



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1156 OF 1996

KENYA PLANTERS' CO-OP UNION LTD.....PLAINTIFF

AND

RUTH DAMARIS WAMBUI MBIYU.....1ST DEFENDANT

DAVID NJUNU MBIYU2ND DEFENDANT

MARGARET NJERI MBIYU3RD DEFENDANT

EDDAH WANJIRU MBIYU4TH DEFENDANT

RULING

1. The matter at hand is an Application for orders of stay of execution of a decree pending appeal. The Plaintiff, Kenya Planters Cooperative Union Ltd. seeks the orders under Order XLI Rule 4(1) (2) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, on the following grounds: -

i) That the ruling delivered on 29th May 2003 (Kuloba, J.) was not pleasing to the Plaintiff and it filed a Notice of Appeal and applied for copies of the proceedings. The proceedings have not been typed and no appeal has been lodged.

ii) That the Applicant and Intended Appellant has a good and arguable appeal.

iii) That one of the Defendants has now threatened to execute for its costs and yet they were sued in their capacity as the Administrators of the Estate of the Late Mbiyu Koinange.

The costs if at all, should be payable to the Estate and not to the individual administrators.

2. The Supporting Affidavit sworn by Ruth Mwaniki restates in detail the above matters and adds that the 1st Defendant's Bill of Costs was taxed at Kshs.2,209,146 and the other Defendants may also tax individual Bills of Costs to the detriment of the Plaintiff/Applicant.

3. In any event, it is contended that the Learned Judge awarded costs to the aforesaid and he had no basis for striking the Plaintiff in the first place.

4. Further that the loss occasioned to the Plaintiff/Applicant will be enormous as it already lost Kshs.214,906,186.85 claimed in the suit and now stands to lose further monies if the execution proceeds as threatened.

5. The Application is opposed substantially on the ground that there has been inordinate delay in filing the

Application which delay is unexplained. Secondly, costs were awarded to the successful party, in this case the Defendants severally and each is entitled to recovery of its costs separately. Thirdly, when the costs were being taxed, the Applicant did not appear and has not objected to the taxation which still stands. Lastly, the Application is misguided and the intended appeal has no chances of success.

6. The issue to initially consider is this: are the Defendants entitled to their costs separately? In the Plaint filed on 14th May 1996, at paragraph 2 it is said that “the Defendants are **RUTH DAMARIS WAMBUI MBIYU, DAVID NJUNU MBIYU, and EDDAH WANJIRU MBIYU** all adults who by order of this Honourable Court dated 22 nd March 1993 were appointed the administrators intestate of all the estate of Mbiyu Koinange (deceased)”

7. The penultimate paragraph of the Plaint states thus: -

“WHEREFORE the Plaintiff prays for judgment against the Defendant, jointly and severally as follows: -

a) the sum of Kshs.214,906,186/85.

b)

c)

d)”

8. The Affidavit of Service of the Summons to Enter Appearance dated 6th August 1996 indicates that the Defendants were served separately and each of them required to file a Defence.

9. The 1st Defendant filed her Defence on 21st August 1996 and she denies the alleged debt.

10. The Defence filed on 7th August 1996 for the Defendants jointly also specifically at paragraphs 3 and 4 uses the words, the Defendants “deny that the administrators of the estate of the Late Mbiyu Koinange or the Defendants or any one of them ever requested the Plaintiff to act as alleged” And further that “the Defendants deny that they or any one on their behalf ever acknowledged the debt....”

11. At the close of pleadings it was clear that the Defendants knew that they were defendants to the suit jointly and severally.

12. Then came the Application by the Defendants to strike out the suit for being statute time barred. For some strange reason I could not get that Application in the court file. I however, have a photocopy of the Ruling delivered on 29thMay 2003 by Kuloba, J. He starts the Ruling by apologizing for delay in delivery of the same as the “file was quite unexplainably taken from my (his) chambers by an unknown agent, and after this long time”, it was returned. That may explain the missing application. But that is a sideshow.

13. The Learned Judge at page 9 of a very concise Ruling had this to say: -

“for these reasons, the Application of the Defendant is allowed; the Plaint is struck out; and the suit dismissed with costs of the suit and of this Application, on the grounds that it is frivolous and an abuse of the process of the court, because it is time - barred by the Limitation of Actions Act (Cap. 22).

14. I understand the Plaintiff to be saying that the “Defendant” in the sentence above is “the Administrator of the Estate of the Late Mbiyu Koinange” as an entity and not the several Defendants. I think not.

15. Had judgment been entered for the Plaintiff it would certainly have been against the Defendants jointly and severally as prayed in the Plaint barring some other eventuality that would necessitate a different ending. Conversely if the suit is dismissed, I read the Judge above to be saying that because the suit was time barred it was dismissed against all the Defendants and costs would be payable to them. There may well be an argument that the 1st Defendant is entitled to costs separately as she filed her own Defence. There may well also be argument that the other Defendants having filed a common Defence and had common representation should have one Bill of Costs. These are matters for the Taxing Officer but suffice it to say that the issue should not be the basis for seeking a stay of execution. I have deliberately spent time on it to show precisely that.

16. As regards the intended appeal, with respect I don't see where it would take the Applicant. The sole reason why the Learned Judge struck out the suit was because it was time-barred. From my view point the matter was crystal clear and should end as it did at that point. However, the right of appeal exists and the Applicant can take it. However, I have seen nothing and heard nothing to justify grant of a stay.

17. I must say something about the delay in bringing forth the Application. The Applicant came to court long after the Bill of Costs had been taxed and execution looming. It may well have intended to appeal but it waited for too long and the instant Application is an after thought.

18. In the circumstances and in view of the matters I have set out above, the focus by the Applicant on who is entitled to costs and not the thrust of an Application for stay of execution. I find the Application weak and wobbly.

19. I hereby dismiss the same with costs to the 1st Defendant on one hand and the other Defendants jointly as they jointly argued their case before me.

Dated and delivered at Nairobi this 10th day of February 2004.

I. LENAOLA

Ag. JUDGE

10.2.2004

Ruling read in the presence o:

Mr. Njiru for the 1st Defendant and holding brief for Mr. Pandya for

the 2nd, 3rd and 4th Defendant

Mr. Kairaria for the Plaintiff/Applicant

I. LENAOLA

Ag. JUDGE