



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 497 OF 2013

KAJULU HOLDINGS LIMITED.....1st PLAINTIFF

COMMERCIAL BANK OF AFRICA LIMITED.....2ND PLAINTIFF

- VERSUS -

DIAMOND TRUST BANK KENYA LIMITED.....DEFENDANT

RULING NO. 2

1. The defendant, **DIAMOND TRUST BANK KENYA LIMITED**, has sought a stay of any further proceedings in this case until such time as the Court of Appeal will have determined the appeal **DIAMOND TRUST BANK KENYA LIMITED Vs KAJULU HOLDINGS LIMITED (IN RECEIVERSHIP) & ANOTHER, CIVIL APPEAL No. 369 of 2014**.
2. The appeal in issue arose from the Ruling dated 26th November 2014, when I declined the defendant's request to strike out the Plaint. I had held that the Plaint raised serious issues of law, which could not therefore be struck out summarily.
3. The defendant holds the view that the plaint not only lacked triable issues but also did not disclose any cause of action against it. As far as the defendant was concerned, it was sufficient that the court had concluded that, on a prima facie basis, the defendant had acted on the instructions of the directors of **KAJULU HOLDINGS LIMITED**.
4. The defendant intends to persuade the Court of Appeal that I should have appreciated that the question as to whether or not the directors had legal authority to manage Kajulu Holdings limited was purely a point of law.
5. In any event, as far as the defendant was concerned, the actions of the directors of Kajulu Holdings Limited were not attributable to the defendant.
6. Furthermore, the defendant is convinced that when it took action, the defendant was merely complying with the valid Court Orders.
7. For all those reasons, the defendant believes that its pending appeal was arguable.
8. If the appeal were to succeed, it would mean that the plaint against the Defendant would be struck out. Therefore, if these proceedings were not stayed until the Court of Appeal had determined the appeal, the defendant feels that it would be prejudiced, as the appeal would be simply academic.
9. Why would the appeal be rendered academic?
10. The defendant said that it would be indirectly compelled to abandon the appeal, and to focus on the trial. Furthermore, if the case proceeded to trial, the defendant believes that the Court of Appeal may not even want to hear the appeal.

11. Another factor that the defendant raised was that if the trial proceeded, there was a possibility that the trial court could grant judgement against the defendant, thus leading to a situation in which the defendant was compelled to pay out a colossal amount of money before it had exercised its unfettered right to appeal.
12. It was also the defendant's contention that if the trial proceeded whilst the appeal was pending, that may well be an exercise in futility, because the appeal court may end up striking out the plaint which was the foundation upon which the trial was developed. Therefore, the defendant submitted that the stay of further proceedings would constitute an optimum utilization of judicial time.
13. The plaintiffs opposed the application, as they were convinced that the defendant was only keen on causing further delays to the trial.
14. The plaintiffs pointed out that the defendant had already demonstrated a history of delays at every turn in the proceedings. Examples of such delays were given as follows;
 - a. **Failure to file Witness Statements with the Defence. The said statements were filed 3 months later.**
 - b. **Failing to file a List of Issues within the time ordered by the court.**
 - c. **Filing the application to strike out the plaint 5 months after the Defence was filed; and after the case was set down for hearing.**
 - d. **Consenting to the listing of the case for trial, but thereafter applying to strike out the plaint.**
15. In my considered view, the consequences for the failure to file Witness Statements at the time when the Defence was filed are clear. It can form the foundation for an application to strike out the Defence. If the plaintiff did not take steps that would have led to that conclusion, I do not think that the said failure can be used now, to try and portray the defendant as being keen to delay the trial of the case.
16. As regards the delay in filing the List of Issues, I find that the defendant has already been penalized. I say so because the court did certify the case as ready for trial, despite the defendant's failure to file its List of Issues. In effect, the defendant lost its opportunity to make any contribution to the identification of the issues which the trial court would be called upon to determine.
17. On the other hand, when the defendant had consented to having the case set down for hearing, and it thereafter filed an application to strike out the plaint, that suggests the defendant may not have been keen to proceed to trial, even though it was party to the fixing of a date for the trial.
18. I also find merit in the criticism levelled against the defendant for waiting for 5 months, after its application to strike out the plaint was dismissed, to then apply for stay of execution.
19. Considering that the defendant had made up its mind to appeal against the Ruling dated 26th November 2014, the defendant should have had no difficulty in seeking stay of further proceedings until the appeal was heard.
20. Instead, the defendant consented to the fixing of hearing dates, on two occasions, before applying for stay of proceedings.
21. I cannot help but wonder why the defendant did not bring this application earlier. The defendant did not offer any explanation for that delay.
22. When a party consents to the fixing of a date for trial, he must be deemed to appreciate that after a date is fixed, the other party would commence preparations for the actual trial.
23. Indeed, I do presume that by the time the advocates were fixing a date for trial, they would have discussed with their respective clients and witnesses, about the dates which would be convenient. Therefore, when the other party later causes the trial date to be abandoned, it is prejudicial to the party whose witnesses had made arrangements to be present and ready on the scheduled trial date.
24. On the question whether or not the defendant's appeal was arguable, I hold the view that my decision was correct. If I thought otherwise, I would not have rendered that decision.
25. But then again, I lay no claim to infallibility. Therefore, there is a possibility that the appellate court could arrive at the conclusion that the plaint ought to be struck out.
26. In determining this application I need to balance the competing rights. On the one hand I could proceed with the trial, and later, the Court of Appeal says that the suit should have been struck out. If that happened, would the time spent handling the trial, have been well-spent?
27. On the other hand, I could stay proceedings, and the Court of Appeal thereafter says that the case

- should have proceeded to trial. In such a scenario, there would have been a delay in the determination of the issues raised in the pleadings. Notwithstanding such a delay, I agree with the defendant, that it would be possible to compensate the plaintiffs with an appropriate award of interest, if the case against the defendant finally succeeded.
28. The defendant's fear of execution is, however, not well founded. If the case proceeded when the appeal was pending, and the trial court granted judgement in favour of the plaintiffs, there would still be an opportunity for the defendant to seek stay of execution. In other words, even if the trial proceeded, and in the event that judgement was in favour of the plaintiffs, it would not follow that there would necessarily be execution levied against the defendant.
29. I am alive to the fact that in determining an application for stay of further proceedings pending an interlocutory appeal, the court has an unfettered discretion.
30. In the exercise of the said discretion the court needs to be guided by the interests of justice.
31. If stay was to be granted, the court also needs to ask itself whether or not justice demands that some terms and conditions be imposed.
32. I appreciate the need for expeditious disposal of cases, including this case.
33. But I also find that the appeal lodged by the defendant was not so hopeless as to be termed, unarguable. For instance, the Court of Appeal would have to determine whether or not the directors of Kajulu Holdings Limited had legal authority to manage the company simply because they were directors. Did not the appointment of the Receivers matter, in the circumstances of this case?
34. Did the court attribute to the bank, the actions of the directors? And if so, was the court right so to do?
35. To my mind, those issues need to be answered by the Court of Appeal. And it is for that Court to decide whether or not to answer the questions conclusively at this stage, as alluded to by the defendant. The Court of Appeal could decide to refer the issues or some of them back to the High Court, to enable the trial court make a determination on them, after receiving evidence.
36. But it is also possible that the Court of Appeal may make some conclusive determinations.
37. In the circumstances, considering the number of cases to be determined; the time available to the court; and the fact that the pending appeal was arguable, I find that justice demands an optimum utilization of judicial time. In this case, that can only be achieved if these proceedings are stayed until the Court of Appeal determines the pending appeal.
38. However, the parties will each bear its own costs of the application dated 7th May 2015. I so find because of the timing of the application, which was brought after the defendant had consented to the fixing of trial dates.

DATED, SIGNED and DELIVERED at NAIROBI this 2nd day of July 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Ken Fraser for the 1st Plaintiff

Ken Fraser for the 2nd Plaintiff

Shah for the Defendant

Mr. C. Odhiambo, Court clerk.