



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL& ADMIRALTY COURT
CIVIL SUIT NO 489 OF 2012

PRIME COMMUNICATIONS LIMITED.....PLAINTIFF

VERSUS

KENYA MEDICAL LABORATORY

TECHNICIANS& TECHNOLOGISTS BOARD.....DEFENDANT

RULING

1. For the determination of the Court was the application by the Defendant dated 11th December 2015 in which it seeks to stay the execution of the decree of the Court, and further for intervention in settlement terms for the decretal amount. The application is brought under the provisions of Order 21 Rule 22(1) of the Civil Procedure Rules and Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act. The prayers were set out as follows;

2. Spent

3. Spent

4. THAT this honourable Court be pleased to stay execution of the decree herein pending the hearing and determination of this application.

5. THAT the honourable Court be pleased to allow the judgment-debtor to pay the decretal amount in instalments of Kshs 1,000,000/- every 5th day of each month from January 2016 until payment is made in full.

6. THAT the costs of this application be provided for.

2. The application was predicated upon the grounds as set out in the application, and was further supported by the affidavit of Francis Mula Kadima sworn on 11th December 2015.

3. In its averments, the Defendant contended that the parties had intended to come before the Court on 8th December 2015 for purposes of recording consent. Further, it was deposed to that at the stated date, no consent had been reached by the parties, and that further, the Court file was missing on that date, and thereby, denied the Defendant an opportunity and chance to negotiate on suitable terms of the consent.

4. It was averred that it was in the interest of justice that the prayers and orders sought were granted, and that the Defendant would stand to suffer irreparable harm and prejudice. The Defendant filed a further

affidavit on 16th December 2015 in further support of the application.

5. The application was opposed by the Plaintiff through its affidavit in reply sworn on 15th January 2016. Therein, it was deposed to that this Court did not have the jurisdiction to deal with this application for the reason that the Defendant had filed a similar application in the Court of Appeal vide Civil Application No 56 of 2013.

6. Further, it was deposed to that the Defendant's instant application was an abuse of the process of the Court, having filed previously in the same Court similar application on diverse dates; the application for stay dated 13th August 2013 which application was heard and dismissed and the application dated 10th November 2015, which application is still pending hearing. Under both applications, similar prayers were urged by the Defendant. It was reiterated that the Defendant was guilty of material non-disclosure, having filed several application similar to the present one since 23rd January 2013 when judgment was entered against it.

7. Further, it was deposed to the proposal to settle the decretal sum as made by the Defendant in its letter to the Plaintiff's advocate dated 4th December 2015 was rejected, and furthermore, the rejection communicated vide the letter dated 7th December 2015.

8. It was contended that the Defendant was not keen on settling the decretal sum, as no commitment had been made on its part since judgment was entered on 23rd January 2013, and that in any event, the amount of Kshs 3,458,415/- allegedly held by the Defendant's previous advocates, which they had intimated would be paid to them, has not, to date, been paid as promised.

9. Further, it was averred that the application was misconceived, incompetent and fatally defective, and in seeking to enforce a rejected proposal through the Court was unreasonable, and would further delay the Plaintiff from obtaining what was due and owing to it.

10. I have considered the dispositions and averments made by either parties, and further, the submissions made in support of, and in objection to, the Defendant's application. In summation thereof, the Defendant seeks to invoke this Courts discretionary power to stay the execution of the decree issued by the Court on 23rd January 2013. Further, it would also be determined that the Defendant has sought to have its proposal for settlement of the decretal sum recognized and enforced by this Court, as the prudent and reasonable way of settling the decretal sum.

11. However in reiterating their contentions, the Defendant averred that as a government body, it was protected from execution proceedings under the Government Proceedings Act, and more specifically Section 21(3) and (4) thereof, as read with Order 29 Rule 4(1) of the Civil Procedure Rules.

12. Suffice to say, however, is that he Defendant is a body corporate, established under the Medical Laboratory Technicians and Technologists Act. Pursuant to Section 3(1) and (2) thereof, there is established a board, which is a corporate body, with perpetual succession and with the capacity to sue or be sued in its own name.

13. The holding in *Amira (K) Ltd v National Irrigation Board* (2001) 2 EA 333 and *Nathaniel Kipruto Arap Ng'ok v Attorney General* (2010) eKLR are applicable in the instance. Therein, it was held that a body corporate or parastatal established under an Act of Parliament was not government, and therefore, did not fall within the provisions of the Government Proceedings Act.

14. That being said, it would now turn to the Court to consider the previous applications that had been made by the Defendant, and further, the application made to the Court of Appeal. It is an issue that would in turn be considered as to whether this Court had the jurisdiction to hear and determine the instant application.

15. The Defendant had previously made two applications to this Court, on 12th March 2013 and 13th August 2013, in which it sought stay of execution of the decree issued on 23rd January 2013 and for stay

of proceedings pending appeal respectively. Both applications were heard before Havelock, J who had issued the decree dated 23rd January 2013. Both applications were dismissed in his ruling dated 24th April 2014.

16. The Defendant further moved the Court of Appeal by invoking the Courts power donated under Rules 5(2) (b) and 42 of the Court of Appeal Rules. In the application dated 12th March 2013, the Defendant sought orders for stay of execution and stay of further proceedings in the instant matter.

17. The application was allowed; on condition that the Defendant was to deposit Kshs 4,000,000/- into a joint interest earning account within thirty (30) days of the Court of Appeal ruling.

18. It would follow that the condition as set by the Court of Appeal for the orders for stay of execution and stay of proceedings was not met by the Defendant, and as such, and in accordance with the Court's ruling, leave to defend was lost, and the Plaintiff was therefore, at liberty to proceed with execution proceedings.

19. For the Defendant to have come back to this Court after making three application which have all been denied would certainly be tantamount to an abuse of the process of this Court. In Bullen and Leake and Jacob's Precedence of Pleadings 12th Edition page 148, scandalous pleadings and the term "abuse of process" is described as follows:

20. The term "abuse of the process of court" is a term of great significance. It connotes that the process of the court must be carried out properly, honestly and in good faith, and it means that the court will not allow its function as a court of law to be misused but will in a proper case, prevent its machinery from being used as a means of vexation or oppression in the process of litigation. It follows that where an abuse of process has taken place, the intervention of the court by way of stay of even dismissal of proceedings, although it should not be lightly done, yet it may often be required by the very essence of justice to be done".

21. In concurring with this definition as set out in the case of John Mathiaka Kimundu v Lawrence Mwangi T/A Lawrence Mwangi & Co. Advocates [2015] eKLR, Muriithi, J in Heritage Insurance Company Limited v Patrick Kasina Kisilu [2015] Eklrheld inter alia;

"In accordance with the hierarchical authority of laws, as part of the Civil Procedure Rules the provisions for the filing or repeat of application for stay of execution in the court to which the appeal is preferred, regardless of whether such an application has been granted or refused [and I daresay made] in the court appealed from, must be subject to the ordinary principles of civil litigation on sub judice and res judicata, which are statutorily underpinned under sections 6 and 7 of the Civil Procedure Act, respectively. Accordingly, the filing of the application herein by the appellant falls to be considered with reference to the principles of res judicata and sub judice as well as other considerations relating to abuse of process."

22. It is manifestly evident that the Defendant has been in flagrant abuse of the process of the Court by filing numerous applications seeking similar orders. The applications have either been dismissed, or are pending hearing. They have moved the Court of Appeal through the notice dated 13th March 2013, and where there too, their application was dismissed. No further evidence would be needed to establish that the Defendant has in the least been a cantankerous litigator.

23. The Court shall not allow such conduct from the Defendant, who instead of assisting the Court in achieving the overriding mandate as postulated under Sections 1A and 1B of the Civil Procedure Act, they instead, have been perpetrating abuses on the working of this Court. It would therefore follow that the application by the Defendant is sub-judice and/or res-judicata, and that the same is unmeritorious and is hereby dismissed with costs to the Plaintiff.

Dated, signed and delivered in court at Nairobi this 4th day of March, 2016.

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C. KARIUKI

JUDGE