



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

Civil Case 2463 of 1996

REUBEN INDIATSI

NASIBI.....PLAINTIFF

VERSUS

ALFRED MACHAYO.....1ST
DEFENDANT

HON. ATTORNEY GENERAL.....2ND
DEFENDANT

ECOBANK KENYA LIMITED.....3RD
DEFENDANT

RULING

The genesis of the application the subject of this ruling is the ruling dated 20th March 2007 by the **Hon. Mr. Justice Osiemo**, in which the learned Judge granted a stay of execution of the Judgement and orders of the **Hon. Mr. Justice Ransley** dated 20th February 2006 pending the hearing and determination of the intended appeal on condition that the rent collected be deposited in an interest earning Bank Account to be opened in joint names of counsel for the Plaintiff and the defendant.

The application is brought by way of a Notice of Motion dated 18th January 2011 and is expressed to be brought under the provisions of Section 1A, 1B and 3A of the Civil Procedure Act as well as Order 51 rule 1 of the Civil Procedure Rules. By that application the Plaintiff/applicant seeks the following orders:

1. This application be certified as urgent and be heard ex parte in the first instance.
2. Pending hearing and determination of this application, the 3rd defendant herein, Eco Bank limited be ordered not to release the funds already held in or to be held in Account No. CA-06-30000178; S.K. Ritho & Co Advocates & Kamau Kuria & Co. Advocates at its West Minister Branch, Nairobi.
3. This Court be pleased to set aside and discharge its stay orders made on 20th March, 2007.

4. The 3rd defendant herein, Eco Bank Limited be ordered to release all the funds already held in or to be held in Account No. CA-06-30000178; S.K. Ritho & Co. Advocates & Kamau Kuria & Co. Advocates at its West Minsiter Branch, Nairobi to the plaintiff/Applicant herein.

5. Costs of this application.

The application is supported by an affidavit sworn by **Reuben Indiatsi Nasibi** on 16th January 2012. According to the applicant following the delivery of the aforesaid ruling granting stay all preparations were made towards the facilitation of the opening of the joint account and to this end his advocates executed the necessary documents and supplied all the necessary information to the respondent's advocates. However, subsequent requests by the applicant's advocates to be supplied with information relating to the said account as well as bank statements were not responded to and their attempts to access the same were denied on the ground that they were not signatories to the said account. On seeking explanation from the respondent's advocates, the applicant's advocates were furnished with a statement whose only recipient was the former. According to the applicant by the time of the judgement the monthly rentals accruing from the suit premises was Kshs. 25,000.00 which sum, the applicant deposes, does not seem, from the statements, to have been regularly deposited. The applicant was, however, able to establish from the tenant **Dr. Osundwa** that he used to pay the said rents into the 1st defendant's wife's account at Barclays Bank. It is further deposed that although judgement was made on 20th February 2006 and a notice of appeal filed on 26th February 2006, no appeal has been lodged six years down the line which delay, the applicant contends, has greatly prejudiced him as he has been deprived of the fruits of the judgement for all this time. Accordingly, the applicant believes that 1st defendant is not interested in the appeal hence the orders sought herein.

In opposing the application, the 3rd respondent filed a replying affidavit on 30th April 2012 through **Paul Kinyanjui Ndungu**, the 3rd respondent's Head, Legal & Company Secretary. According to the deponent, the application as against the 3rd defendant, hereinafter referred to as the Bank, is misconceived, a blatant abuse of the court process, is incompetent and should be struck out with costs to the Bank. The deponent deposes that the firms of **Kamau Kuria & Kiraitu Advocates** (for the plaintiff) and **S K Ritho & Company Advocates** (for the 1st Defendant) opened account number CA 06-30000178 with the Bank, then known as EABS Bank Ltd, with the designated signatory for the latter firm. However, attempts to secure the signatory for the former firm did not elicit any response and in the absence of the same, the Bank was unable to transact the account save on the basis of the availed signatory. Despite being urged to go to the Bank and regularise the situation, the deponent contends, the applicant's advocates did not comply. It is the Bank's position that the application should be dismissed with costs to the Bank and that it be discharged from these proceedings. The Bank also filed a notice of preliminary objection dated 30th April 2012 in which it raised the following issues which issues were agreed to be canvassed in the application:

- 1. Ecobank Kenya Limited is neither a Defendant nor a Plaintiff in this suit and no application has been made or orders granted to join Ecobank Kenya Limited as a party to this suit prior to make the Application or at all.**
- 2. In the premises, Ecobank Kenya Limited is non-suited and the Plaintiff's Application as against Ecobank Kenya Limited is an abuse of the court process and incompetent and the same should be struck out with costs to Ecobank Kenya Limited.**

On its part the 1st respondent was content to rely on the following grounds of opposition:

- 1. The application is frivolous, vexatious and has no merits**
- 2. The application is based on grounds that are not factual and untruths.**
- 3. The application is baseless and the grounds cited are untenable.**

4. The application is an abuse of Court process and is unsustainable under the law.

In his submissions in support of the application, **Mr. Gacheru**, learned counsel for the applicant, while reiterating the contents of the supporting affidavit, stated that the account was opened in the names of **S K Ritho** and **Kamau Kuria Advocates** which latter names is not the names of the applicant's firm of advocates. On looking at the statement furnished, it is submitted, the rents for the last 6 months prior to the present application was missing, an indication that the 1st defendant has not been depositing full rents into the said account. According to counsel, out of Kshs. 25,000.00 monthly rental that was being paid only Kshs. 23,000.00 was going to the account. According to counsel these averments have not been controverted by the 1st defendant. It is further submitted that the delay in filing the appeal goes contrary to the overriding objective stipulated in sections 1A and 1B of the Civil Procedure Act with respect to speedy resolution of disputes. Accordingly, counsel submitted that in order to enable the applicant enjoy the fruits of his judgement the application ought to be allowed.

On his part, **Mr. Kanyangi**, learned counsel for the 1st defendant submitted that the reason the 1st defendant did not file any replying affidavit is because they intended to fully rely on the applicant's annexures. While admitting that there might have been an omission of the name "**Kiraitu**" in the account name, counsel submitted that it is clear that the account is in the names of both firms of advocates. Counsel submitted that the money has been consistently going into the said account without withdrawal save for ledger fees and bank charges and the sum in the Bank now stands at Kshs. 464,000.00. According to counsel the omission to include the applicant's advocates as signatories was occasioned by the failure by the latter to furnish their documents. With respect to the delay in instituting the appeal it is submitted that the proceedings are still awaited. If the stay is vacated, counsel submits, the 1st defendant will suffer loss and damage. Instead of vacating the orders of stay, counsel opines, the applicant's advocates should instead furnish the particulars so as to be made signatories to the account. Further, it is submitted by counsel that the grant of the orders sought will be in vain since the firm in question was a sole proprietorship whose proprietor is away in the United Kingdom and is unable to come and release the money.

On behalf of the Bank **Mr. Okwiri**, while reiterating the contents of the replying affidavit, submitted that, from the time of institution of the suit till judgement, the Bank was never a party to the proceedings. Further no application was made to join the Bank to the proceedings and therefore its sudden joinder was out of the blue. Accordingly, it is submitted that no orders can be made against the Bank. As the orders sought are discretionary, it is submitted that a party who has abused the Court process is undeserving of the same. According to the Bank the application deserves dismissal.

In a rejoinder, **Mr. Gacheru**, submitted that as the orders sought are discretionary, they cannot be the subject of a preliminary objection. While admitting that the Bank is not a party to these proceedings, counsel submitted that since there is no suit pending, Order 1 of the Civil Procedure Rules is inapplicable. The reason for bringing the Bank on board, it is submitted, is due to the fact that the orders sought in the application may affect the Bank since it admitted opening a joint account without obtaining the necessary documentation. It is further submitted that the documents which were sought were duly submitted.

I have now considered the foregoing. It is not in doubt that the conditions for grant of stay of execution were not complied with to the letter. The 1st respondent blames the applicant for not co-operating in the opening of the joint account as ordered. The applicant on the other hand contends that he submitted all the relevant documents to facilitate the opening of the said account. Whereas the applicant has sworn an affidavit in support of the application the 1st respondent has chosen to rely on grounds of opposition with the result that the averments contained in the supporting affidavit are not controverted. Accordingly, the averment that the rentals were being banked in the 1st respondent's wife's Bank account as well as the contention that the sum that was being deposited was less than the actual amount that was meant to be deposited, largely remained uncontroverted. To compound the issue the account name is not even in the full names of the applicant's firm of advocates. The 1st respondent's contention that the account was opened without making the applicant's advocate signatory due to lack of co-operation, in my view does not hold. Whereas that would have been a valid ground for obtaining an order for review of the said

orders, that cannot be a ground for failure to comply with the conditions for stay. I cannot do better than quote **Koome, J** (as she then was) in **Machrose Limited vs. Bank Of Baroda Limited & Another Nairobi (Milimani) HCCC No. 439 of 2006 (OS)** where the learned Judge expressed herself as follows:

“The plaintiff had a duty to ensure there was compliance with the court order and there is no material before the court to show the plaintiff instructed his former advocates to pay the sum ordered. It was not the advocates who were ordered to pay but the plaintiff who should have complied or sought an extension of the time if there were difficulties...The present advocates were also obliged to advise their client to comply with the court order. The plaintiff is asking the court to extend time but have not filed any application seeking for extension of time or variation of the order. It was not proper for the plaintiff to sit and piggyback on the 1st defendant’s application and to apply for the extension of time in the course of the reply. The conduct of the plaintiff is not deserving of the exercise of the court’s discretion. The court exercised its discretion and the plaintiff who had not prosecuted his suit was given an opportunity which was on conditions. It therefore follows that failure to comply with the conditions set out by the Judge the suit stood dismissed. There is no justifiable reason why the plaintiff should benefit from another exercise of the court’s discretion which would amount to a reward for failure to obey a court order. Court orders must be obeyed in order to protect the dignity of the court and the rule of law”.

In the present case, judgement having been given against the 1st respondent, the Court, in appreciation of the 1st respondent’s right to appeal, suspended the realisation of the judgement on conditions. If the said conditions were for any reason incapable of being complied with in the manner directed by the Court, the prudent thing was for the 1st respondent to seek assistance from the court instead of proceeding in a manner other than the one contemplated by the Court. By so doing the respondent took a big gamble and as happens in lottery when you gamble, sometimes you win and sometimes you loose.

The other issue is that for the last six or so years the 1st respondent has been baby-sitting his notice of appeal without taking steps to ensure that the appeal is lodged. Whereas the 1st respondent contends that the proceedings are yet to be supplied, there is no indication of the steps taken by the 1st respondent to expedite the process. In the absence of such evidence one cannot help agreeing with the applicant that the 1st respondent has no interest in pursuing the appeal. Where a party has been granted an indulgence in form of a stay of execution in order to enable him pursue an appeal, it behoves him to take all the necessary steps to ensure that the said appeal is expedited. He should not just sit back and twiddle his thumbs under the pretext that he is awaiting proceedings. The exercise of judicial discretion in favour of a party places a corresponding duty on the party to avoid abuse of the said orders. Under section 1A(1) of the Civil Procedure Act the overriding objective of this Act and the rules made under the Act is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act while subrule (3) thereof enjoins a party to civil proceedings or an advocate for such a party to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court. In **Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. Nai. 6 of 2010** the Court of Appeal dealing with the said objective stated *inter alia* as follows:

“the applicant cannot be allowed to invoke the “O2 principle” and at the same time abuse it at will...All provisions and rules in the relevant Acts must be “O2” compliant because they exist for no other purpose. The “O2 principle” poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In the court’s view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day. If improperly invoked, the “O2 principle” could easily become an unruly horse and therefore while the enactment of the “double O” principle is a reflection of the central importance the court must attach to case management in the administration of justice, in exercising the power

to give effect to the principle, it must do so judicially and with proper and explicable factual foundation. The overriding principle will no doubt serve us well but it is important to point out that it is not going to be a panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained”.

In arriving at my decision I associate myself with the decision in **Safaricom Limited vs. Ocean View Beach Hotel Limited & 2 Others Civil Application No. 327 of 2009** in which the Court expressed itself thus:

“The overriding objective is so called because depending on the facts of each case, and the circumstances, it overrides provisions and rules which might hinder its operation and therefore prevent the court from acting justly now and not tomorrow”.

To extend the lifespan of the stay granted herein where there is lack of evidence of diligence on the part of the 1st respondent would in my view hinder the attainment of justice in the circumstances of this case. In this case, therefore, it is clear that the 1st respondent and/or his advocate have utterly disregarded the said objective. To invoke the overriding objective in these circumstances in order to sustain the conditional stay granted would, in my view, be tantamount to abusing the said objective at will. To the contrary the objective should be invoked to enable the applicant enjoy his fruits of judgement now and not tomorrow since he has waited long enough.

Accordingly, I find merit in the Notice of Motion dated 18th January 2011. Whereas it is true that the Bank was not and has never been a party to these proceedings, the Bank’s conduct in opening an account before securing all the necessary documentation does not augur very well in its favour. Accordingly, whereas ordinarily orders should not be made against non-parties to the suit, in cases where a person conducts himself in a manner that brings his *bona fides* into question, he has himself to blame if he finds himself in unfamiliar territory.

Since in this case the 1st respondent’s position is that he is unable to comply with the orders sought the presence of the Bank in these proceedings becomes necessary in order for the orders of the court to be realized and any procedural mis-steps with respect to its joinder is curable under Article 159(2)(d) of the constitution.

In the result the orders of stay made herein on 20th March 2007 are set aside and the stay discharged. The Bank is ordered to release all the funds already held in or to be held in Account No. CA-06-30000178 in the name of **S K Ritho & Co. Advocates & Kamau Kuria & Company Advocates** at its Westminster Branch, Nairobi to the applicant. The costs of this application shall be borne by the 1st respondent.

Ruling read, signed and delivered in Court this 27th day of July 2012

G.V. ODUNGA

JUDGE

In the presence of:

Mr Gacheru for the Applicant

Mr Guyu for the 3rd Respondent