



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL DIVISION
CIVIL APPEAL NO. 34 OF 2015

HALAN SLIME AGENCIES LIMITED..... APPELLANT

VERSUS

ABIAZIZ ADAN.....1ST RESPONDENT

LIBERTY AFRIKA TECHNOLOGIES LIMITED2ND RESPONDENT

SAFARICOM LIMITED3RD RESPONDENT

RULING

1. This is a ruling on two (2) applications. The first is a Motion dated 5th February, 2015 by the Appellant seeking a stay of execution and injunction against the proceedings in CMCC No.4845 of 2013 pending the determination of the appeal herein; and the second one is dated 11th February, 2015 by the 1st Respondent seeking to set aside an order made by this court on 4/2/15, the transfer **CMCC No. 4845 of 2013 Liberty Afrika Technologies Ltd Vs Abdiaziz Adan & Anor** from the lower court to this court and for an order that the 3rd Respondent do pay Kshs.7,781,191/18 to the 1st Respondent pending the hearing of the application.
2. I will first deal with the motion by the 1st Respondent dated 11th February, 2015 that seeks the transfer of the lower court suit to this court and for payment of Kshs. 7,781,191/18 to the 1st Respondent. It is supported by the Affidavit of Ezekiel Wafula, Advocate. The grounds are that the lower court had on 17/04/2014 made an order compelling the 3rd Respondent to pay to the 1st Respondent monies based on a 3rd Respondent' pre-determined ratio of Kshs.0.27 per down load of some content, that the 3rd Respondent computed the sum at Kshs.9.8 million; that the 3rd Respondent had failed to comply with the said order as a result of which the 1st Respondent sought to execute a preliminary decree in respect thereof but which was stayed by the lower court. That it is this court that has the jurisdiction to determine the suit. That further, it is in the interests of justice that the monies ordered by the lower court be paid to the 1st Respondent.
3. The Applicant did not file any affidavit to oppose the said application. Neither did its Counsel submit on it in his written submissions dated 25th February, 2015. It therefore remained unopposed. However, on its part the 3rd Respondent filed a Replying Affidavit sworn by Daniel Mwenja Daba sworn on 3rd March, 2015. As relates the 1st Respondent's Motion, the 3rd Respondent contended that it was not willfully disobeying the orders of the lower court since the

- orders of attachment had been stayed by the lower court and that court had directed the monies be deposited in court an order which the 3rd Respondent had complied with. It contended that this court lacks jurisdiction to grant the orders sought and that the application should be dismissed.
4. In his submissions dated 4th March, 2015 Counsel for the 1st Respondent did not address his application. That application can therefore be said that it remained unprosecuted. Be that as it may, I have carefully considered the same and I will make a determination thereon on merit.
 5. The first prayer is that the order of stay made on 4th February, 2015 be discharged as it had been overtaken by events. I have perused the record and noted that there was no order made by this court on 04/02/2015 save one certifying the Applicant's application dated 5th February, 2015 as urgent. That prayer fails as the order is already spent.
 6. The 2nd prayer seeks the transfer of **NRB CMCC No.4845 of 2013 Liberty Afrika Technologies Ltd Vs Abdiaziz Adan & anor** from the Chief Magistrate's Court to this court for hearing and determination. As I had earlier stated, neither of the prayers in the 1st Respondent's application was prosecuted. I do not agree with the 3rd Respondents contention that this court lacks jurisdiction to grant any of the prayers in the 1st Respondent's Motion. I believe that when a proper basis is laid, this court can discharge and vary its own orders; it can also order a transfer of a suit filed in the lower court to itself for hearing and determination. The court can also order payment of monies by a party to a proceeding to another if legal basis is shown. Therefore, in a proper application, this court has jurisdiction to grant the prayers sought by the 1st Respondent.
 7. In the present case however, the 1st Respondent did not exhibit any of the pleadings in the lower court to enable the court gauge the nature of the case in that court. Further, there were no grounds either in the body of the motion or the Supporting Affidavit showing the basis for seeking to transfer the suit from the lower court where it had originally been filed and has so far been substantially prosecuted to this court. There being no reasons advanced that fall within Sections 15 through 18 of the Civil Procedure Act to warrant such a transfer of that suit, the prayer in my view was mischievous and an abuse of the process of the court.
 8. That leaves me with the prayer for payment of Kshs.7,781,191/18 by the 3rd Respondent to the 1st Respondent. For reasons to be advanced I will consider this prayer when considering the Appellant's application for stay.
 9. I will now deal with the Applicant's Motion dated 5th February, 2015. It is brought under Sections 1A, 1B and 3A of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules. It seeks three prayers :-

“a) Pending the hearing and determination of the appeal filed herewith there be a stay of execution of the ruling and order of the Chief Magistrate Court in civil suit number 4845 of 2013.

- b. ***Pending the hearing and determination of the appeal filed herein this court be pleased to issue a temporary injunction against all the proceedings in civil suit number 4845 of 2013.***
- c. ***Pending the hearing and determination of the appeal filed herein this court be pleased to issue a stay of proceedings against all the proceedings in civil suit number 4845 of 2013.”***

10. The grounds are elaborated both in the body of the Motion and the Supporting Affidavit of Abdilahi Abdisalam Haji sworn on 5th February, 2015. These are as follows; that the Applicant and the 2nd Respondent entered into a contact in July, 2009 in respect of certain composition of Islamic songs, scripture readings and prayers for uploading with the 3rd Respondent; that the 2nd Respondent later on entered into a similar contract with the 1st Respondent; that the Applicant later discovered that the 1st Respondent had laid claim on the said songs and had applied to receive payments therefor directly from the 3rd Respondent in CMCC No. 4845 of 2013 which application was allowed. That the Applicant's application to be enjoined as an interested party in those proceedings was declined by the lower court whereby the Applicant filed an appeal against that order. That it was improbable that the Applicant will recover the sums ordered to be paid to the 1st Respondent as the 3rd Respondent cannot make double payments; that the appeal has high chances of succeeding and unless the orders sought are granted the same will be rendered nugatory.

11. The 3rd Respondent filed a Replying Affidavit Supporting the application. It was contended on its behalf that before it could comply with the order to pay the 1st Respondent monies relating to the content of the aforesaid Islamic songs, prayers and scripture readings, it discovered that the Applicant and the Somali Embassy had a claim to the said content; that the 3rd Respondent applied to deposit the monies in court pending determination of ownership of the contents; that the said application was dismissed on 19/01/2015 and that there was a likelihood that the lower court may order the release of the said monies before the appeal is heard. That there are no known assets of the 1st Respondent from which the monies may be recovered if it is paid over to him. The 3rd Respondent submitted that in the circumstances there may be recovery proceedings that may be instituted against the 1st Respondent if the appeal is allowed and the 3rd Respondent therefore supported the Appellant's application.
12. Both the 1st and 2nd Respondent did not file any specific Affidavits in opposition to the Applicant's application. However, Counsel for the 1st Respondent informed the court that the 1st Respondent was to rely on its application dated 11/2/15 and the Affidavit in Support thereof in opposition to the Application. I have carefully looked at the 1st Respondent's application dated 11/2/15 and the Affidavit in support thereof and I have found nothing useful as far as opposition to the Applicant's application is concerned. Indeed, it never made any reference whatsoever to the Applicant's application. Be that as I may I have to determine the motion on its merit. I have considered in detail the Affidavits on record and the written submissions of the respective parties and the oral hi-lights thereon.
13. As indicated above, the Applicant seeks three prayers. I propose to consider each prayer separately. The first prayer reads:

“2. Pending the hearing and determination of the appeal filed herewith there be a stay of execution of the ruling and order of the Chief Magistrate Court in Civil Suit No. 4845 of 2013.”

14. From the foregoing, it is not clear which ruling and order this court is being asked to stay. In paragraph 19 of the Affidavit of Abdullahi Abdissalam Haji, sworn on 5/2/15, it is stated:-

“19. That the court erroneously made a ruling that the Applicant was not an interested party and as such did not deserve to be joined as an interested party. Annexed hereto and marked AAH-5 is a copy of the proceedings and ruling.”

15. I have looked at Exhibit “AAH-5”. There are several rulings to that exhibit. The first one is dated 25/11/13, the second is dated 15/04/14, and the third one is shown to have been delivered on 19/01/15. When the matter came up *ex parte* on 06/02/15, the court granted that prayer. However, the order extracted does not show which of the said three rulings, or orders was stayed. I think that alone is enough to have that prayer to be dismissed for being unclear. It is trite law that for a party to be able to comply with an order of the court, such order must be clear and unequivocal. A prayer that is so vague like the first prayer in the Applicant's motion, is not capable of being granted.
16. Since the prayer is not as clear as it is supposed to be, the court has to speculate and presume that the ruling referred to in prayer 2 is the last ruling of the court dated 19/01/15. This is so considering that at the heading of the motion, it is indicated that the ruling and order sought to be appealed against is that of 19/01/15.
17. Is that ruling and order capable of being stayed? I do not think so. The order does not require the doing of any positive act. The order is in the negative terms. It just dismissed the Applicant's and 3rd Respondent's applications dated 17th and 19th November, 2014, respectively. I have always known it to be that orders that are in negative terms are incapable of being stayed. In this case, if I granted a stay on that ruling so what? Will that enjoin the Applicant to the proceedings? I think it will be an order in futility as it will only retain the position that was prevailing before delivery of that ruling. Such a status cannot be maintained. That prayer is accordingly declined.
18. The second prayer is for a temporary injunction against all the proceedings in civil suit number 4845 of 2013. Looking at the grounds set out in the motion, I do not see any ground to support this prayer. Firstly, I do not think that a court can issue an injunction against proceedings that are

properly ongoing before a court of competent jurisdiction. Such a scenario will be untenable unless such a court is conducting the proceedings irregularly, has veered off its jurisdiction and is about to engage in an outright illegality that might permanently or irreversibly injure or prejudice a party to those proceedings. Nothing like that was alleged in the proceedings in the lower court. Secondly, I do not think the provisions under which the jurisdiction of this court was invoked allows the grant of the injunction as sought. I accordingly decline that prayer.

19. The last prayer is one for stay of proceedings in CMCC No. 4845 of 2013 pending the determination of the appeal. The Applicant submitted on the correct principles applicable in an application for stay of proceedings. The learned Counsel for the Applicant referred the court to the text in **Halsburys Laws of England 4th edn. Vol. 37 pages 330 and 332**, wherein the learned writers observe that:-

“The stay of proceedings is a serious, grave and fundamental interference 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 proceedings beyond reasonable doubt should not be allowed to continue.”

20. In the case of **Global Tours and Travels Ltd Winding Up Cause No. 43 of 2000 (UR)** it was held that:-

“.....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 interests of justice. Such discretion is unlimited save that by virtue of this character as a judicial discretion, it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests 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 the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, 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 timeously.” (underlining provided)

21. I agree with those principles. How then do they apply in the present case? The Applicant and the 3rd Respondent submitted that the Applicant’s motion do satisfy them. Of course as I have already stated, Counsel for the 1st Respondent did not submit on it.

22. On whether the application was brought timeously, the order impugned or appealed against was made on 19th January, 2015. The present application was lodged on the 5th February, 2015 well within 30 days allowed for lodging an appeal from the lower court to this court. In my view, the application was brought within a reasonable time.

23. As to the question of doing justice, it is imperative to weigh the pros and cons of granting the order for stay. As properly submitted by the Applicant, Article 159 of the Constitution of Kenya demands that proceedings should be disposed off expeditiously, that they should not be hindered without a just and without sufficient cause. Before me are two (2) competing interests. The Applicant’s interests to safeguard what it claims to be its right to join the lower court proceedings and establish that it is entitled to monies generated by contents downloaded by the 3rd Respondent on some Islamic prayers, scripture readings and songs. On the other hand, there is the 1st Respondent’s interest to have the monies already ascertained by the court paid over to him. Both the Applicant and the 3rd Respondent insist that further proceedings in the lower court should be halted until the issue of ownership of content is sorted out. Where does the justice of the case lie?

24. I think the justice of the case lies in considering the other two principles applicable in granting orders staying proceedings. These are the exercise of judicial discretion and considering the prima facie merits of the intended appeal. In exercising its judicial discretion, the court must do so rationally, based on rules of reason and justice not according to private opinion. It has to be in accordance with the law and not arbitrary, vague and fanciful but legal and regular.

25. In order to exercise that discretion, the court has to consider what the dispute in the lower court

was. Both the Applicant and 1st Respondent were not candid with this court. They deliberately failed to produce to this court the principal pleadings in the lower court suit for this court to discern the nature of the dispute before that court. As if that was not enough, the Applicant did not produce its application that led to the ruling and order being appealed against. It is only the 3rd Respondent who did so in its Replying Affidavit. At pages 220 to 230 of the exhibit to the Replying Affidavit of Daniel Mwenja Ndaba is the Plaintiff and the Defence. From the said pleadings, it is clear that the dispute is between the 1st Respondent and the 2nd Respondent on an agreement between the two dated 04th December, 2012. The 1st Respondent dragged the 3rd Respondent into the proceedings for purposes of being paid by the latter directly.

26. On the other hand, I have looked at the agreements which are said to be the subject of the parties' respective claim which appear at pages 45 to 95 of Daniel Mwenja's Replying Affidavit. The Applicant's two agreements with the 2nd Respondent are dated 25th July, 2009 and 5th February, 2013, respectively. The 1st agreement of July 2009 bound the 2nd Respondent at Clause 2:2 thereof to:-

“Develop by way of digitally altering content provided by the client (Applicant) for the purposes of delivery over internet networks. The contents thus altered will be made available for sale mainly to mobile subscribers. The contents include but is not limited to images, video and audio content with a strong bias towards the sport of rugby.” (Underlining mine)

That agreement did not contain any schedule of the contents but from Clause 2:2 above, the agreement seems to have been about the sport of rugby.

27. The first time the issue of Islamic content arises in the Applicant's agreements with the 2nd Respondent is in its agreement dated 5th February, 2013 which was entered into four (4) months after the 1st Respondent and the 2nd Respondent had entered into the Agreement of 4th December, 2012 and; six (6) months before the lower court suit was commenced. Can this be a case of two equities that are the same? That is not for this court but for the trial court to discern.

28. I have gone into the foregoing detail to gauge the prima facie merits of the Applicant's appeal. Apart from the depositions in the Affidavit in support of the application, there is no evidence that is on record to show that the Applicant had made any demand on either the 2nd Respondent or 3rd Respondent on the agreement of 3rd February, 2013. It is also not clear from the record that either the 2nd or 3rd Respondent had identified the monies ordered by the court in April, 2014 to be paid to the 1st Respondent as being the amount payable under the Applicant's agreement dated 3rd February, 2013. To me without making any firm findings so as not to jeopardize the appeal, there is nothing on record to connect the Applicant with the original dispute submitted to the court by the parties in the lower court suit which the Applicant seeks to halt. The agreements dated 4/12/2012 and 3/02/13 are by separate parties and the one of 3/02/13 has nothing to do with the lower court suit. I think the lesser I speak about it the better.

29. If that was all I would have had no difficulties in declining the prayer. However, the 3rd Respondent contended that it was not clear whether the monies it had deposited in court belonged to the 1st Respondent on his agreement of 04/12/12 or to the Applicant on its agreement of 03/02/13. As I have already found, the two agreements are only four (4) months apart. On the other hand the monies deposited in court seem to cover the period December, 2012 and April, 2014. Since there is overlap on the period when the two agreements apply for the same contents; a risk arises whereby the 3rd Respondent may be called upon to make payments twice for the same content and the same period but different agreements.

30. Further, the 3rd Respondent swore on oath that the financial standing of the 1st Respondent was not clear. That it might be difficult to recover the monies if the same is paid over to him. The 1st Respondent did not respond or show his ability to repay the money if it is ultimately found that he was not entitled to the same or part of it. That will obviously injure the 3rd Respondent. Further, there may be the likelihood of having to mount another suit against the 1st Respondent for recovery. That in my view might lead to waste of scarce judicial time. The justice of the case

demands that the position of the 3rd Respondent be protected by preserving the money. The same I am told is in the custody of the court out of reach of any of the parties.

31. I think substantive justice will call upon this court to preserve the status quo. I will grant prayer No. (c) in the Applicant's Motion dated 5th February, 2015. Accordingly, the 3rd prayer in the 1st Respondent's application fails.

32. In the end, the 1st Respondent's application dated 11th February, 2015 is dismissed while I allow the Applicant's application dated 5th February, 2015 only in terms of Prayer No. (c) thereof. Since parties were partially successful I will order that each of them do bear its own costs of the applications.

DATED and DELIVERED at Nairobi this 22nd day of May, 2015.

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A. MABEYA

JUDGE