



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**COMMERCIAL SUIT NO. 69 OF 2017**

**JUJA COFFEE EXPORTERS LTD.....PLAINTIFF**

**VERSUS**

**NATIONAL BANK OF KENYA LTD.....DEFENDANT**

**R U L I N G**

1. On 30/4/2019, when the Notice of Motion dated 29/4/2019 was placed before me under Certificate of Urgency I did certify the same urgent and ordered that the same be heard today after service upon the Respondents.
2. When counsel appeared before me this morning, Mr. Omondi Advocate for the Defendant sought an adjournment for 14 days to enable him file a response to the application because time given to him upon service was too short to enable him get instructions from the client.
3. To that request, Mr. Kongere Advocate for plaintiff/applicant did not object, even though he said he was ready to proceed on his part, but then requested that if the adjournment be granted his client be indulged with an interim order of injunction pending appeal in order that the sale stated for 6/5/2019 be stopped to preserve the purpose of and substratum of the appeal to the Court of Appeal and the application for stay pending appeal.
4. That request was seriously opposed by Mr. Omondi who among other point submitted that:-
  - i. There is no valid suit as the plaintiff has never taken out and served summons to enter appearance hence the suit was by provisions of Order 5 abated.
  - ii. There is no valid notice of appeal as the one on record was filed out of time and doesn't thus qualify to institute an appeal under Order Rule 6(6) of the Civil Procedure Rule.
  - iii. On the delivery of the ruling on 11/4/2019 the plaintiff sought stay as a clear indication that it was intent on appealing.
  - iv. There was inordinate delay in presenting the current application as is the reputation of the plaintiff in coming to court too late in the day to obtain undeserved orders.
  - v. That only if the court be inclined to grant the interim orders, it should do so in terms that the plaintiff pays a substantial sum towards reduction of the debt and atleast Kshs.6,000,000/= to cover auctioneers fees and costs of advertisement.
5. In response to the opposition Mr. Kongere submitted and pointed out to court that the issue of whether or not summons were issued and served would require that he be given time to establish the truth because he came into the matter months after it had been filed but more importantly that the defendant cannot insist on invalidating the suit on account of lack of summons to enter appearance when it has in fact entered an appearance and filed a defence without protest.
6. On the notice of motion, Mr. Kongere pointed out the fact that Order 42 Rule 6(6) only require a notice of appeal to be filed and the question of validity thereof falls for determination by the Court of Appeal and not this court. It was equally pointed out that before the court for determination is a prayer for extension of time and that to declare the Notice of Appeal invalid would preempt that prayer for extension of time.
7. On delay, counsel pointed out that he had to seek instructions from the client whose directors had misfortunes which forced them to travel outside Kenyan and only came back recently.

8. On payment of part of the debt, Mr. Kongere conceded that the court reserves the discretion to impose terms but reminded the court that the plaintiff's suit herein is a contest on whether or not the debt was ever incurred by the plaintiff or if it was a fraud on the plaintiff.

9. I have had deep regard to elaborate submissions by the counsel and I am fully aware that the application is yet to be urged on the merits. What I am called upon to decide is whether or not to grant an interim order to forestall the sale of 6/5/2019 which has the potential of dissipating the very substratum of the application for injunction pending appeal and the appeal itself.

10. I will refrain from making any comments that may prejudice the application which is yet to be heard while I strive to preserve the purpose of having the same application pursued before me.

11. In undertaking that task, I have posed to myself the question whether or not there shall persist a purpose of the application and indeed the appeal challenging my decision dismissing an application for injunction pending a suit if the sale proceeds. I must say that while I may not doubt myself on the ruling and findings of 11/4/2019 this court is subject to the decision by the appellants court. It is not for this court to assess the strength of an appeal against its decision and thus however convinced of its correctness the Court of Appeal may in its own mandate reverse my decision. With that view and the learning that the right to access justice even by way of appeal is constitutional, I hold the view that it is only just and fair that the substratum of both the appeal and the application for injunction pending appeal be preserved pending the hearing of the application dated 29/4/2019. That cannot be done if the sale scheduled for 6/5/2019 is allowed to proceed.

12. Accordingly I do grant to the plaintiff an interim injunction pending appeal to restrain the sale due to the 6/5/2019 but on terms that the plaintiff deposits into its account with the defendant a sum of atleast Kshs.5,000,000/=, towards the reduction of the debt and to meet the costs of the aborted sale, within 30 days from today.

13. Let the Defendant file any responses to the Notice of Motion dated 29/4/2019 within 14 days from today for that application to be heard on the 20/5/2019. Parties are given the liberty to file and exchange submissions before then, if they so wish.

14. Costs in the cause.

**Dated and delivered at Mombasa this 3rd day of May 2019.**

**P.J.O. OTIENO**

**JUDGE**