



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 296 of 2006

CHURCH ROAD DEVELOPMENT CO. LTD. PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LTD1ST DEFENDANT

DAVID MUTUKU2ND DEFENDANT

SAMUEL NJIHIA3RD DEFENDANT

RULING

By an application dated 3rd November 2006, the plaintiff sought an injunction to restrain the defendants from entering onto or being on the suit property L. R. NO. 1870/IV/14, or managing it, or collecting rent from tenants who occupy the flats or offices thereon.

The plaintiff also wished to have the defendants restrained from selling, alienating or transferring the suit property to any person whatsoever.

When faced with that application, the defendants' first response was to raise a preliminary objection. Essentially, the defendants pointed to the fact that by an order dated 1st August 2006, this court had stayed this suit and proceedings until the plaintiff herein had first settled in full the costs in **Milimani HCCC No. 55 of 2005**.

The plaintiff did not challenge the factual basis of the preliminary objection, therefore, the court does accept the defendants contention that the plaintiff had not yet paid to the defendants, the costs of the earlier case, (HCCC No. 55 of 2005).

The question that arises for determination is whether notwithstanding the order of 1st August 2006, the plaintiff could be allowed to file and canvass the application dated 3rd November 2006, even though the plaintiff had not yet paid costs, as it had been ordered to do.

As far as the defendants were concerned, the order staying proceedings herein served to freeze the proceedings as at 1st August 2006. Therefore, the plaintiff ought not to be allowed to move the court with any application, subsequent to 1st August 2006, until and unless it could demonstrate that it had met the conditions set by the court.

Secondly, and in any event, the application dated 3rd November 2006 is said to be res judicata, in the light of the decisions by the Hon. Emukule J. and of the Court of Appeal.

In response, the plaintiff submitted that the preliminary objection was misconceived. It is their understanding that the object of an order for stay of proceedings is not to freeze the suit, but to require a party to perform actions as per the order of the court.

In that regard, the plaintiff submitted that where the court has power to stay proceedings under Section 6 of the Civil Procedure Act, interlocutory applications were not affected. In support of that contention, the plaintiff cited the following words from "**The Code of Civil Procedure**" by Sir Dishah Fardunji Mulla, at page 35;

"A stay order under this section does not take away the power of the Court in the stayed suit to make interlocutory orders, such as orders for a receiver or an injunction, or an attachment before judgement."

As the learned author of that text indicated, his interpretation was in relation to Section 13 of the Code of Civil Procedure of Calcutta, India. The wording of that section is largely similar to the provisions of section 6 of our Civil Procedure Act. But there is one significant distinction between the two statutory provisions.

Whereas the position obtaining in India was that;

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit"

the provision in Kenya is to the effect that;

"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding"

The distinction is that whereas in India, the stay appears to relate to the "suit", in Kenya the stay relates to the "suit or proceeding". That would probably explain Mulla's conclusion, that a stay order under Section 13 of the Calcutta Code of Civil Procedure does not take away the power of the court to make interlocutory orders, such as for an injunction.

But the plaintiff believes that even under our Civil Procedure Act, an order for stay relates only to the trial of the issues in dispute. In effect, the plaintiff says that for as long as they had not yet paid the costs of HCCC No. 55 of 2005, the plaintiff could only be stopped from proceeding with the trial. As far as they were concerned, the order for stay of proceedings could not be a bar to their moving the court for interlocutory reliefs.

Furthermore, the plaintiff pointed out that the defendants had not yet extracted the formal orders, out of the ruling dated 1st August 2006. Therefore, it was submitted that the defendants could not demonstrate that there was contempt when the plaintiff filed the application dated 3rd November 2006.

The plaintiff submitted that the construction that the court forbid any form of proceedings, short of a trial was manifestly wrong, as it was based on a wrong interpretation of the administration of justice. For that reason, the plaintiff invited the court to hold that interlocutory applications were allowed.

To my mind, if one contends that interlocutory applications could nonetheless be filed and prosecuted, even though there was an order for stay of proceedings, it is to suggest that such interlocutory applications were not proceedings.

Baron's "Dictionary of Legal Terms" 3rd Edition, defines proceedings as follows;

"1. The succession of events in the process of judicial action. 2. The form in which actions are to be brought and defended, the manner of intervening in suits, of conducting them; the mode of deciding them, of opposing and of executing."

In effect, by bringing the application for an interlocutory injunction, the plaintiff must be deemed to have brought about a process of judicial action. If the said application was to be canvassed, there would be proceedings.

"**Black's Law Dictionary**" defines 'stay of proceedings', in the manner following;

"The temporary suspension of the regular order of proceedings in a cause, by direction or order of the court, usually to await the action of one of the parties in regard to some omitted step or some act which the court has required him to perform as incidental to the suit; as where a non-resident plaintiff has been ruled to give security for costs. It is similar to an injunction with which a court freezes its proceedings at a particular point. It can be used to stop the prosecution altogether, or to hold up some phase of it, such as an execution about to be levied on a judgement."

Evidently, the scope of an order for the stay of proceedings is wide as it is varied. It could relate to a specific action, such as taxation or execution; and it could also relate to the prosecution of the suit altogether.

If the plaintiff here were to be allowed to urge its application for an interim injunction, it would have been allowed to undertake further proceedings within this suit. And as the court already ordered that there would be a stay of proceedings until the plaintiff pays the costs in HCCC NO. 55 of 2006, I do hereby uphold the preliminary objection. To hold otherwise would be to negate the orders of this court without either compliance with the conditions already set by the court or alternatively without the said order being reviewed, varied or discharged. That would not be right. Therefore, it is hereby reiterated that until the plaintiff pays the costs of HCCC No. 55 of 2005, it will not be permitted to undertake any further proceedings in this case. In other words, the plaintiff may not canvass its application dated 3rd November 2006.

However, whilst the said application remains frozen, I decline to strike it out. I think that the filing of the application, by itself, is not a proceeding.

Finally, the costs of the preliminary objection are awarded to the defendants in any event.

Dated and Delivered at Nairobi this 22nd day of January 2007.

FRED A. OCHIENG

JUDGE