



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)
CIVIL CASE 418 OF 2004

KWALITY CANDIES & SWEETS LTDPLAINTIFF

VERSUS

INDUSTRIAL DEVELOPMENT BANK LTD.....DEFENDANT

R U L I N G

The plaintiff is seeking an order for the enlargement of the orders made on 13th July 2006, so that the said orders may then subsist either until the hearing and determination of the Appeal, or alternatively for a further 7 months.

The court records show that on 13th July 2006 this court granted an injunction in favour of the plaintiff, for a period of ninety (90) days. However, that injunction was conditional upon the plaintiff paying KShs. 3,000,000/=, to the defendant within a period of seven (7) days.

According to the plaintiff, the court did allow them the ninety (90) days, for purposes of ensuring that their appeal was fixed for hearing. In the alternative, it is said that the plaintiff was to utilise the period for purposes of undertaking any such action as they contemplated before the Court of Appeal, with a view to ensuring that the said appeal was not rendered nugatory.

Having paid the sum of KShs. 3,000,000/=, the plaintiff says that they are now apprehensive that unless this court extended time, the appeal would be rendered nugatory.

It is for that reason that the plaintiff sought the extension of the 90 days' period. In the meantime the plaintiff asked the court to direct that pending the determination of the application herein, time should be deemed to have stopped running.

In answer to the application, the defendant first pointed out that this was one amongst a multiplicity of applications by the plaintiff, since the Hon. Emukule J. dismissed the plaintiff's injunction application, on 4.5.2005. It was the defendant's position that due to the said multiple applications by the plaintiff, it had not been possible for the defendant to enjoy the fruits of the orders made by the learned judge.

The defendant submitted that the court had allowed the plaintiff the period of 90 days, solely for the purposes of the plaintiff paying-off the outstanding debts, from the proceeds of sale of the plaintiff's other assets.

Therefore, the defendant feels that it was now an afterthought for the plaintiff to say that they wished to lodge an appeal.

The defendant also pointed out that the plaintiff's substantive application for an injunction pending appeal had been dismissed by the Hon. Ransley J., on 20th April 2006.

Therefore, it is the defendant's contention that the plaintiff cannot seek another injunction pending their intended appeal, to the Court of Appeal. I was thus urged by the defendant to make it clear to the plaintiff that litigation must come to an end.

A perusal of the court records revealed that on 4th May 2005 the Hon. Emukule J. held as follows;

“Being mindful therefore of the discretion conferred upon the Court of the above cited provisions, and being also mindful of the fact that the plaintiff did not approach the Court of Equity with clean hands, the plaintiff stopped payments of a cheque of KShs. 2.8 million to the Defendants, which they had no justifiable reasons to do, and being further mindful of the fact that the Plaintiff has enjoyed the benefit of an undertaking by the Defendant's counsel that the Defendant will not appoint a Receiver, since about 30.07.2004, that is a period of nearly nine (9) months, I would grant prayer No. 2 of the plaintiff's application dated 26th July 2004 subject to the qualification or modification that pending further orders of this court the orders shall be for a period of three (3) months from the date of this Ruling and not pending the hearing and determination of this Court.”

In order to have a better understanding of the orders, I believe that it is necessary to spell out herein, the particulars of the prayer No. 2, in the application dated 26th July 2004. The said prayer was in the following terms;

“2. THAT pending the hearing and determination of the suit herein:

- (a) The Defendant whether by itself, its officers, servants and/or agents be restrained from appointing any person or persons as receiver(s)/manager(s) of the plaintiff company.**
- (b) The Defendant whether by itself, its officers, servants and/or agents be restrained from advertising for sale, offering for sale, or in any other way attempting to sell the plaintiff's business or assets or any of them and any other assets charged to the Defendant.**
- (c) An account be taken of the plaintiff's loan accounts with the Defendant by a qualified accountant/auditor to be agreed upon between the parties to determine the exact indebtedness, if any of the plaintiff to the Defendant.**
- (d) Immediately upon payment by the plaintiff of the monies, if any, found to be due to the Defendant after the taking of accounts under prayer (c) above the Defendant do discharge and release all securities held by it in respect, of the plaintiff's loan accounts, to the plaintiff or as the plaintiff shall direct.**
- (e) The costs of this application be provided for.”**

It is clear that the Hon. Emukule J. did not dismiss the application, as asserted by the defendant. The record shows that the learned judge granted prayer (c) above, but with what he deemed as appropriate modification or qualification.

After that order, which was made on 4th May 2005, the plaintiff filed another application dated 8th July 2005. By that application they sought an enlargement of the interim orders until the hearing and determination of the suit.

In the alternative, the plaintiff sought an enlargement of the orders made on 5th May 2005, so as to

allow the plaintiff a period of 30 days within which the plaintiff would pay KShs. 2.8 million to the defendant.

In the reasoned ruling, the Hon. Njagi J. allowed the plaintiff a period of 7 days, from 25th November 2005, to pay KShs. 2.8 million. He also extended the other orders which had been delivered on 4th May 2005, for a further period of 3 months. In doing so, the learned judge expressly said;

“Hopefully, by the end of that period, the parties will have completed the pursuit of orders 2 (c) and (d) on accounts and put behind the threat of the appointment of receivers/managers.”

Thereafter, the plaintiff brought yet another application; this time the said application was dated 9th March 2006. Through that application, the plaintiffs sought to restrain the two gentlemen who had been appointed as the receiver/managers of the company. They also sought the variation and setting aside of the orders made by the Hon. Emukule J. on 4th May 2005.

When the Hon. Ransley J. delivered his Ruling on 20th April 2006, he dismissed the application dated 9th March 2006.

It is instructive to note that the learned judge made the following findings;

“Leaving aside the fact that the Applicant had already been given a great deal of indulgence by the court, the Applicant seeks to rely on an agreement which has not been implemented in accordance with the terms thereof. It is clear that the agreement for the sale of the Muthaiga property is a long way of completion, if ever. Also the sale of the machinery, which is prayed in aid does not as yet exist. The Applicant does not deny that it owes money nor that the Respondent has a right to appoint a receiver, its only prayer is basically for more time. The order of Mr. Justice Emukule was given eleven months ago and yet no payment has been made since.

In my view, the Applicant has had enough time and there must be an end to prevarication.”

Those views were expressed some ten months ago. It is therefore no wonder that the defendant should urge me to tell the plaintiff that litigation must come to an end, at some point in time.

But, as far as the plaintiff was concerned, they had not yet come to the end of their applications to this court. On 4th May 2006, the plaintiff filed an application for either an injunction or for stay pending an appeal against the decision of the Hon. Ransley J.

It is in relation to that application that I delivered my ruling on 13th July 2006, restraining the defendant’s appointed receiver/managers from taking over the assets of the company for a period of 90 days, if the plaintiff paid KShs. three (3) million within 7 days.

In the body of the said ruling, I noted, inter alia, as follows;

“At the conclusion of his submissions, Mr. Simiyu advocate for the plaintiff, did inform the court that an injunction for three (3) months would suffice, for purposes of Patco Industries remitting payment to the defendant, and also for the purchaser of the Muthaiga Property too.”

After giving the consideration to the plaintiff’s application dated 3rd May 2006, I held as follows;

“In view of the possibility that I might not have fully appreciated the impact of the Receiver Managers taking charge of the plaintiff’s assets, I am prepared to grant to the plaintiff one last chance, to sell-off the necessary assets, so that they can thereafter pay off the defendant. For that reason alone, I do allow the plaintiff a period of ninety (90) days from today to pay-off the defendant’s debt.”

In my view, there can be no ambiguity about the reasons why the plaintiff was given the period of ninety (90) days from 13th July 2006. It certainly was not intended to allow the plaintiff time to lodge an appeal against the ruling which the Hon. Ransley J. delivered on 20th April 2006.

The orders made on 13th July 2006 were intended to provide the plaintiff time to dispose of some assets, and thereafter pay off the debts owed to the defendant. In that regard, the Hon. Ransley J. had earlier made a finding that pursuant to the plaintiff's own submissions, the outstanding debt was KShs. 38 million, as at 6th December 2005.

Given those circumstances, I find not justification for the plaintiff seeking an enlargement of the orders made on 13th July 2006.

Furthermore, I hold the view that this application is intended to result in the review of the orders in question, although it is camouflaged as one for enlargement of orders.

Accordingly, the application dated 31st October 2006 is dismissed with costs.

Dated and Delivered at Nairobi this 23rd day of day of February 2007.

FRED A. OCHIENG

JUDGE