



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 513 of 2004

YASMIN AMIRALI SHARIFF1ST DEFENDANT

ZULOBIA HASSAN FATEHALI DHALLA.....2ND DEFENDANT

SHAHIN AMIRALI SHARIFF Suing by her sister and next friend

ZULOBIA HASSAN FATEHALI DHALA3RD DEFENDANT

VERSUS

KENLIFE PROPERTIES LIMITED.....1ST DEFENDANT

HABIB BANK LIMITED.....2ND DEFENDANT

SHIRNKHANU SHARIFF.....3RD DEFENDANT

R U L I N G

The plaintiffs filed an application under Order 6 Rule 13 (1) (b) seeking to strike out certain paragraphs of the defendant’s defence and sought that thereafter judgment be entered in their favour. When that application came up for hearing the 1st defendant raised a preliminary objection to the same. This court ruled on that objection on 28th November 2005 and dismissed the objection.

The 1st defendant was aggrieved by that dismissal and therefore filed a notice of appeal and the record of appeal.

The 1st defendant by the Notice of Motion dated 7th February 2006 seeks the following order.

“Further proceedings in this suit be stayed pending the hearing and determination of Civil Appeal No. 330/2005 being the appeal filed against the ruling delivered by this Honourable court on 28th November 2005”

The 1st defendants said application is supported by the ground that further proceedings shall cause the 1st defendant substantial loss which shall be irreversible in that the appeal shall be rendered academic if it is favour of the 1st defendant.

Learned counsel for the 1st defendant Mr Ngatia stated in support of that application that the power to stay proceedings is to be found in Order 41 Rule 4. That the reason why the 1st defendant seeks stay of proceedings hereof is to safe guard the appeal so that the appeal is not rendered academic. In support of

that argument 1st defendant relied on the case BUTT – V – RENT RESTRICTION TRIBUNAL [1982] KLR 417. 1st defendant also argued that the court should be concerned with the optimum use of judicial time, in that the court should avoid hearing this matter when, if the appeal is successful, it might turn out that such a hearing was in vain. In this regard 1st defendant relied on the case HC W/up No. 43 of 2000 (MILIMANI) IN THE MATTER OF THE GLOBAL TOURS & TRAVELS LTD.

The plaintiff's objection was firstly that the 1st defendant is estopped from prosecuting the present application because it had consented to the finding for hearing of the plaintiff's application. To support this the plaintiff relied on the book, *The Law Relating to Estoppel by Representations* page 365/366.

The plaintiffs submitted that in considering the application for stay the court ought to balance the advantage and disadvantage of granting a stay. The plaintiff relied on the case THE ANTLANTIC STAR, THE OWNERS OF THE ANTLANTIC STAR – V – THE OWNERS OF THE BONA SPES [1973] 2 ALL ER 175. The court held in that case that in deciding on stay of proceeding the court had discretion and; **“That discretion was to be exercised by taking into account (i) any advantage to the plaintiff, and (ii) any disadvantage to the defendant.”**

The plaintiff also relied on the case of HEPTULLA BROTHERS ltd – V – CIVIL APPEAL No. 57 of 1954 where the court of appeal for Eastern Africa refused to grant stay of proceedings and held that:

“If, as the result of the trial of those issue, an order for possession was made, it would be open to the appellants then to apply for a stay of execution pending the disposal of his appeal to the privy council.”

Plaintiff finally stated that the 1st defendant had failed to show the prejudice it would suffer if the proceedings were not stayed.

I have considered the arguments of the parties hereof and the authorities cited before me. The 1st defendant's pending appeal relates to its objection to the plaintiff's application for striking out certain paragraphs of the defendant's defences and for entry of judgment for the plaintiff. The appeals does not relate to any other aspect of this suit. I accept that the power to stay proceedings is to be found in O. 41 R. 4 (1), which in part states:

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order.....”

The power to stay proceedings is a matter of judicial discretion to be exercised in the interest of justice. I accept as submitted by the plaintiff that it is the duty of the court to weigh the advantage to the plaintiff and disadvantage to the defendant if stay is to be granted. I have weighed the advantage and disadvantage of stay being granted hereof. I am of the view that this court cannot grant orders as sought in the 1st defendant's application, which seeks absolute stay of the proceedings of this suit. Having in mind that what the 1st defendant is appealing against is not related to whole proceedings of this suit but rather an application, I am of the view that the interest of justice require that stay be only granted as relating to that application only. That is the plaintiff ought not to be allowed to proceed with that application for indeed to do so may be prejudicial to the 1st defendant who will not be able to rely on the objections dismissed by this court's ruling.

Accordingly the court will issue the following orders: -

- (1) **That the hearing of the chamber summons dated 23rd November 2004 is hereby stayed pending the determination of the appeal No. 330 of 2005.**
- (2) **That the costs of the Notice of Motion dated 7th February 2006 shall abide by the aforesaid appeal.**

MARY KASANGO

JUDGE

Dated and delivered this 2nd May 2006.

MARY KASANGO

JUDGE