



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

COMMERCIAL & TAX DIVISION – MILIMANI
CIVIL CASE NO. 18 OF 2009

SUISSE LTD.....1ST PLAINTIFF
MONDO PROPERTIES LTD.....2ND PLAINTIFF

VERSUS

HABIB BANK AG ZURICH..... DEFENDANT

RULING

On 9th July, 2010, the Plaintiffs herein were ordered, jointly and severally, to pay to the Defendant an admitted sum of Kshs.25, 863,438.93 within 30 days from that date, after which payment, an injunction was to issue pending the hearing and determination of this suit. In default of payment the order of injunction thus granted would lapse.

By this application, the Plaintiffs seek orders that the 30 day period of time within which to deposit the above sum of money be extended by a further 120 days, and that the cost of the application be in the cause. It is brought by a Notice of Motion taken out under Sections 3A and 95 of the Civil Procedure Act; Order XLIX Rule 5 of the Civil Procedure Rules, and all enabling provisions of the Law.

The application is supported by the annexed affidavit of Ngige Mondo, a Director of the Plaintiffs, sworn on 9th August, 2010. It is based on the grounds that –

- (1) The 30 day period of time granted by this court for the payment of Kshs 25,863,438.93 is too short for the Plaintiffs to comply therewith.**
- (2) The Plaintiffs, through a sister Company known as Kiri-ira Holding Ltd (KHL) are in the process of disposing of all that parcel of land known as L.R. No. Kajiado/Kitengela/2293 for a sum of Kshs. 47,500,000/-.**
- (3) It is noted within the said agreement between KHL and Namsi Ltd that part of the proceeds of the sale shall be applied towards the liquidation of the sum of Kshs 25,863,438.93.**
- (4) The completion date of the said agreement is 5/12/2001. The lengthy completion period was necessitated by the loss of the original title deed to L.R. No. Kajiado/Kitengela/2293.**

(5) It is in the interest of justice that the extension of time sought be granted to enable the Plaintiff to comply with the said court order.

(6) The Defendant will not be unduly prejudiced whatsoever by the extension of time sought.

The application is opposed by the annexed replying affidavit of Iqbal Allawalla, the Country Manager of the Defendant Bank, sworn on 16th August, 2010. In the said affidavit, Mr Allawala deposes that he is advised by his advocate and verily believes that the application is misconceived and an abuse of the process of the court. He also states that the Defendant is a Commercial Bank and that it stands to suffer prejudice if any more time is given to the Plaintiffs to pay. He further avers that the time within which the above sum of money ought to have been paid has already lapsed, and that the injunction in question had also lapsed. He therefore prays that the application be dismissed with costs.

At the hearing of the application Ms Kamende for the Applicant emphasized that all the Applicant needed was an extension of time to comply with the order, and that such a move does not dispense with the entire suit. She submitted that no miscarriage of justice would ensue if extension of time was granted as prayed. On her part, Ms Gikonyo for the Respondent submitted that the application was an eyewash which was not made in good faith and that it was made to revive the injunction which had already elapsed. She reiterated that the Defendant was a bank in business of loaning money to clients, and that when customers do not pay back the bank suffers in its business. She submitted that the applicants had no intention or ability of paying the money owed and had failed to make out a case for revival and reinstatement of the injunction. She therefore asked the court to dismiss the application with costs to the Respondent.

Having considered the application and the respective submissions of counsel, I note that the order by which the Applicant was required to pay the money to the Defendants to read as follows –

“I therefore order that the Plaintiffs jointly or severally shall pay to the Defendant the admitted sum of Kshs 25,863,438.93 within the next thirty (30) days from the date hereof upon which an injunction will issue as prayed pending the hearing and determination of this suit. In default of payment the order of injunction thus granted shall lapse.”

As observed earlier, this order was issued on 9th July, 2010. The anticipated payment ought to have been paid to the Defendant by 8th August, 2010. However, no such payment was made. Instead, the Applicants moved to court on 9th August, 2010 and filed this application seeking extension of time to pay. Against that background, two issues arise. The first one is whether the court has jurisdiction to extend time which has already elapsed. Order XLIX Rule 5 under which the application is made provides and instant answer. It states that **“where a limited time has been fixed for doing any act or taking any proceedings under this Rule... the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed...”**.

Although the time for the payment of the money had expired before the date this application was filed, nevertheless, this court has jurisdiction to extend that time in exercise of its powers under the above Rule.

The next issue is whether the injunction in question had lapsed. Again, it will be observed that the 30 day period ordered by the court expired on 8th August, 2010. This application was filed in court the following day. Whereas the life of the injunction technically expired on 8th August, 2010, in order to ensure that a technicality does not override substantive justice, I find that the justice of this case requires that the injunction be extended along with the time over which to effect the payment of the money ordered to be paid.

In my view, the extension envisaged in **Order XLIX Rule 5** should be reasonable. It should be long enough to facilitate the execution of that which the applicant intends to do, but short enough not to

prejudice the right of the Respondent. In the instant matter, the Applicant was granted 30 days within which to pay the requisite sum of money to the Defendant. In Paragraph 4 of the supporting affidavit, Mr Mondo deposes that **“a sale agreement has indeed been entered into between KHL and Namsi Ltd whose completion date is set for 5th December, 2010”**. In Paragraph 7 of the said affidavit, he further deposes that he **“can confidently confirm to this Honourable court that the Plaintiffs would be able to raise and pay the Kshs 25, 863, 438.93 on or before the completion date on 5th December, 2010.”** As of now, this would mean that the Applicant has been in possession of the requisite funds since 5th December, 2010, and therefore he does not need the 120 days prayed for. It also means that the Applicant is in a position to pay the money forthwith.

For the above reasons, I find that the Applicant does not need the 120 days from now because the money is already in its possession. I therefore direct that the applicant do pay the said Kshs 25,863,438.93 to the Defendant within 7 days from today upon which payment an injunction will issue pending the hearing and determination of this suit. In default of payment, the said order of injunction as granted shall automatically lapse.

The Applicant will pay the costs of this application in any event.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 17th day of February, 2011.

L NJAGI
JUDGE