



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 357 OF 2008

ORIENTAL COMMERCIAL BANK LIMITED.....PLAINTIFF

- VERSUS -

BUBACON AGENCIES LIMITED.....1ST DEFENDANT

ABDULLAHI M. ALI.....2ND DEFENDANT

RULING

1. On 6th February 2009 Lesiit J. rejected the plaintiff's application for summary judgment.
2. The learned Judge expressed the view that the Defences on record were sufficiently elaborate and strong that they could not be rejected off-hand.
3. However, the court also felt the need to impose conditions which the defendants would have to meet, in order to be able to continue their defences against the plaintiff's claims.
4. The defendants were ordered to deposit in court, the sum of Kshs. 2,800,000/- within 30 days.
5. Being dissatisfied with the Ruling, the defendants filed a Notice of Appeal. The defendants also wrote to the Deputy Registrar of the High Court, asking for certified copies of the proceedings and also of the Ruling dated 6th February 2009. The defendants letter was dated 17th February 2009, and it was copied to the advocates for the plaintiff.
6. On 5th November 2014, the defendants brought their current application (which is dated 5th November 2014). By that application the defendants sought a stay of all proceedings in this case, until the defendants' appeal was heard and determined.
7. At the time when the application was filed, the defendants had been served with Notices To Show Cause why execution should not be levied against them. In particular, the 2nd Defendant was required to Show Cause why he should not be committed to Civil Jail.
8. The defendants pre-empted that application by asking that further proceedings be stayed until their appeal was heard and determined.
9. According to the applicants, they stood to suffer irreparable damages if these proceedings were not

stayed. If the 2nd defendant was sent to jail whilst his appeal was still pending, that would defeat the defendants' quest for justice; that was the submission of the applicants.

Why do the defendants say so?

10. They point out that as early as on 20th February 2009, the defendants had asked the court to make available to them, the record of the proceedings and the Ruling which they needed in order to be able to lodge their appeal. To date, the court had not yet made available the proceedings and the Ruling. Therefore, the defendants believe that it would be very wrong to condemn them for a failure attributable to the court.

11. Secondly, the defendants feel that the attempt to send **MAALIM A. ALI** (the 2nd defendant), to jail, was in bad faith, considering that there was an agreement between the parties herein, pursuant to which the applicants would liquidate the decretal amount with monthly instalments of Kshs. 20,000/-.

12. Whilst the defendants were waiting for the court to type the proceedings and the Ruling; and when the court was going about the process of making ready the typed proceedings and Ruling, the plaintiff is said to have interfered with that whole process.

13. The interference took the form of filing several different applications, which therefore resulted in the post-ponement of the process of typing, so that the file could be placed before a Judge who would hear and determine such applications.

14. Therefore, the defendants argued that the plaintiff must be held responsible for the delay in making ready the typed proceedings and Ruling.

15. In the circumstances, the defendants asked the court to reject the plaintiff's attempt to exert undue pressure upon the defendants, considering that the plaintiff had already agreed to receive monthly instalments from the defendants.

16. In relation to the appeal, the defendants expressed the view that it had high chances of success because the Judge ought not to have imposed conditions on the defendant after the court had concluded that the Defence raised triable issues.

17. Finally, if the court was unable to order that proceedings be stayed until the appeal was determined, the defendants requested the court to stay proceedings for a limited period of about six (6) months, to enable the defendants lodge their appeal.

18. In answer to the application the plaintiff submitted that because the defendants had not yet filed a Memorandum of Appeal, this court cannot determine whether or not the intended appeal had merit.

19. Quoting from the followings words of Ringera J. (as he then was) in **RE: GLOBAL TOURS & TRAVELS LIMITED, WINDING UP CAUSE NO. 43 OF 2000**, the plaintiff said;

“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 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”.

20. I think that those words pretty much summarise the factors which the High Court should take into account when determining an application for stay of proceedings pending an appeal.
21. In this case, the defendants have not yet filed the Memorandum of Appeal. They are still waiting for the typed proceedings, which they will need to incorporate into the record of appeal.
22. However, the wait has been a very long one, since 2009. It is already 6 years since the Ruling was delivered.
23. The defendants have put the blame for the delay largely on the plaintiff, who filed several applications during the period in which the court ought to have been typing the proceedings.
24. Of course, it is true that whenever the process of typing of proceedings is interrupted, there will be delays. The said delays occur because when a court is handling an application, the court file is ordinarily removed from the Registry and it is placed before the Judge.
25. Whilst the prosecution of new applications would disrupt the court's process of typing proceedings, it would be improper to cast a wholesale condemnation on the party making such new applications.
26. If an application was found, by the court, to have been an abuse of the process of the court, the party bringing such an application could be said to have caused unwarranted delay in the process of the typing of the proceedings.
27. In this case, after the court had granted to the defendants conditional leave to lodge a defence the claim against them, the plaintiff applied for the striking out of the defences. That new application was premised on an "Agreed Settlement" which was set out in a signed letter dated 5th February 2009.
28. The defendants respective signatures were appended to the letter on 10th February 2009. In effect, the Agreed Settlement was executed on the day after the court had given the defendants conditional leave to defend themselves against the suit.
29. Having given due consideration to the plaintiff's application, the court struck out the defences on 12th June 2009. It is on the basis of that development that a Decree was thereafter issued. And it is that Decree which the plaintiff took steps to have executed.
30. It is noteworthy that the defendants are not challenging the efficacy of the Decree. Instead, the defendants' focus is on the Ruling dated 6th February 2009. That fact is evident from the Notice of Appeal dated 17th February 2009, in which the defendants said;
- "TAKE NOTICE** that the Defendants herein being dissatisfied with the Ruling and Order delivered at Nairobi on the 6th February 2009 by the Honourable Lady Justice Lesiit intends to appeal to the Court of Appeal against the whole of the said Ruling".*
31. Is so far as the plaintiff was taking steps to execute a lawful Decree which is not being challenged through the intended appeal, I hold the considered view that the said appeal, even if it should ultimately be successful, cannot have any impact on the Decree.
32. Therefore, the execution of the Decree cannot, also, have any impact on the appeal which does not have any bearing on the efficacy of the said Decree.
33. The defendants could only be prejudiced if the execution were to be levied before the determination of an appeal which could probably result in the setting aside of the Decree that was the foundation upon which the Decree sprang up from.
34. In this case, the success of the appeal could only go as far as declaring that the defendants should have

been given unconditional leave to prosecute their Defence. Such a finding, if it were made, would not affect the Decree dated 12th June 2009, because that Decree was founded upon a decision which was arrived at by the court subsequent to the Ruling which the defendants were challenging through the pending appeal.

35. In the result, I find no merit in the defendants' application for stay of proceedings or of execution. The application dated 5th November 2014 is dismissed with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 25th day of May 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiff

Masafu for Mwangi for the 1st Defendant

Masafu for Mwangi for the 2nd Defendant

Collins Odhiambo – Court clerk.