



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 458 of 2011

KHILNA ENTERPRISES LIMITEDPLAINTIFF

VERSUS

FINA BANK LIMITEDDEFENDANT

RULING

1. On 8th June, 2012, this Court ordered the Plaintiff to pay Kshs.7,649,330/30 as security for the costs of the Defendant within 30 days. The Plaintiff did not and has not complied with that order. That prompted the Defendant to take out a motion on notice on 14th February, 2013 under order 26 Rule 5(1) seeking the dismissal of the suit for failure to give the security ordered. That application was supported by the Affidavit of Zachary Muturi Muchai sworn on 11th February, 2013.

2. It was submitted for the Defendant that the Plaintiff was aware of the order as it had on 20th June, 2012 filed and served a Notice of Appeal against the order, that a letter bespeaking proceedings had not been copied to the Defendant's Advocates, that as a result therefore the time for filing an appeal has expired. It was further submitted that the Plaintiff had not applied to stay the order and that it was no defence that the amount of costs ordered was excessive. The Defendant urged that the application be allowed.

3. The Plaintiff opposed the application by filing a Replying Affidavit of Milan Jayendra Malde. It was contended by the Plaintiff that the Plaintiff was aggrieved by the order of this court of 8th June, 2012 and did file a Notice of Appeal on 15th June, 2012 intending to appeal against the said order. That the Plaintiff applied for copies of proceedings which have not been supplied to enable it lodge the appeal, that the costs ordered were too high and the Plaintiff was therefore unable to pay the same, that dismissing the suit will render the suit nugatory thereby subject the Plaintiff to injustice, that the Plaintiff had a bona fide claim. The Plaintiff urged that the application be dismissed.

4. That I have considered the Affidavit on record and the submission of Counsel. It is not denied that the

Plaintiff was aware of the order to provide the security ordered. It is also not denied that the Plaintiff has not complied with that order. The reason given for non-compliance is that the Plaintiff has filed a Notice of appeal in the Court of Appeal envisaging an intention to appeal against the said order and that the amount of security for costs ordered was excessive.

5. On the issue of the filing of a Notice of appeal, it is trite law that the filing of a Notice of Appeal or the substantive appeal perse is not a stay of execution of an order. A party who wishes to stay an order must apply under the relevant provisions of the law for the stay of such an order. The Plaintiff did not and has to date not applied to stay the order of 8th June, 2012. No reason has been given for the delay or failure to apply for such a stay.

6. In any event, it was submitted by Mr. Njoroge, learned counsel for the Defendant that the time for filing an appeal had long expired thereby making the Notice of Appeal superfluous. I have seen the letter dated 10th June, 2012 by the Plaintiff's Advocates. That letter is not copied to the Defendant's advocates. Under Rule 82 of the Court of Appeal Rules, an appeal in the Court of Appeal should be lodged within sixty (60) days from the date of lodging the Notice of Appeal. The time for preparation of the typed copies of the proceedings and ruling can only be excluded under Rule 82 (2) if the letter bespeaking proceedings is served upon the Respondent. Since Mr. Njoroge submitted that the letter of 10th June, 2012 was not served upon his firm which was not denied, then it is obvious that the time for filing an appeal by the Plaintiff against the order of 8th June, 2012 must have expired on or about 15th August, 2012 in terms of Rule 82 of the Court of Appeal Rules. In view of this, the Plaintiff's argument that to dismiss the suit the intended appeal will be rendered nugatory becomes a cropper. That is presumptuous that the Court of Appeal will extend the time for the Plaintiff to file the alleged appeal out of time! The delay from August, 2012 to February, 2013 to me seems inordinate.

7. The other issues is the contention that the sum of Kshs.7,649,333/30 ordered to be deposited as security was excessive. There are three reasons that militate against this ground. Firstly, the Plaintiff has not demonstrated with any acceptable evidence that the amount was excessive in the circumstances of this case. Secondly, the Plaintiff has not shown whether it sought or attempted to comply with the order and it was unable. Finally, if the Plaintiff had felt that the amount ordered was excessive as it alleges, why did the Plaintiff not apply to have the sum reduced? No explanation has been offered for such a failure. To my mind therefore, this is only an excuse not to comply with the order.

8. Under Order 26 Rule 5(1) of the Civil Procedure Rules, where a party fails to provide the security ordered within time, the sanction is to dismiss the suit. This is if the party is not allowed to withdraw the suit. In this case, no security was given as ordered. The Plaintiff has not applied to withdraw the suit. However, in order not to unseat the Plaintiff from the seat of judgment I am inclined to grant the Plaintiff one more time to comply. The order that commends itself to make in the circumstances is to exercise this courts discretion and extend the time for compliance. I accordingly direct that the Plaintiff is granted seven (7) more days from the date hereof to give security for the costs of the Defendant in the sum of Kshs.7,649,333/30 in default whereof the suit **shall stand dismissed** with costs without the necessity of making any application to that effect.

Orders accordingly.

DATED and DELIVERED at Nairobi this 19th day of April, 2013

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A. MABEYA

JUDGE