Hon. Justice P.J.O Otieno (M.R) upon receiving this Application wishes to return the entire file to the deputy Registrar of the High Court in Mombasa for allocation to another competent High Court Judge in Mombasa, I will proceed in the entire case to save time and money in having the final Justice delivered on the entire suit.”

22. From that deposition I form the view that the intended appeal is a red herring and the instant Application is not one genuinely seeking stay but an Application for review and/or an Appeal against the ruling dated 30/4/2020 camouflaged as an Application seeking a stay of proceedings pending Appeal. Nevertheless, since the instant Application is not a review and/or an Appeal of the ruling dated 30/4/2020, I find that this Court is *functus officio* on the issues of bias and the recusal of this Court and this Court will only concentrate on the issue of stay of proceedings pending Appeal.

23. The powers of this Court to Stay proceedings pending Appeal and its jurisdiction is derived from both Order 42 Rule 6 of the *Civil Procedure Rules* as well as the inherent jurisdiction reserved in section 3A of the *Civil Procedure Act*. In the case of **Global Tours & Travels Limited, Nairobi HC Winding Up Cause No.43 of 2000**, the Court laid down the considerations on whether or not to stay proceedings. The Court held that:-

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice... the sole question is whether it is in the interest of

justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”

24. An order for stay of proceedings should not be granted as of course merely because it has been sought. The court must appreciate the constitutional dictate for the expeditious disposal of the case and only stay proceedings in very compelling cases. This is what I get from the author of Halsbury’s Law of England, 4th Edition. Vol. 37 page 330 and 332, on the threshold for stay of proceedings;

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

25. In deciding whether to grant a stay of proceedings, a judicious and equitable balance between the principle that matter should be allowed to proceed towards conclusion and end to litigation and that justice should be expeditious to both parties has to be struck. I have given due regard to the fact that the purpose of the appeal and the application is not the pursuit of unbiased justice but an endeavour towards a choice of forum. That comes when the matter has been substantially handled and substantial steps made by mutual consent but the consent has turned sour to the plaintiff. To grant stay would in those circumstances defeat rather than facilitate justice.

26. A Court of law will only grant a stay if there are exceptional circumstances, which must be deposed in an affidavit. I say this mainly because courts ought to discourage parties who lose any motion on merits from stalling further proceedings; by keeping the litigation alive through appeals or to gain respite against further action until the matter goes their way. Consequently, I find and hold that the Plaintiff has failed to demonstrate an arguable case and that his Appeal will be rendered nugatory.

27. On the issue of substantial loss, the Plaintiff stated that execution of the Partial Settlement Agreement dated 11/6/2018 and complying with the directions of this Court issued on the 3/2/2020 involves sums totaling to Kshs. 364,000,000/= which is substantial. It is noteworthy that the Plaintiff admits to the existence of a Court order and directions issued on the 3/2/2020 requiring it to charge the suit property in favour of Bank of Africa Kenya Limited for sums totaling to Kshs. 364,000,000/= as per the terms of the partial settlement agreement. The said direction have not been appealed against and /or set-aside. However, the Plaintiff has adopted an approach of refusing to comply with the said Court’s direction by stating that the said terms of the Partial Settlement Agreement are unfair. I find and hold that the Plaintiff is in blatant disregard and/or disobedience of Court order. The plaintiff ought to be reminded that parties are bound by their bargains and that it is no duty of the court to rewrite a contract for the parties. Where a party negotiates a contract, it is not open for it to run away freely merely because it does not favour him. Such attempts can only cast the party as acting in bad faith and thus not entitled to a court’s judicial discretion.

28. Since the Plaintiff has approached this Court with tainted hands, this Court as a Court of equity cannot come to its aid, as the grant of a stay of proceeding will perpetuate blatant disregard and disobedience of Court orders. See **Fred Matiang’i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others [2018] eKLR** where the Court of Appeal stated as follows...

“When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who deigns to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities.”

29. The upshot of the foregoing is that the application before the court lacks merit, and is herewith dismissed with costs to the Respondent.

30. While this decision was pending and after I had written it, I have been transferred out of Mombasa High Court station, with the consequence that I have no prospects of having to hear the matter a fact that should dissipate any fears the plaintiff could have had. The file will thus land on the desk of the judge that would be assigned the docket

Signed, dated and delivered at Mombasa **this 25th day of September 2020.**

P J O OTIENO

JUDGE