REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

Civil Suit 75 of 2004

BENSON ONDIMU MASESE T/A B. O. MASESE AND COMPANY ADVOCATES .....…….. PLAINTIFF

VERSUS

KENYA TEA DEVELOPMENT AGENCY LIMITED …….. DEFENDANT

RULING

On 9th May 2005, Mr. C.B.G. Ouma Advocate holding brief for Mr. Wambugu Advocate for the defendant applied for an adjournment on the grounds that Mr. Wambuga Advocate who had the conduct of the matter was engaged in another matter therefore could not travel to deal with the hearing of the matter. The application for adjournment was refused by Tanui J. on the strength of the submission made by another Advocate by the name Ouma Advocate. The plaintiff proceeded to give evidence and closed his case on the same day. The Court made an order that the defence is also closed for want of prosecution, though it is not clear from the record whether Mr. C.B.G. Ouma Advocate was present at the time the proceedings of the plaintiff was conducted. As a matter of good measure, there is no indication whether Mr. C.B.G. Ouma was granted leave not to participate in the proceedings of that day. It is however clear that no cross-examination was done on behalf of the defendant.

The Court then gave a judgment date of 16th June 2005. The defendant were aggrieved by what transpired on 9th May 2005, and therefore filed an application dated 13th June 2005, seeking that:

1) The Honourable Court be pleased to set aside orders issued on 9th May 2005, and:

2) That the defendant be allowed an opportunity to tender evidence in the defence case.

Pending the delivery of the judgment the parties appeared before Hon. Justice B. K. Tanui on 17th October 2005, for purposes of litigating on the application dated 13th June 2005. It is the contention of the applicant that the Court declined to hear them but ordered the matter be stood over generally awaiting the delivery of judgment. It is further alleged that no notice of judgment was given to the appellants, despite giving their intention to participate in the delivery of the judgment. The appellant also complain that judgment was delivered on 28th October 2005, in their absence and without notice.

It is the contention of the appellant that since the said judgment was delivered without notice to them, time of appeal had already lapsed by the time it discovered the existence of the judgment. The appellant

allege that it learnt of the judgment on 6th December 2005, and hence the failure to file the notice of appeal within time was caused by the failure to be notified of the judgment date. And the same was not deliberate or intended to overreach. I have on my part discovered that the notice of judgment was sent to the appellant's former Advocates M/s. Wambugu, Motende & Co. Advocates, who are based in Nairobi. I have also discovered that as at 17th October 2005, the Advocates for the appellants were Kibichiy & Co. Advocates, who were duly and properly on record for the appellant. That must have been material error on the part of the Court, which the defendant cannot be held liable. It equally means that if the appellant did not file a notice of appeal on time, it was as a result of miscommunication from the Court. The appellant had no opportunity to know when a judgment would be delivered when they were not given a notice of its delivery. It is beyond doubt the judgment in which the defendant is aggrieved with was delivered without notice to the appellant, therefore the failure to file a notice within time cannot be solely blamed on the defendant. The appellant has since filed an application seeking leave to file appeal out of time, which is still pending for determination before the Court of Appeal.

I have deliberately put the above history in an attempt to appreciate and understand the nature and ramification of the application under my consideration. And perhaps to ensure that I do not loose sight of the interest of the parties in determining the application within the parameters of Order 41 Rule 4(1) and (2). The application seeks a stay of execution of the decree in this suit pending the hearing and determination of an intended appeal, as the defendant has already lodged an application in the Court of Appeal. It must be understood clearly that there is yet no competent appeal by the applicant, though an intention to appeal has been intimated or expressed. The notice of appeal was filed out of time and no leave to validate it, has been obtained and/or granted. The question is if there is no competent appeal, can a stay be granted on the expression of an intention to appeal against the decision of the Court.

The High Court's discretion to order for a stay of execution of its order or decree is fettered by conditions:

1) The applicant must establish a sufficient cause.

2) The Court must establish or be satisfied that substantial loss would ensue from a refusal to grant a stay.

3) The applicant must furnish security and:

4) The application must of course be made without unreasonable delay.

Under Order 41 Rule 4(1) the Court appealed from may for sufficient cause or reasons order stay of execution of a decree or order made or passed by it. And in support the applicant must show sufficient cause to enable the Court to exercise its discretionary powers to remedy the infringement of a party's right. As matters stand, there is no appeal but there is an expression to appeal and the good prospect of success of such intention is outside my province. It is not for me to assess the chances of the two application succeeding in the Court of Appeal, However it suffices to say that the issues raised by the appellant cannot prima facie be termed as being frivolous or not disclosing a case with some chance of success. The issues require merit consideration of the Court with competent jurisdiction. It is important to appreciate and remember that some fundamental procedural lapses occurred in this matter to warrant the consideration of the application on sufficient cause and not on the existence of an appeal.

As far as a party is seeking to stay a decree passed by the High Court and on considering whether to grant such relief, I think the yardstick should be among others that we should not put obstacles or impediments into the path of the parties seeking their sense of justice before a superior Court. I am not in any way stating that the considerations enumerated in **Order 41 Rule 4(1) and (2)** are not good but in considering those guidelines we should be more liberal and elastic in the import and interpretation of order 41 Rule 4. We should weigh the scales of justice so as not to deprive or prevent a party of a right to be heard on his/her cause of complaint. The fundamental and constitutional right of an appellant must not override the equally substantial right of the successful party to enjoy the fruits of his success, which is sweet. There must be a consideration and/or a good cause for denying the winner of the joy and

happiness of his accrued and acquired right. The Court must not keep out a party of his judgment without good cause.

In my understanding a stay is meant to prevent breach of a party's legal and fiduciary rights before the other party makes a final execution of the decree passed by the Court. It is meant not to essentially defeat the appeal but to avoid substantial or irreparable loss on the loosing party before the determination of his appeal. It is meant to preserve the position of the parties as it existed prior the date of the decree or judgment appealed from. The fruits of justice must be enjoyed by both parties and we can do so by allowing the unsuccessful party from challenging the decision he/she is aggrieved with without unnecessary hurdles or restrictions. The appellant is statutorily entitled to challenge any decision which it thinks contravenes its right or which is not fair according to its perception of the word justice. However we must not loose sight of the fact that even the successful party expects to enjoy the fruits of the judgment but such judgment cannot be final until the challenge to its validity is removed out of the way. The Court ought not to place a successful party in such disadvantageous position to feel that the fruits of his judgment was inadequately withheld from him.

The successful party herein is an Advocate of the High Court of Kenya but I have no evidence of his financial ability to repay the huge sum of KSh.10 million if the appeal succeeds against his award. And in the absence of such important financial information on the ability of the respondent, I think justice requires that a stay be granted on terms. I am not saying the respondent is impecunious but perhaps we have to exercise some caution in order not to jeopardize the outcome of the intended appeal. The figure of KSh. 10 million is in my view astronomical award for the range of awards of similar cases. The applicant would be in a great difficulty or impossible position to recover the money paid in satisfaction of the plaintiff's decree hence the statutory right of the defendant to be heard on its intended appeal may be lost or rendered nugatory. I am in doubt that if the sum of KSh. 10 million is paid and the appellant is successful in its appeal, the respondent would be in a financial position to make full payment or restitution of the decretal sum. We do not need to be in doubt as to the rights and interests of the parties especially when the possibility of the appeal succeeding is high. Even where there no appeal exists, the Court can still grant a stay if the circumstances dictates that it is just and fair to grant the order of stay to enable the party to pursue his right without undue pressure to defeat the appeal. And because of the peculiar and outstanding nature of this matter, I think the strict interpretation of order 41 Rule 4 (1) and (2) should be viewed in favour of the applicant. There is sufficient cause to grant the order of stay inview of the special circumstances enumerated above and to do otherwise would defeat the pursuit of the defendant in its intended appeal. The appellant has demonstrated that substantial loss would be occasioned if stay is not granted and I am inclined to give them a chance or an opportunity to litigate its lost case in the Court of Appeal. The appellant deserve the exercise of my discretionary powers so that parties can be on equal footing to deliberate on the strength and weakness of their respective cases in the Court of Appeal. The merit of their complaint would surely be determined by the Court of Appeal.

I therefore grant stay in terms that the appellant to deposit a sum of Kenya shillings One Million Five Hundred Thousand only (KSh.1,500,000/=) in the joint names of the Advocates for the parties within the next 14 days in an interest earning account with a reputable Bank. Each party to bear its own costs in this application. If the appellant does not deposit the said sum within the stipulated period, execution to issue.

Dated and Delivered at Kisumu this 17th day of January 2005.

M. WARSAME

JUDGE

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