



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO 264 OF 2018

O-PLAY KENYA LIMITED.....PLAINTIFF

VERSUS

FIVESPOT KENYA.....DEFENDANT

RULING

1. The plaintiff O-Play Kenya limited filed a plaint on 3rd July 2018 suing the defendant M/s Fivespot Kenya seeking judgment against the defendant for:-

a) A mandatory injunction be issued directing the defendant whether by itself, servants, agents, nominees and assigns to immediately restore the iPay payment services and iPay billing channels provider services as envisaged in the Agreements dated 1st September 2017, pending the resolution of the dispute through arbitration.

b) A permanent injunction be issued restraining the defendant whether by itself, servants, agents, nominees and assigns from suspending, cancelling or interfering in any way with the iPay payment services and the iPay billing channels provider services as contained in the Agreements dated 1st September 2017, pending the resolution of the dispute through arbitration.

c) A mandatory injunction be issued directing the defendant whether by itself, servants, agents, bankers or assigns to immediately remit to the plaintiff the sum of Kshs. 46,124,580 being the loan repayment collections collected through the payment gateway, and the float balance held by the defendant as well as USD 4.8 million (as more particularly set out in paragraphs 30 and 33 above) due to the plaintiff, pending the resolution of the dispute through arbitration.

d) Costs of the suit.

e) Any other or further remedy that this Honourable Court may deem just to grant to the plaintiff.

2. The plaintiff at the same filed chamber summons seeking the following orders:

1) This matter be certified as urgent and be heard ex-parte in the first instance for purposes of prayers 2, 3, 4 and 5.

2) An injunction be issued directing the defendant whether by itself, its servants, agents, advocates, nominees and assigns to immediately restore the iPay payment services and the iPay billing channels provider services it suspended pending the hearing and determination of this application inter-partes.

3) A temporary injunction be issued restraining the defendant whether by itself, servants, agents, advocates, nominees and assigns from suspending, cancelling or interfering in any way with the iPay payment services and the iPay billing channels provider services pending the hearing and determination of this application inter-partes.

4) An injunction be issued directing the defendant whether by itself, its servants, agents, advocates, nominees and assigns to immediately release to the plaintiff monies belonging to it being Kshs. 46,124,580 and USD 4,800,000, pending the hearing and determination of this application.

5) In the alternative to prayer number 4, the defendant be compelled to immediately and not more than 2 days from the date of the order to deposit into court Kshs.46, 124,580 and USD 4,800,000 pending the hearing and determination of this application.

6) An injunction be issued restraining the defendant whether by itself, its servants, agents, advocates, nominees and assigns from suspending, cancelling or interfering in any way with the iPay payment services and the iPay billing channels provider services pending the resolution of the dispute between the parties through arbitration.

7) The plaintiff be at liberty to apply for such further or other orders and/or directions as this Honourable Court may deem fit and just to grant.

8) The costs of this application be provided for.

3. The Plaintiff/Applicant was represented by Mr. Kiragu Mwangi, learned Advocate, whereas Mrs. Mwangi, Mrs. Kashindi and Miss Mbugua, learned Advocates represented the Defendant/Respondent. The parties and their Advocates recorded 3 consents on prayers numbers 4 and 5 of the chamber summons, and submissions were filed and matter set up for highlighting on the chambers as regards prayers numbers 2,3,6,7 and 8.

4. When the matter came up for highlighting on the submissions on 26/7/2018, Mr. Owiti, learned Advocate, appeared for the Plaintiff/Applicant, while Mrs. Mwangi, learned Advocate, jointly with Mrs. Kashindi and Miss Mbugua, learned Advocates appeared for the Defendant/Respondent.

5. Mr. Owiti learned Advocate, for the Plaintiff/Applicant urged that by virtue of the three consents recorded the plaintiff's case was partly successful and urged the substantive issue is being dealt with at South Africa and that the relationship between the parties having broken down beyond repair, the plaintiff do not insist on going on with a strained relationship and urged, the effect of that is; that the plaintiff did not want to pursue prayers 2, 3 and 6 pointing out the same has been abandoned as parties cannot do business together any more. He pointed out that there is nothing else to determine in the application. He prayed for costs. He prayed that the application be marked settled on the basis of the consent recorded on 5th, 11th and 26th July 2018. He urged that he has no doubt the Plaintiff/Applicant is entitled to costs having succeeded under prayer No.4 and 5 of the application.

6. The consents referred to by Mr. Owiti, learned Advocates are as follows:-

"On prayer No.4 of chamber summons we are consenting Kshs.46,124,580 be released to the plaintiff by the defendant subject to the deduction of defendant's charges; with liberty to apply by close of business on 6th July 2018. We have agreed I have leave to file further affidavit."

"By consent the defendant do pay to the plaintiff a sum of Kshs.19, 722,408.66 by close of business on 12th July 2018; with liberty to apply."

"By consent the sum of Kshs.6, 081,002/80 as well as Kshs.12, 837 be paid to the plaintiff by close of business on 26th July 2018. Parties at liberty to apply."

7. Mr. Owiti, learned Advocate further urged that cost of the application should be in the cause awaiting the outcome of the arbitral proceedings in South Africa. He further urged there existed a dispute over the money and that there is a pending dispute of USD 11,000,000.

8. Mrs. Mwangi, learned Advocate, submitted that her submissions are already on record and she had come for highlighting; that parties were able to reach partial settlement on the amount claimed when the defendant offered to pay at the close of the day, urging that as far as their side is concerned there was never a dispute over the money but on suspension of services.

9. She further referred to paragraph 68(a) of the Replying affidavit of Philip Nyamwaga dated 5th July 2018 in which it is stated:-

"In response to paragraphs 28, 30 and 33(f) of the plaintiff's supporting affidavit:-

a) The defendant admits that it is holding the Kshs. 46,124,580 as float for operation of the OKash application. There was no obligation to refund this amount to the plaintiff during the suspension of the services in line with clause 4 of the First and Second Agreement.

b) The defendant is prepared to deposit the float in court or refund it to the plaintiff, less the applicable charges and commission under the First and Second Agreements.

c) The defendant is not aware of the US\$ 4,800,000 allegedly held by the defendant and challenges the plaintiff to provide strict proof of the said amount."

10. It is further urged that under clause 6 of the agreement between the parties there was a requirement to have a discussion first before action and that did not take place or happen. It is therefore urged by the defendant prayer 4 and 5 were not successful as alluded to by the plaintiff, urging USD 4,800,000 has not been substantiated at all but has been abandoned. She urged the defendant has been successful in defending the unsubstantiated claim of USD 4,800,000. She urged it is the defendant who has been successful and is entitled to costs.

11. On the alleged Arbitral proceedings in South Africa Mrs. Mwangi, learned Advocate, urged that the truth is that there are no arbitral proceedings in South Africa; as the plaintiff has not even declared a dispute as required by the two agreements, that they are seeking to enforce on Rules under ICC which govern the arbitration clause they are seeking to enforce. She urged that there are no proceedings to abide by for an order of costs to await the outcome of the arbitral proceedings.

12. Mrs. Kashindi, learned Advocate, on her part urged the parties relationship broke due to the plaintiff action of cyber attacking the system and by breaking the law. She urged a party who acts unreasonably in bringing an action ought to pay costs.

13. Mr. Owiti, learned Advocate, in response, urged on arbitral proceeding, under **Section 7 of the Arbitration Act**; a case can be filed before or during the arbitral Agreement. On dispute he urged there is no requirement for a dispute to be declare formally as the defendant is aware there is a dispute and its conflict is against their actions. He urged there was discussion and evidenced by letters before institution of the suit.

14. I have considered the counsel rival submissions and from their submissions, the issue for consideration is who should pay the costs of the application following the plaintiff's abandonment of prayers numbers 2,3,6,7 and 8 of the application?

15. **Section 27 of the Civil Procedure Act** provides the following as regard costs.

"1. Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such."

It is therefore clear under the above-mentioned section costs of any action follow the event unless the court or Judge shall for good reason otherwise order.

16. In the instant case, the parties recorded 3 partial consents on two prayers only. The parties did not mention the issue of costs in the 3 consents and I believe they were aware the consents were not touching on the main issue. Secondly, the same were done as the defendant stated in their replying affidavit, that it had not disputed the issue of money. The Plaintiff/Applicant abandoned the main prayer giving the reason that the relationship between the two parties had broken beyond repair and could not work together any more. The Plaintiff/Applicant did not file any document to confirm existence of arbitral proceedings in South Africa as alluded so as to convince this court that costs should await alleged arbitral proceedings in South Africa. The Plaintiff/Applicant did not demonstrate that in deed it had filed arbitral proceedings or had declared an intention to do so. The Plaintiff/Applicant claim is only anticipated, as it is yet to be demonstrated it had been declared. I find once the Plaintiff's/Applicant's prayers under nos. 2, 3 and 6 were abandoned, there is nothing pending for determination by the court as regard the Plaintiff/Applicant application. There is nothing this court is to await for as regard the withdrawn application save to consider the issue on costs. I find anticipated arbitral proceedings cannot bar this court from deciding on the issue of costs on the withdrawn application. The costs as per section 27 of Civil Procedure Act follow the event herein being abandonment of the application by the plaintiff of prayers nos. 2, 3, 6 and 7. The withdrawal of the application notwithstanding the 3 consents orders means the defendant is successful in defending the main prayer which in essence entitles the defendant costs for withdrawal of the application.

17. The upshot is that the defendant by virtue of abandonment of the remaining prayers in the plaintiff's application dated 2nd July 2018 is awarded costs of the application.

Dated, signed and delivered at Nairobi this 17th day of October, 2018.

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J .A. MAKAU

JUDGE