



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MALINDI
Civil Case 37 of 2005

BEBA RESORT LTD PLAINTIFF

VERSUS

RELIANCE SRL

CORDSEN WOLFGANG DEFENDANTS

R U L I N G

By an application by way of Notice of Motion dated 6th September, 2006, pursuant to the provisions of Order L Rule 1 and XXIV Rules 6(1) and (2) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, and all other enabling provisions of the law, the applicant seeks orders:

- a. That this application be certified as urgent and be heard exparte in the first instance.*
- b. That execution of the orders given on 24.5.2007 be stayed pending the hearing and determination of the intended Appeal against the ruling and orders made on the said date.*
- c. That pending the hearing and final determination of this application a temporary stay of execution be granted the order made on 24.5.2007.*
- d. That costs of this application be provided for.*

The application is premised on the grounds that:

- 1. The defendants filed a Notice of Motion application dated 16.5.2007 on 17.5.2007 for stay of further proceedings in this suit. That application was on record before the plaintiff's Notice of Motion application for judgment was heard.*
- 2. The defendants' Notice of Motion application dated 16.5.2007 is fixed for hearing on 21.6.2007. That application seeks stay of further proceedings. The proceedings sought to be stayed include execution proceedings.*
- 3. In addition to the defendants' pending application for stay of proceedings the defendants have filed a Notice of Appeal against the whole of the decision made on 24.5.2007.*
- 4. Unless this application is granted the defendants will suffer substantial loss on the ground that the plaintiff company does not legally exist and it may not be possible to recover any monies paid to the plaintiff's advocates or to the plaintiff upon the success of the intended appeal.*

5. *The plaintiff already has more than adequate security.*

6. *The plaintiff is not engaged in any economic activity and has no assets. It will not therefore be able to refund any monies paid to it upon success of the appeal.*

The application is predicated upon the annexed affidavit of Robert Roseli sworn on the 6th day of September, 2006.

The application was served on the firm of Kinyua Kamundi & Co Advocates who failed to file a replying affidavit or grounds of opposition as enjoined by Order L Rule 16(1) of the Civil Procedure Rules. The application thus proceeded ex-parte courtesy of Order L Rule 16 (3) of the Civil Procedure Rules. The applicant relied on the affidavit in support in addition to submissions of counsel.

For the applicant, it was argued that the suit herein was filed on 20th April 2005. The applicant/plaintiff sought judgment against the respondent/defendant jointly and severally in the sum of **Euro 95,228.98**.

Immediately, thereafter the applicant/plaintiff sought for and obtained warrant of arrest before judgment against the 2nd respondent/2nd defendant herein.

Subsequently, the parties herein in the presence of their advocates mutually compromised the suit on the terms that the 2nd respondent/2nd defendant herein would in part satisfaction of the applicant/plaintiff's claim arrange to be transferred to the applicant/plaintiff's account No.084 604 990 313 at Kenya Commercial Bank Malindi Branch the sum of **Euro 47, 614.49**.

Consequently, parties executed a consent letter embodying the terms of the compromise marked as exhibit "**RRI**".

On the 21st day of April 2005, the said consent letter dated 21st April 2005 was duly filed and subsequently adopted as an order of this court.

It was a fundamental term of the consent order dated 21st April 2005 aforesaid, that 50% of the applicant/plaintiff's claim by the 2nd respondent/2nd defendant constituted a condition precedent to the lifting of the warrant of arrest dated 20th April 2005 issued against the 2nd respondent/2nd defendant and to the ultimate part settlement of the applicant/plaintiff's claim as per the plaint.

It was further agreed between the applicant/plaintiff and the 2nd respondent/2nd defendant, and embodied in the said consent order, that a fax message to fax number (+254) 042 – 30297 would be made by the first and second defendants to confirm the actual payment of the said sum of **Euro 47,614.49** as per terms of the consent order.

On 21st April 2005 a fax message was indeed received through fax number (+254) 042 – 30297 from Capitalia Gruppo Bancario purporting to confirm the transmission of the sum of **Euro 47,565.75** by the 1st respondent/1st defendant for and on behalf of the 2nd respondent/2nd defendant to the applicant/plaintiff's account No. 084 604 990 313 at the Kenya Commercial Bank Ltd Malindi Branch through Banca Roma Milano 30. A copy of the said fax is marked as exhibit "**RR2**".

Upon subsequent enquiry on behalf of the applicant/plaintiff at the Kenya Commercial Bank Ltd Malindi branch it came to pass that the said fax transmission was a hoax. No money had actually been deposited in the aforesaid account.

To date the 2nd respondent/2nd defendant has failed, refused and/or neglected to pay the said sum or to comply with the terms of the consent order aforesaid.

By a notice of motion application dated 26th July 2005, the respondent/defendants attempted to set aside

the terms of the consent order aforesaid. This court by a ruling dated 24th October, 2005 dismissed the said application.

It was a further term of the said consent order that the 50% balance of the claim plus the costs of the suit would be discussed and agreed upon at a meeting between the parties. No such meeting has been held due to the “**unavailability**” of the respondent/defendant’s advocates.

On the premises, I was urged to enter judgment for the applicant/plaintiff against the 2nd respondent/2nd defendant in respect of the compromised sum of **Euro 47,614.49** and thereafter set down the suit for determination of the 50% balance of the applicant/plaintiff claim herein.

I have carefully analyzed the evidence in support of the application. It is clear to me that the suit herein was compromised in terms of the consent letter exhibit “**RRI**”. The said consent was subsequently duly adopted as an order of the court.

It is equally clear to me, that on 21st April an attempt was made to transmit the sum of **Euro 47,565.75** by the 1st respondent/1st defendant for and on behalf of the 2nd respondent/2nd defendant to the applicant/plaintiff’s account at Kenya Commercial Bank Malindi Branch as per exhibit “**RR2**”. Eventually, it transpired that the fax transmission sent was a hoax. No money was actually sent to the said account.

As matters now stand, I have evidence for an on behalf of the applicant/plaintiff that there is due and owing the sum of **Euro 47,614.49** from the 2nd respondent/2nd defendant. I have no evidence by way of an affidavit or otherwise from the 2nd respondent/2nd defendant that payment has been made to the applicant/plaintiff to date.

In the foregoing circumstances, I enter judgment for the applicant/plaintiff against the 2nd respondent/2nd defendant **CORDSEN WOLFGANG** in the sum of **Euro 47,614.49** with costs and interest at court rates. The applicant/plaintiff do set down the suit for hearing in respect of the 50% balance of the claim in terms of the consent order entered into between the parties herein.

Dated and delivered at Malindi this 24th Day of May, 2007.

N.R.O. OMBIJA

JUDGE