KREPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 115 OF 2011

INTERACTIVE GAMING & LOTTERIES LIMITED……...PLAINTIFF

VERSUS

FLINT EAST AFRICA LIMITED…….……..…..…..1ST DEFENDANT

SAFARICOM LIMITED…..……..…..……..2ND DEFENDANT

KENYA REVENUE AUTHORITY……..…..……..3RD DEFENDANT

RULING

1. Following the delivery of Judgement in this suit on 30th April, 2014, the 3rd defendant herein made an application for stay thereof pending an appeal to the Court of Appeal.

2. However, before the said application could be heard and determined inter partes the plaintiff on 18th May, 2014 filed an application seeking that the ex parte orders granted pursuant to the 3rd Defendant's said application be set aside and/or discharged and that the said Motion dated 6th May, 2014 be struck out. It is this Motion dated 16th May, 2014 which is the subject of the instant ruling.

3. The said application was based on the ground that there was no judgement or decree directed to be satisfied by the 3rd Defendant and that this fact was not disclosed to the Judge who granted the ex parte orders. Further it was not disclosed that the parties were yet to appear before the Deputy Registrar to ascertain the figure due as directed in the judgement and the decree was yet to be extracted. These grounds were expounded in the supporting affidavit sworn by **Adil Bashir**, the plaintiff's director on 16th May, 2014.

4. The application was opposed vide a replying affidavit sworn by **Kenneth Agolla**, a Principal Revenue Officer of the 3rd Defendant on 13th June, 2014. According to him, there is on record a judgement which is capable of being executed and it is the execution of the said judgement which the 3rd Defendant is seeking to stay since it is a party to this suit and laid claim to the amount in dispute.

5. It was deposed that when the 3rd Defendant's application came for inter partes hearing the fact that the matter was due to be placed before the Deputy Registrar was disclosed hence the certification of urgency. It was therefore deposed that there was no deceit or falsehood or misleading of the Court by the 3rd Defendant's counsel.

6. In support of the application, **Mr Ng'ang'a** learned counsel for the plaintiff while reiterating the foregoing submitted that the 3rd Defendant knowing that no decree had been extracted deliberately misled the Court that there was a decree against it which was about to be executed. It was submitted that the 3rd Defendant was under an obligation to disclose the same and if it had done so the application would have been disallowed. Learned counsel relied on **Mwalimu Nzau Mwalyo vs. Joseph Weru & 3 Others Nairobi HCCC No. 1249 of 2005**.

7. It was submitted that the wording of Order 42 rule 6 of the ***Civil Procedure Rules*** under which the 3rd Defendant came to court contemplates the existence of decree or order and to the extent that there was none the ex parte orders granted herein cannot stand and the same ought to be expunged from the record and the application be dismissed.

8. On behalf of the 3rd Defendant, it was submitted by **Ms Ngugi** its learned counsel that there was a judgement delivered herein the execution of which the 3rd Defendant seeks to stay. She reiterated that when the application came before **Mr Justice Ogola**, all the material was disclosed. In her view the issue of non-disclosure is a matter of evidence which cannot be raised in a preliminary objection.

9. I have considered the application and submissions of counsel.

10. The first issue for determination is whether the issue of non-disclosure was properly taken in these proceedings. **Ms Ngugi's** contention that the same could not be properly taken in these proceeding was premised on the understanding that what was before the Court was a preliminary objection. However, as indicated at the beginning of this ruling what was before the Court was in fact a formal application. In the premises the issue of non-disclosure of material facts could properly be taken in the application.

11. It is not in doubt that no decree has as yet been extracted in these proceedings and no final decree could be extracted. What this Court granted was a preliminary decree as defined in section 2 of the ***Civil Procedure Act***. In **Commercial Bank of Africa vs. Lalji Karsan Rabadia & Others NRB High Court (Commercial and Admiralty Division) Civil Case No. 109 of 2011**, this Court held as follows:

> **"Both the words "decree" and "order" are defined under Section 2 of the Civil Procedure Act. Under the said section "decree" means "the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final". "Order" on the other hand means "the formal expression of any decision of a court which is not a decree". What comes out clearly from the ruling in question is that the suit herein has not been finally determined. However, certain issues have already been determined, of course subject to any appeal that may be preferred against the decision. Ordinarily a determination giving rise to summary judgement as prayed in the plaint results into a decree. In this instance, however, part of the claim is yet to be determined. Accordingly, the ruling the subject matter of this decision cannot be said to have been a final decision in this suit. One may therefore be tempted to argue that in the circumstances, it must have been a preliminary decree. However, under the said section "a decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final". Whereas it is true that further proceedings have to be taken before the suit herein can be completely disposed of, the decision arising from the application for summary judgement, in my considered view is not wholly a preliminary decree. As is stated in INDIAN CIVIL PROCEDURE CODE 13TH EDN. PAGE 12 BY MULLA:**
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> > **"A preliminary decree is one, which declares the rights and liabilities of the parties leaving the actual result to be worked out in further proceedings. Then as a result of the further enquiries conducted pursuant to the preliminary decree, the rights of the parties are finally determined and a decree is passed in accordance with such**

determination".

12. Similarly, in this case the actual result of the judgement in terms of how much, if any, the parties are entitled to, are yet to be worked out. Strictly speaking therefore the only document which can be extracted from the judgement is a preliminary decree and that preliminary decree is not capable of being executed without further steps being taken as directed in the judgement.

13. That then leads to the issue whether the Court can grant a stay of execution under Order 42 rule 6(1) of the ***Civil Procedure Rules*** before the decree or order is extracted. The said provision provides as follows:

> ***No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.***

14. In **PKA vs. MSA Civil Application No. 285 of 2009 [2009] KLR 744**, **Aganyanya, JA** expressed the belief that as no decree had been drawn in the matter, the Court could not stay the superior court judgement unless there was an impending danger which called for such stay on an interim basis. Similarly in **The Public Trustee vs. Mary Achitsa Litswa Kisumu High Court Civil Appeal No. 8 of 2003** **Tanui, J** dismissed an application seeking stay of execution of a decree on the ground that the application was premature as no decree had been drawn by the time of the application. This position was also taken by **Ringera, J** (as he then was) in **Sankale Ole Kantai T/A Kantai & Co. Advocates vs. John Nganga Njenga Nairobi (Milimani) HCCC No. 102 of 2001**, where he held that an application brought under Order 21 Rule 22 for stay of execution before the decree was extracted was premature.

15. In the premises I do not see the need to deal with the issue of non-disclosure since in my view, non-disclosure only entitles the Court to set aside or vacate the orders granted by the Court as a result of the said non-disclosure and as the application has been struck out in its entirety, there is no need to vacate the *ex parte* orders granted herein.

16. I however wish to remind the parties of the holding by the Court of Appeal on the subject in **Bahadurali Ebrahim Shamji vs. Al Noor Jamal & 2 Others Civil Appeal No. 210 of 1997** where the Court of Appeal stated:

> **"It is perfectly well-settled that a person who makes an ex parte application to the court – that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained. It has been for many years the rule of court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an *ex parte* statement he should make a full and fair disclosure of all the material facts – facts, not law. He must not misstate the law if he can help it – the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement…In considering whether or not there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to include; (i) The duty of the applicant is to make full and fair disclosure of the material facts. (ii) The**

material facts are those which it is material for the judge to know in dealing with the application made; materiality is to be decided by the court and not the assessment of the applicant or his legal advisers. (iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made sufficient inquiries. (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which the application is made and the probable effect of the order on the defendant, and (c) the degree of legitimate urgency and the time available for the making of the inquiries. (v) If material non-disclosure is established the court will be astute to ensure that a plaintiff who obtains an ex parte injunction without full disclosure is deprived of any advantage by that breach of duty. (vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge in the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented. (vii) Finally, it is not every omission that the injunction will be automatically discharged. A *locus pentitentiae* (chance of repentance) may sometimes be afforded. The Court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to make a new order on terms: when the whole of the facts, including that of the original non-disclosure, are before it, the court may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed… In the instant case the so-called material facts repeatedly alleged to have been either suppressed, concealed or not disclosed by the respondents are only two pending applications which were never heard nor determined by the superior court. It is submitted that the court was consequently misled but the court cannot understand how this could be so…It is accepted that in cases of ex parte proceedings there must be full and frank disclosure to the court of all material facts known to the applicant but in the instant case everything was in the court record and was available to the learned judge for perusal. There was no deliberate concealment on the part of the respondents. Both the applications were on record and the notice of discontinuance accompanying the latest application clearly showed what applications were being discontinued and they were not in any sense misleading. Granted that the respondents did not inform the learned Judge of the pending applications, the issue is: were the material facts those, which it was material for the learned judge to know in dealing with the application as, made? The answer to this must be in the negative since the learned Judge was satisfied that the pending applications did not preclude him from doing justice to the parties especially in that the applications and the suit had not been heard on merit. He was also concerned that injury to the respondents, which could not be compensated for damages, could be occasioned by a delay. This mode of approach to the matter before him cannot be faulted".

17. Based on the authorities cited above it is my holding that a clear reading of Order 42 rule 6(1) of the ***Civil Procedure Rules*** contemplates the existence of an order or decree without which a stay of execution under the said provision may not be granted. Accordingly, I find that the application dated 6th May, 2014 is premature and the same is struck out with costs to the plaintiff.

Dated at Nairobi this day 24th day of June 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ng'ang'a for the Plaintiff

Mr Mwakio for Mr Kabugu for the 1st Defendant

Mr Kiche for Mr Ohaga for the 2nd Defendant

Cc Kevin