



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 700 OF 2005

PHILIP KIOKO KATHENGE.....1st PLAINTIFF

DOROTY MUENI KIOKO.....2ND PLAINTIFF

• **VERSUS -**

HOUSING FINANCE COMPANY.....DEFENDANT

RULING

1. On 13th February 2014, Havelock J. delivered a Ruling in which he upheld the defendant's Preliminary Objection to the plaintiff's application dated 24th September 2014.
2. The said application was premised on a Settlement Agreement dated 12th July 2004, pursuant to which the plaintiffs were to pay Kshs. 350,000/- within six (6) months; and that payment would then be deemed to have been made in full and final settlement of the debt which the plaintiffs owed to the defendant.
3. As far as the plaintiffs were concerned, although the original period of six (6) months had lapsed, the parties had mutually extended the period for payment, indefinitely.
4. But the defendant's view was that there was no such an extension of time.
5. During the six (6) months when the plaintiffs were to have paid Kshs. 350,000/-, they only managed to pay Kshs. 60,000/-. The plaintiffs' reason for failing to pay the agreed sum was that there had been a difficult economic condition in the country at the material time.
6. In view of the said harsh economic realities then prevailing, the plaintiffs requested the defendant to allow them pay the balance of Kshs. 290,000/- by monthly instalments of Kshs. 15,000/-. That offer was made on 17th February 2005.
7. By the letter through which the plaintiffs made that offer, they pledged to pay without any default, until the debt was paid in full.
8. According to the plaintiffs, their offer was accepted by the defendant. Following the alleged acceptance, the plaintiffs asserted that they then paid Kshs. 367,000/- between the period ranging from 1st July 2005 to 4th May 2010.
9. Having made payment, the plaintiffs called to their aid, the Settlement Agreement pursuant to which the defendant had agreed that it would accept Kshs. 350,000/- in full and final settlement.
10. The learned Judge upheld the Preliminary Objection which the plaintiff had raised. In arriving at that conclusion, the court found that the defendant's letter dated 1st March 2005 did not, in any way, extend the Settlement Agreement.
11. It was the court's considered view that because the Settlement Agreement constituted a contract, it lapsed after six years.
12. Although the court did not expressly state the exact date when the contract lapsed, by my

- calculations, the six – year period from 28th June 2004, came to an end on 27th June 2010.
13. Therefore, when the plaintiffs filed the application dated 24th September 2012, through which it sought to enforce the contract which had lapsed two years before the date when the application was filed, the court concluded that the application was time – barred. For that reason, the court struck out the plaintiff’s application.
 14. Being aggrieved by that Ruling, the plaintiff’s have lodged an appeal before the Court of Appeal. The Notice of Appeal was filed on 25th February 2014.
 15. The plaintiffs have now asked this court to stay any further proceedings in this case until their appeal was heard and determined.
 16. It is their considered view that if the proceedings were not stayed, the appeal would rendered nugatory.
 17. Why do the plaintiffs feel that their appeal would be rendered nugatory?
 18. It is because although the defendant had agreed to accept Kshs. 350,000/- in full and final settlement, the defendant had subsequently demanded payment for more than Kshs.700,000/-.
 19. The plaintiffs submitted that although they appreciate that a party seeking stay is ordinarily required to demonstrate that he would suffer substantial loss if the stay was not granted, that requirement did not apply to this case. This is what they said in their submissions;

“The question whether or not the plaintiffs will suffer substantial loss or damage is, with respect, rather academic. If indeed, we all agree that a party has a right of appeal, which they have shown a serious intention of exercising, then we cannot argue whether loss or damage will occur if a stay of proceedings were not granted. In our respectful submission, irreparable loss and damage will be suffered by the plaintiffs herein if this Honourable Court proceeds with the hearing of the main suit without regard to the plaintiffs’ right of appeal”.

20. To my mind, the plaintiffs cannot be right to say that the very fact that a person was exercising his right of appeal was, of itself, a ground enough to prove that if an order for stay of proceedings was not granted then the person would suffer irreparable loss and damage. I so find because if that were the correct position then everybody who had lodged an appeal would be deemed to be entitled to a stay of either proceedings or of execution.
21. Nonetheless, I do find that the plaintiffs have an arguable appeal. I say because it was arguable whether or not an application filed within an ongoing court case was premised upon a cause of action.
22. If the suit proceeded to full trial at a time when the plaintiffs could not rely upon the Settlement Agreement because the said Agreement had been impeached, there may be total loss if thereafter the Court of Appeal were to overturn the decision of the High Court.
23. However, I do also appreciate the following words of Hancox J.A. in the case of **KENYA SHELL VS KARUGA (1982 – 1988) 1 KAR 1018**, at page 1021;

“I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory; then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause”.

24. In effect Justice is about achieving the perfect balance between the rights of competing parties, particularly during the interlocutory stages of a case. In the matter before me, the case has not been fully heard and determined.
25. The plaintiffs wish to have their own case put on hold until such time as their appeal from the interlocutory Ruling was determined.
26. For that reason, the defendant is apprehensive that the determination of the case herein would be further delayed. That view is appreciated by me, because any prolonged delays in the determination of the suit may well result in a situation where the debt due exceeds the value of the security held by the defendant.
27. In the meantime, the plaintiffs will continue to derive benefit from the interim injunction orders which had been in place since the year 2005.

- 28.As there is always a possibility that the plaintiffs appeal could ultimately fail, the continued delay in the prosecution of this case would not be beneficial to either the plaintiffs or the defendant.
- 29.In view of the longstanding injunction in favour of the plaintiffs, the defendant cannot realize the security even though the plaintiffs may not be remitting any payments. In fact, the plaintiffs are not likely to be making any payments because they feel that they already the debt in full.
- 30.It looks to me like the plaintiffs wish to have the proceedings put on hold, to add to the injunction which they were already enjoying. Thus they would have the security whose value may well end – up outstripping the quantum of the debt, if the determination of the case was delayed for a considerable period of time.
- 31.For the plaintiffs to hold onto the suit property without making any more payments to the defendant, Housing Finance Company (Kenya) Limited, because the plaintiffs were enjoying both an injunction and an order for stay of proceedings, is not sync with justice.
- 32.In any event, if the trial proceeded, the plaintiffs will have an opportunity to present their evidence.
- 33.The said trial cannot render nugatory the pending appeal. At worst, it may constitute a waste of valuable judicial time and effort if the Court of Appeal were to reverse the decision of Havelock J., and if the decision after the full trial was directly impacted by the Ruling dated 13th February 2014.
- 34.For those reasons, the application for stay of proceedings is rejected.

DATED, SIGNED and DELIVERED at NAIROBI this 12th day of November 2014.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

.....for the 1st Plaintiff

.....for the 2nd Plaintiff

.....for the Defendant.