



Alcon Holdings Limited v Kenya Commercial Bank Limited (Commercial Civil Case 1766 of 2000) [2021] KEHC 216 (KLR) (Commercial and Tax) (11 November 2021) (Ruling)

Neutral citation: [2021] KEHC 216 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL CASE 1766 OF 2000
DAS MAJANJA, J
NOVEMBER 11, 2021**

BETWEEN

ALCON HOLDINGS LIMITED PLAINTIFF

AND

KENYA COMMERCIAL BANK LIMITED DEFENDANT

RULING

1. There are two applications before the court for consideration. The first one dated 29th May 2021 is filed by the 1st Proposed Interested Party (“Vijay”) and the other one dated 24th May 2021 is filed by the 2nd Proposed Interested Party (“Alka”).
2. Vijay’s application is made, inter alia, Order 42 Rules 6 of the *Civil Procedure Rules* (“the Rules”) and seeks an order of stay of execution of two consent orders; one dated and filed in court on 8th November 2017, and a further consent recorded in court on 25th October 2018 (“the Consent Orders”) pending the hearing and determination of his appeal against the ruling and order of the court dated 11th March 2021. Vijay relies on his affidavits sworn on 29th May 2021 and 18th June 2021. The Defendant (“the Bank”) opposes the application through its Grounds of Opposition dated 16th June 2021.
3. Alka’s application is also made, inter alia, under Order 42 rule 6 of the Rules and similarly seeks to stay the proceedings in this suit and all process thereunder in execution of the consent order dated 8th November 2017 pending the hearing and determination of her appeal from the ruling and order dated 13th March 2020. She relies on her own affidavit sworn on 24th May 2021. The application is opposed by the Bank through the replying affidavit of its Director, Legal Services, Bonnie Okumu sworn on 16th June 2021. It is also opposed by the Plaintiff through its Grounds of Opposition dated 29th July 2021.



4. Jaspriya Kaur Hanspal who claims to be the Administrator of the Estate of Davinder Singh Hanspal who currently holds majority shares in the Plaintiff opposes both applications through his replying affidavit sworn on 11th June 2021.
5. The facts giving rise to both applications are a matter of record and are not disputed. Sometime in 1995, the Bank advanced the Plaintiff KES 50,000,000.00 secured by a Charge dated 23rd October 1995 over Land Reference No. 12467 (I.R 33634) situated in Industrial Area, Nairobi (“the suit property”). The Plaintiff failed to meet its obligations under the Charge and its account fell into arrears. The Bank then initiated steps to realize the suit property in a bid to recover the outstanding sums owed to it by the Plaintiff. To forestall the sale of the suit property by the Bank, the Plaintiff filed this suit on 5th October 2000 seeking, inter alia, an injunction to restrain the Bank from exercising its statutory power of sale.
6. In due course, the Plaintiff and the Bank engaged in negotiations to resolve the matter. This culminated in a consent dated 8th November 2017 where they agreed that:
 - i. The suit property will be sold subject to and under the supervision of this Honourable Court.
 - ii. The Plaintiff agrees to remit to the Defendant the sum total of Kenya Shillings Ninety Million (90,000,000/=) from the proceeds of the Sale (hereinafter the said sum) in full and final settlement of the claims in Civil Suit Number 1766 of 2000 and Civil Suit Number 735 of 2003 and with regard to the charge dated 16th October 1995 over the suit property upon execution of the proposed sale agreement.
 - iii. The said sum will be paid immediately upon execution of the proposed sale agreement but not later than one (1) month hereof.
 - iv. The title documents will thereafter be discharged and released to the Plaintiff. Upon the payment of the said sum this suit together with suit Number 735 of 2003 be marked as settled. This matter be mentioned after two (2) months from the date hereof to confirm the settlement.
 - v. Upon the payment of the said sum this suit together with suit Number 735 of 2003 be marked as settled.
 - vi. This matter be mentioned after two (2) months from the date hereof to confirm the settlement.
7. The Plaintiff and the Bank subsequently entered into another consent dated 25th October 2018 on the following terms:
 - i. Both parties be at liberty to market the suit property;
 - ii. The Defendant be at liberty to commission an independent valuation of the suit property;
 - iii. The costs of the valuation and marketing be netted off from the sale proceeds
 - iv. The matter be mentioned on 12th February 2019 Orders to apply to 735/2003.
8. It is these Consent Orders that Vijay and Alka seek to ultimately challenge upon joinder to the suit. Vijay claims that he is the son of Inderjit Singh Haspal (deceased) who until his death was the holder



of 333 shares in the Plaintiff. Alka claims that she is the owner of 334 shares in the Plaintiff following the death of her husband Kultar Singh Haspal. At any rate, there are pending disputes regarding the shareholding within the Plaintiff.

9. Vijay filed an application dated 29th June 2020 seeking to join the suit as an interested party and thereafter set aside and review the Consent dated 8th November 2017. Tuiyott J., dismissed the application by the ruling dated 11th March 2021. Alka also filed an application dated 7th February 2019 seeking to join the suit as an interested party which Tuiyott J., dismissed on 13th March 2020. She then filed an application dated 12th June 2020 seeking to review the said orders but the application was also dismissed on 11th May 2021.
10. Both Vijay and Alka have expressed their intention to exercise their undoubted right of appeal. They now seek to stay execution of the Consent Orders and further proceedings pending the hearing and determination of their respective appeals. The issue for resolution in this ruling therefore is whether the court should grant stay of execution of the Consent Orders pending the appeal from the ruling and orders by the court declining to join Vijay and Alka as interested parties to this suit. I have considered the parties' depositions and submissions and I take the following view of the matter.
11. The principles that guide the court's discretion on whether or not to allow an application for stay of execution and proceedings pending an appeal are grounded in Order 42 Rule 6 (2) of the Rules. In order to succeed, the applicant must demonstrate substantial loss may result unless the order of stay is made. It must also demonstrate that the application has been brought without undue delay and lastly, the applicant must give such security as the court may order for the due performance of the decree or order as the case may be (see [*Christopher Ndolo Mutuku & another v Cfc Stanbic Bank Limited ML HC Civil Case No. 74 of 2011 \[2015\] eKLR*](#)).
12. In applying the strictures of Order 42 rule 6 of the Rules, the court ought to have regard to the applicant's unfettered right of appeal and the right of the respondent to benefit from the judicial decision in its favour. This position of the law is informed by the principle of justice in Article 159 of the Constitution that justice must be done without delay and undue regard to technicalities which are now given effect through the overriding objective of the law that cases should be disposed of in a just, proportionate, expeditious and affordable manner.
13. Turning to the circumstances of this case, Vijay states that unless the orders of stay are granted, he together with the Plaintiff and other parties entitled to the Plaintiff's shares will suffer irreparable damages and/or substantial loss. He states that he is willing to abide by the directions regarding conditions for stay including security that the court may order in light of the peculiar circumstances of this case.
14. On her part, Alka states that her appeal will be rendered an academic exercise were this court to proceed as directed. She contends that execution of the consent order dated 8th November 2017 will lead to the Plaintiff and its shareholders suffering irreparable loss since the sale of the suit property will not be reversed or cancelled in the event her appeal is successful.
15. I find and hold that Vijay and Alka have not made out a case for stay of execution and proceedings for the following reasons. Tuiyott J, in the rulings of 11th March 2021, 13th March 2021 and 11th May 2021, emphasized the fact that the parties to this suit are the Plaintiff, a limited liability Company, and the Bank. Vijay and Alka seek to litigate these matters as shareholders of the Plaintiff. In the ruling



dated 11th March 2021, Tuiyott J., with reference to the rule in *Foss v Harbottle* [1843] 2 Hare 461, 67 ER 189 expressed himself as follows:

- (6) That said the application faces a more unforgiving challenge. The substantive parties to this suit are the Company and the Bank. The true nature of the grievance of the Applicant is that the consent was entered without the authority of Company as there was no Board of Directors or living shareholders. That grievance, in my view, belongs to the Company and although the shareholders or estates of the shareholders could feel aggrieved by the Consent, still, because of the legal distinction between a company and its owners, the person to challenge the consent is the Company. Individual shareholders acting outside the corporate entity cannot do so.
16. Although the aforesaid decision may be set aside on appeal, the fact remains that it is the Plaintiff that entered into contractual relations with the Bank. The Plaintiff has also admitted its indebtedness to the Bank and neither Vijay or Alka dispute the fact of indebtedness. The debt, so long as it remains unsettled, continues to attract interest while the value of the security in relation to the debt diminishes to the detriment of the Bank.
17. Vijay and Alka have not demonstrated what substantial loss they will incur as shareholders of the Plaintiff. The Plaintiff is bound to settle the debt. In the event the Bank sells the suit property, it is legally obligated to remit any excess from the proceeds of the sale of the suit property to the Plaintiff after recovering its debt. Thus, it is actually in the interest and convenience of Plaintiff, Vijay and Alka that the suit property be sold at the earliest to stop the Plaintiff from paying additional interest and costs to the Bank.
18. I also do not see how the intended appeal by Vijay and Alka will be rendered nugatory or an academic exercise. In the event the appeal succeeds, they will only be joined as parties to the suit. Further, if the Consent Orders are set aside, they have not shown that the Bank will not be in a position to refund the Plaintiff the proceeds of sale and the costs. At the end of the day, when the Plaintiff offered the suit property as security, it was always aware that it would be sold in the event of default.
19. For the reasons I have set out above, I now dismiss the applications dated 24th May 2021 and 29th May 2021 with costs to the Defendant.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF NOVEMBER 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Mr Mituga instructed by Mituga and Company Advocates for the proposed interested party (Vijay Hanspal)

Mr Kinyanjui instructed by J. Harrison Kinyanjui and Company Advocates for the proposed interested party (Alka Roshanlal Harbansal Sharma)

