



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL SUIT 294 OF 2012

ERDEMANN PROPERTY LIMITED PLAINTIFF

VERSUS

THE REGISTERED TRUSTEES OF THE KENYA

RAILWAYS STAFF RETIREMENT BENEFIT SCHEME.....1ST DEFENDANT

KENYA RAILWAYS CORPORATION.....2ND DEFENDANT

R U L I N G

On 8th June, 2012, when the court had delivered a ruling on the 2nd Defendant's application to set aside *ex parte* orders made herein on 23rd May, 2012, the Plaintiff orally applied for leave to amend the Notice of Motion dated 23/5/12. The Defendants objected to the oral application and insisted that the Plaintiff do make a formal application.

Accordingly, the court granted leave to the Plaintiff in the following terms:-

“In view of the objections of the Defendants, let the Plaintiff make a formal application for leave to amend.”

The Plaintiff filed that application and on 13th June, 2012 this court after being satisfied that it was urgent issued a certificate to that effect and gave today's date for the hearing thereof. The Defendants have failed to respond to the same on various grounds:-

- (1) That the Defendants were excused from responding to the Plaintiff's case.
- (2) That the 1st Defendant's application dated 4th June, 2012 should take precedent to the Plaintiff's application.
- (3) That Section 6(2) of the Arbitration Act dictates that no further proceedings are to take place after an application for stay has been filed under that Section.

(4) That Mr. Miller, learned Counsel for the 2nd Defendant left the country on 19th June, 2012 and will be back on 26/6/12.

The Defendants have therefore urged that the Motion which was listed for hearing today be adjourned to another date after the 28th June, 2012 when the 1st Defendant's application of 4th June, 2012 is listed for hearing.

I have considered the Defendant's submissions and the Plaintiff's response. I have perused the record of 8th June, 2012. I am satisfied that the Defendants having then insisted that the Plaintiff make a formal application an order was made to that effect and the Plaintiff has complied. When the Plaintiff appeared before the court, on 13th June, 2012 the court was convinced that the said application was urgent and should be heard at once. The Court was alive to the orders made on 8/6/12. Nowhere in the order of 8/6/12 did the court direct that no other application should be heard before the 1st Defendant's application that is coming up for hearing on 28/6/12 is heard. The application that was to await the first Defendant's application was the main motion of 23/5/12 because of the nature of the orders it sought and not the application which the court clearly gave leave to be filed by the Plaintiff.

I have also confirmed from the record that the court did excuse the Defendants from delivering **“any pleadings and that no judgment should be requested.”** That order was made to protect the Defendants from being required to deliver their defences lest judgment was requested and entered for a whooping sum of Kshs. 26billion and/or the 1st Defendant's application dated 4th June, 2012 defeated by their delivering a pleading. To my mind, that order did not excuse the Defendants from responding to an application that they had asked the court to order the Plaintiff make formally. For the reasons, I reject the contention that the Defendants were excused from responding to the Motion dated 12/6/12 which the court had certified as urgent and imposed a date of today for hearing.

As regards Section 6(2) of the Arbitration Act, it is true that the said provision bars any further proceedings once an application for stay has been made. However, it should be noted that the summons dated 4/6/12 was filed on the same day. On that day, the 2nd Defendant's application dated 30th May, 2012 was proceeded with in the presence of Counsel for the 1st Defendant and a ruling thereof delivered on 8th June, 2012. Further, certain orders were made on 8/6/12 which touched on these proceedings with the participation of and/or connivance of the 1st Defendant. It cannot therefore lie in the mouth of the 1st Defendant to state that the hearing of an application that seeks, inter alia, to amend the Plaintiffs motion and bring the same perfectly within the parameters of the Arbitration Act (See the alternative Prayer 8 of the proposed amendment) to be an affront to the said Section 6(2) of the Arbitration Act.

Further, I am persuaded by the submissions of the Plaintiff that the purpose of litigation is to do justice to the parties and that Sections 1A and 1B of the Civil Procedure Act do supercede Section 6(2) of the Arbitration Act for two (2) reasons. Firstly, these sections are later in time having been enacted by Act No. 6 of 2009 whilst Section 6 (2) was enacted in 1995.

Secondly, when the Arbitration Act, 1995 was being revised by Act No. 11 of 2009, that Section 6(2) of the Arbitration Act was never amended to supercede all other provisions of the law. If that were the case, parliament would have used the words in that Section to the effect that:-

“Notwithstanding any other provision of the law”

Further, Sections 1A and 1B enjoin the court to do justice to the parties before it. Technicalities are not encouraged when seeking to do justice. The interests all the parties before the court must be put and be weighed in the scales of justice and a balance struck. That is what the Court of Appeal decreed in the case of **E. Muiru Kamau and Another –vs- National Bank of Kenya Ltd (2009) e KLR**, when it observed that:-

“Some of the principle aims of the overriding objective include the need to act justly in every situation; and the need to have regard to the principle of proportionality and the need to create a level playing

ground for all the parties coming before the courts by ensuring that the principle of equality of all is maintained and that as far as it is practicable to place the parties on equal footing.” (Emphasis mine)

How do the Court keep the parties in equal footing if any one of them is barred from putting forward its case as best and fully as it can? For the foregoing reasons, I am convinced that hearing the Plaintiff’s Motion of 12th June, 2012 will not be breaching Section 6(2) of the Arbitration Act as is suggested by the 1st Defendant.

In any event, one of the cardinal principles of interpretation of statutes is that the Court should interpret statutes as widely as possible with a view to protect the interests and enhance the rights of the subjects and not to stifle them. Indeed that is a constitutional requirement. I cannot interpret Section 6(2) so narrowly as to unseat either the Plaintiff or any of the Defendants from the seat of justice.

In my view therefore, hearing the application of 12/6/12 will not in any way whatsoever be a breach of Section 6(2) of the Arbitration Act.

As regards the absence of Mr. Miller from the jurisdiction, it has not been denied that he was served with the application well before the 19th June, 2012 when he travelled. It is also not denied that there are 14 other lawyers in that law firm. Neither he nor any of the Advocates in the said law firm has responded to the said application. The Plaintiff is entitled to be heard on its application *ex parte*.

Looking at the application of the Defendants generally, I am inclined to echo the words of Kuloba J, as he then was in the case of **Savanna Development Co. Ltd –vs- Mercantile Finance Company Ltd (1992) 1 KLR 463** wherein he stated at page 462 thus:-

“On first principle, adjournment is only granted on the most compelling of reasons laid bare for anyone to see, that indeed adjournment is called for, given the circumstances of the particular case. This is a principle always acted upon, and for good reason. It is in the interests of justice that litigation must be got on with at a reasonable speed – reasonable expedition, the wise say: not too quickly; not too slowly. In the administration of civil justice proceeding at break-neck speed may work injustice in some cases; so may tardiness. Unreasonable haste aborts justice. Proceedings sluggishly fossilizes it. Has it not come down to us through the ages from men of old and wisdom, that justice delayed is justice denied?”

There are no compelling reasons that have been advanced to allow the adjournment. My view is that the Defendants are not genuine in this sought matter. Accordingly, I reject the Defendant’s reasons for the adjournment sought.

However, as earlier on stated justice cuts both ways. Parties who come before the court must be given a full hearing before their rights are determined. Summary dismissal and/or determination of people’s contention and/or rights is not to be encouraged. I am therefore inclined to give the Defendants a chance to place before this court any material in their possession in response to the Plaintiff’s application dated 12/6/12.

Accordingly, I direct that the Defendants do file and serve their respective documents in answer to that application, if any, before 26th June, 2012. That application will now be heard on 27th June, 2012.

The Defendants to pay the Plaintiff’s costs of today and court adjournment fees before 26th June, 2012.

Orders accordingly.

DATED and **delivered** at Nairobi this 21st day of June, 2012.

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A. MABEYA

JUDGE