



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO 1158 OF 2001

**EXCLUSIVE ESTATES LTD
PLAINTIFF**

VERSUS

**KENYA POSTS AND
TELECOMMUNICATIONS CORPORATION 1ST
DEFENDANT**
**POSTEL HOUSING CO-OPERATIVE 2ND
DEFENDANT**

RULING

On 31st day of October, 2003 the 1st defendant obtained an order for security of its costs, Ombija J who made the order said:

“Accordingly I order that the respondent/plaintiff shall provide by way of security for the applicant/1 st defendant costs, a brokers guarantee, an insurance bond or a deposit in the sum of Kshs.50 million in an interest earning account at Barclays Bank of Kenya Limited in the joint names of the applicant/1 st defendant and itself (Exclusive Estates Limited). The compliance to be within 60 days from the date hereof. Until due compliance the proceedings be stayed.”

“Upon the lapse of 60 days the applicant/1 st defendant be at liberty to bring an application under Order XXV Rule 5 and 6 for dismissal of the suit against the respondent/plaintiff.”

By its application dated 16th January, 2004 the 1st defendant seeks to have the suit against it dismissed with costs. The application is by way of chamber summons and is based on the ground that the Plaintiff has not complied with the order for security of the 1st defendant’s costs.

The Plaintiff filed grounds of opposition and replying affidavit on 10th February, 2004.

Mr Kiplagat argued the application for the 1st defendant/applicant and Mr Mulwa opposed the same for the Plaintiff. Mr Kiplagat submitted that Mr Justice Ombija’s Order for security for the 1st defendants’ costs which order was made on 31st October, 2003 has not been complied with by the Plaintiff. Under Order 25 Rules 5 (1) and 6 the 1st defendant is entitled to make the application for the dismissal of the

suit. Mr Kiplagat urged me to dismiss the suit against the 1st defendant/applicant as provided under the said Order 25 Rule 5 (1). Mr Kiplagat admitted that the Plaintiff has filed an application in the Court of Appeal for leave to file and serve a Notice of Appeal and Record of Appeal out of time. But in his view the application in the Court of Appeal has nothing to do with the present application as the Plaintiff has not applied for stay of the present proceedings. The results of the application in the Court of Appeal will therefore not affect the present application.

Mr Kiplagat submitted that if the Plaintiff succeeds in the proposed appeal it can apply to reinstate the suit against the 1st defendant if the suit is dismissed.

Mr Mulwa opposed the 1st defendant/applicant's application and relied on the Grounds of Opposition aforesaid and the replying affidavit sworn by FRANCIS MBURU for the Plaintiff. Mr Mulwa submitted that the order for security of the 1st defendant/applicant's costs can be set aside. He submitted that the application for enlargement of time to file a Notice of Appeal and Record of Appeal has high chances of success as he had not been informed of the date for the delivery of the ruling ordering the said security for the 1st defendant/applicant's costs.

Mr Mulwa further argued that the order dated 31st October, 2003 for the Plaintiff to furnish security had not been extracted. The application for dismissal of the Plaintiff's suit as against the 1st defendant/applicant is for that reason misconceived in the absence of an extracted order.

Mr Mulwa further submitted that to allow the 1st defendant/applicant's application for dismissal of the Plaintiff's suit as against it will prejudice the Plaintiff's application in the Court of Appeal. In any event Mr Mulwa argued the Plaintiff has shown in the replying affidavit why the security for the 1st defendant/applicant's costs was not furnished. In Mr Mulwa's view the 1st defendant/applicant's application for dismissal of the suit as against it should be dismissed.

Having heard the rival submissions from counsel I note the following:-

- 1. Ombija J ordered the Plaintiff after a full hearing to furnish security for the 1st defendant/applicant's costs**
- 2. The order to furnish security limited the period of compliance to 60 days from the date of the order i.e. 31/10/2003.**
- 3. The Plaintiff has not complied with the said order to furnish security.**

These facts are agreed between the parties. The Plaintiff's failure to comply with the said order for the furnishing of security obviously provided ground for the 1st defendant/applicant's to apply for the dismissal of the suit against it. In my view failure to extract the order made by Ombija J is not fatal to the present application particularly as there is no dispute that such an order was made. I also find that the application before the Court of Appeal and Record of Appeal cannot operate as a stay of the present proceedings. The Plaintiff has not applied before this court or in the Court of Appeal for stay of these proceedings. No such order has indeed been made.

In the result the 1st defendant/applicant's chamber summons dated 16th January, 2004 and filed on 28th January, 2004 is hereby allowed. It is ordered that as the Plaintiff has not complied with the order of 31st October, 2003 requiring that the Plaintiff furnishes security for the 1st defendant/applicant's costs, this suit is hereby dismissed as against the 1st defendant with costs.

The Plaintiff shall also pay the 1st defendant/applicant's costs of this application. It is ordered.

Dated and delivered at Nairobi this 12th day of March, 2004.

F. AZANGALALA

JUDGE

12.3.2004