



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 113 OF 2012

KARACHIWALLA NAIROBI LIMITED.....PLAINTIFF
VERSUS
SANJIVAN MUKHERJEE.....DEFENDANT

RULING

1. The court granted Judgment in favour of the plaintiff for the sum of Kshs. 10,600,000/- together with interest at court rates. The said interest was calculable from 21st June 2011.
2. The defendant was dissatisfied with the court's decision, which was delivered on 7th August 2014.
3. However, the defendant says that he only became aware of the Judgment on 10th September 2014. Immediately thereafter, the defendant filed a Notice of Appeal, with a view to challenging the whole judgment.
4. The court records reveal that the Notice of Appeal was lodged in court on 12th September 2014. Five (5) days after filing the Notice of Appeal, the defendant filed the present application, seeking stay of execution until his appeal was heard and determined.
5. When canvassing the application, Mr. Khaseke, the learned advocate for the Defendant, submitted that if the court did not stay execution, his client would suffer substantial loss.
6. The said loss would be substantial because the amount of money that was payable under the Decree was already about Kshs. 12,000,000/-, which is a large sum of money.
7. But the extent of the probable loss was not simply limited to the amount of money. The defendant made the point that the learned trial Judge had earlier held that the defendant had already paid Kshs. 7,000,000/-. Therefore, by his calculations, the defendant said that if any money was thereafter owed to the plaintiff, it would not exceed Kshs. 3,600,000/-.
8. In those circumstances, if the defendant was compelled to pay Kshs. 12,000,000/- he contends that the loss he would sustain would be substantial.
9. When called upon to answer to the application, the plaintiff described the application as an abuse of the process of the court.
10. Mr. Rustam Hira, the learned advocate for the plaintiff, pointed out that the trial court had made it clear that the payment of Kshs. 7,000,000/- was un-connected to the matters in issue in this case.
11. To my mind, although I could express my opinion on the question as to whether or not the trial court had said that the payment of Kshs. 7,000,000/- was un-related to the issues in dispute in the case, I decline to express the said view. I have consciously made that decision because if I were to

- evaluate the decision of my learned brother, I would be deemed to be sitting on an appeal over a decision that was made by a court of concurrent jurisdiction.
12. I therefore leave that issue to be determined by the appellate court .
 13. The plaintiff also submitted that because the defendant had not sought an extension of the time for filing a Notice of Appeal, there was no valid Notice of Appeal.
 14. If there was no valid Notice of Appeal, there cannot be a valid appeal.
 15. Those submissions were founded upon the provisions of Rule 75 (2) of the Court of Appeal Rules, which stipulates that a Notice of Appeal should be filed within 14 days of the Judgement.
 16. But the defendant emphasised that he did not become aware of the judgment until 10th September 2014, which was already long after the period of 14 days had lapsed, from the date of the judgment.
 17. The defendant explained that he could not have filed a Notice of Appeal before he became aware of the Judgment.
 18. Logically, the defendant is very right. A party cannot commence the process of lodging an appeal to challenge a Judgment or Ruling, when the party had not yet become aware of such a Judgment or Ruling.
 19. But then again, the question arises as to whether the 14 days for the lodging of the Notice of Appeal is to be calculated strictly from the date of the Judgment, regardless of whether or not the parties to the case had become aware of the Judgment.
 20. The plaintiff disclosed to this court that it had filed an application at the Court of Appeal, seeking to strike out the defendant's Notice of Appeal.
 21. If the said Notice of Appeal will or will not be struck out, it is for the Court of Appeal to determine. But until the said appellate court determines that question, there remains on the record, a Notice of Appeal. If it had not remained in place, the plaintiff would not have needed to apply to strike it out.
 22. In effect, by virtue of the said Notice of Appeal, the defendant is deemed to have commenced the process of appeal.
 23. Secondly, this application was brought without any undue delay.
 24. Thirdly, I hold the considered view that the amount of Kshs. 12,000,000/- is a colossal amount of money if it is to be paid by an individual. Even if the respondent was able to repay that sum back to the applicant, in the event that the appeal was ultimately successful, the loss which the applicant would have suffered in the interim would be substantial. I so hold because it is unlikely that an average individual would be able to painlessly find a substantial amount of money, which he would then pay out to another person to hold, whilst the parties were litigating.
 25. In the event, I find that the applicant has fulfilled the conditions for the grant of an order for stay of execution.
 26. However, as a pre-condition for the stay of execution, the applicant is ordered to provide security for a sum not less than Kshs. 10,000,000/-. The said security may be in the nature of immovable property, whose Title documents and Valuation Report would be deposited with the advocate for the plaintiff.
 27. The applicant may also provide security in the nature of a Bank Guarantee.
 28. The security must be provided within 30 days from today.
 29. In the event of default, the order for stay will stand discharged.
 30. Each party will bear his own costs of the application. I so order because although the application is successful, the respondent cannot reasonably be burdened with the costs.
 31. Finally, the applicant is granted liberty to seek further orders if he may wish to offer any other kind of security. But such steps, if any should be taken within the 30 days period.

DATED, SIGNED and DELIVERED at NAIROBI this 3rd day of February 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

..... for the Plaintiff.

..... for the Defendant.

Collins Odhiambo – Court clerk.