



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 357 OF 1992

FRANCIS WAITHAKA NGOKONYO.....1ST PLAINTIFF

SUDI ABDALLA.....2ND PLAINTIFF

ANDREW MUGA.....3RD PLAINTIFF

VERSUS

TELKOM KENYA LIMITED.....DEFENDANT

RULING

1. The application before me is for stay of execution pending the hearing and determination of the defendant's appeal.
2. The appeal is in relation to the judgement which was delivered by Havelock J. on 20th December 2013.
3. Pursuant to the said judgement, the plaintiffs were awarded the total sum of Kshs. 29,623,643.30, together with interest and the costs of the suit. The interest was calculable at court rates, from the date of the judgement.
4. For the record, the first time when the court granted a judgement in favour of the plaintiffs was on 11th April 2001. However, that judgement was set aside by the Court of Appeal because it was pronounced by a Deputy Registrar, on behalf of Hayanga J. As the learned Deputy Registrar lacked the requisite jurisdiction to pronounce the judgement of the High Court, the said pronouncement was a nullity.
5. I have deemed it necessary to point out that fact because it explains why the plaintiffs expressed the view that the defendant had engaged the plaintiffs in "*back and forth litigation?*", hoping to tire out the plaintiffs.
6. Secondly, because of the age of the case, the plaintiffs were of the view that it would be inconsistent with the Overriding Objectives spelt out by Sections 1A and 1B of the Civil Procedure Act if stay was granted.
7. On the other hand, the defendant believes that the Overriding Objective would be met by an order staying execution. They so believe because the plaintiffs would be unable to repay back the money if it were paid out now, and if thereafter, the defendant's appeal was successful.

8. But should the defendant have such a view of the plaintiffs?
9. The defendant pointed out that the plaintiffs were retirees, who have no regular or known source of income. In those circumstances, the defendant feels that if money was paid out to the plaintiffs, it would thereafter be literally impossible to recover it, in the event that the appeal was successful.
10. It is noteworthy that the plaintiffs did not respond directly, or at all, to the defendant's assertion regarding their status as retirees. The reason for that is not hard to find, because the very foundation of the plaintiffs' claims was that the defendant had terminated their contracts of employment, unlawfully.
11. But the plaintiffs also confronted the defendant with information contained in a local daily newspaper, which suggested that the defendant was on the verge of insolvency.
12. If the defendant was not ordered to pay the decretal amount soon, the plaintiffs fear that they may never enjoy the fruits of the judgement, because they fear that the defendant may become insolvent.
13. The said newspaper article alluded to the;

“abrupt disruption under the insolvency of Telkom Kenya at any time...?”.

14. According to the said article;

”There’s no doubt that Telkom Kenya is in financial dire straits?.

15. It is not for me to gauge the accuracy or otherwise of the article. But it is a fact that by March 2016, the defendant is still very much alive.
16. Nonetheless, whether or not the defendant is a company which could end up being wound-up due to insolvency, the court notes that the defendant has offered to put down security, in the nature of cash, which could then be held in an interest-earning account. To my mind, that is significant because it demonstrates that whatever the future may hold for the defendant, it currently is in a position to put forward security.
17. On the other hand, the plaintiffs have not made available any re-assurances, that they or any of them, would be able to refund to the defendant the decretal amounts, in the event that the defendant's appeal was ultimately successful.
18. By pointing out this fact, I am not suggesting that the respondents had an obligation to prove their financial ability to make good the refund, if the appeal against the judgement was allowed. However, when a respondent makes available some evidence of his or her ability to repay money, if ultimately required to do so, the court would have been provided with useful information which it must take into account when balancing between the competing rights of the Decree-holder and of the Judgement-debtor.
19. But was the defendant guilty of inordinate delay in bringing this application, so as to be undeserving of the court's discretion?
20. The application was made 6 months after the judgement was delivered.
21. In the circumstances prevailing, I find that there was no inordinate delay. I so find because a Judgement-debtor can only seek an order to stay execution when there was a real likelihood of execution being levied.
22. Therefore, in a case where a Decree had not yet been extracted, it may well be premature to seek a stay of execution.
23. Similarly, when costs had been awarded to the successful litigant, but there had been no taxation of

the Bill of Costs, it may be premature to seek an order for stay of execution.

24. In this case, the plaintiffs were unhappy with the compensation awarded to them by the trial court. Therefore, the plaintiffs filed an application seeking a Review of the Judgement.

25. The application for review was filed on 31st January 2014.

26. As the plaintiffs sought a review of the judgement, they could not have taken steps to execute the Decree. Indeed, until the application for review was determined, it was not possible to extract a Decree. Therefore, there was no reason to warrant the filing of an application for stay of execution, until the plaintiffs' application for review was determined.

27. On 29th May 2014, the court dismissed the application for review. That determination gave way for a Decree to be extracted. And it is only thereafter, that there arose a possibility that execution could be levied against the defendant.

28. In those circumstances, I find that there was no delay in the filing of this application for stay of execution.

29. Finally, I find that the interests of justice will be best served by the grant of an order for stay of execution. I so find because the defendant is entitled to exercise its right of appeal.

30. But that right must also be balanced against the plaintiffs' right to enjoy the fruits of the judgement.

31. In other words, the court is obliged to handle the parties in an even-handed manner, by ensuring that the appeal was not rendered nugatory, whilst also ensuring that the rights of the Decree-holder were not prejudiced.

32. Accordingly, I do now order that there shall issue forthwith an order for stay of execution. The said order shall remain in force until the defendant's appeal was determined.

33. However, as a pre-condition to this order taking effect, the defendant will, within the next 7 days, deposit into an account, the sum of Kshs. 24,000,000/-. The account will be opened in the joint names of the advocates for the respective parties. The costs of the application dated 8th May 2014 are awarded to the Defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 8th day of March 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of:

Sumba for the Plaintiffs

Miss Lubano for the Defendant

Collins Odhiambo – Court clerk.