



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 2560 of 1988

KENSING & PARTNERS CONSULTING

**ENGINEERS LTD.&ANOTHER.....APPLICANT/
3RDDEFENDANT**

versus

KENYA POLICE STAFF SAVINGS & CREDIT

**CO-OPERATIVE SOCIETY.....
RESPONDENT/PLAINTIFF**

RULING

In the application by Chamber Summons dated 28th October 1998, the Applicant, Benjamin Ndubai seeks a stay of execution pending appeal. It has been specified before me, from the Notice of Appeal and from a letter dated 8th October 1998 written by the Applicant's advocates to the Deputy Registrar that the intended appeal is to be against my ruling dated and signed by me on 2nd October, 1998 and read to the parties on 8th October 1998 by Hon. Justice Sheikh Amin.

The orders I made in that ruling dismissed the Applicant's Chamber Summons dated 11th September, 1998 seeking a review of the judgment I delivered in this matter on 11th November 1997 against the Applicant, then Defendant.

By the time I was hearing the Chamber Summons dated 11th September 1998, the Respondent, who was the Plaintiff in the main suit, was moving to execute the judgment in his favour. That is the judgment dated 11th November 1997. The Chamber Summons dated 11th September, 1997 therefore put that execution in abeyance until that Chamber Summons was dismissed as thereafter the Respondent resumed execution process. That was also put in abeyance following the filing of this application.

Clearly therefore the Respondent intends to execute the judgment of 11th November 1997 and from what

has happened on the side of the Applicant so far, I get the impression that the Applicant intends to appeal as he is bitterly complaining on the ground that no justice has been done by me in this case.

I have always refused to be an obstacle to parties who want to appeal against my rulings, orders or judgments. I do not see the reason why I should be an obstacle to Hon. Benjamin Ndubai who complains that the sum of Kshs.18 million he was ordered to pay is colossal and that he does not have that money. He was claiming no less than that amount against the Respondent in suit No.4694/87 which was filed earlier than the three cases filed by the Respondent against him. Following the filing of the Respondent's three cases in 1988 against the applicant, he amended the plaint in his H.C.C.C. No. 4694/87 in 1989.

This case was therefore a case involving big money and I do not see why the Applicant expected small money only to be awarded in a judgment against him. Could be he did not think any sum of money could be awarded against him. He should, however, realise, with due respect, that the court was not bound by that way of thinking.

It was pointed out during the time I was hearing the Chamber Summons dated 11th November 1997 and the same was repeated at the time I was hearing this Chamber summons dated 28th October 1998 that the main suit still remains to be heard because it was the Counter Claim only which was heard and that that was a counterclaim in one suit. This suggests that only one of the four cases then before me, was heard.

With due respect, that is not so. Otherwise, what was I saying in the opening paragraph of the judgment dated 11th November 1997 when I stated:

"These are four cases consolidated for hearing following an order made on 26th October 1993 by Mr. Justice Couldrey, as he then was. The effect is that I have Kenya Police Staff Savings and Credit Co-operative Society fighting it out against four companies.... "

I then proceeded to mention the four companies the fourth one being Benjamin Ndubai and Chloris Ndubai at Kensing and Partners Ltd. I went on to say:

"For the purpose of these proceedings, I will be referring to the Kenya Police Staff Savings and Credit Co-operative Society as the Society or the Plaintiff while referring to the other four parties as first defendant, second defendant, third defendant and fourth defendant respectively. Benjamin Ndubai and Chloris Ndubai is said to be a director of all the defendant companies. He was the active director and signed all the agreements, on behalf of the Defendants, between the Plaintiff and the Defendants."

At mid page 2 of the typed judgment I said:

"The evidence brings out a consolidated claim based on three contracts signed by the Plaintiff on the one side and Benjamin Ndubai on the other side for the defendants. In most cases, it would look as if he was acting for the fourth Defendant and that the fourth Defendant was sometimes standing in for one of the other three. In the last paragraph on page 3 of the typed judgment, I stated:

"From the sum of money the Plaintiff was paying for the loan therefore, the defendants were taking some money on account of damages. H.C.C.C. No. 4694/87 is therefore mainly on this claim for damages by the third Defendant against the Plaintiff."

At the bottom of page 4 to top page 5 I said:

"The Plaintiff, has made various claim, from that scenario. That is the claim in H.C.C.C. No. 2559/88, the claim in H.C.C.C. No. 2560/88 and the claim PW2, Mr. David M. Kombe set out in his evidence."

From the above and reading the whole judgment, I was handling all the aspects of each one of the four cases before me. The learned counsel for the Applicant may be taking advantage of the fact that I did not specifically state that I had dismissed H.C.C.C. No. 4694/87. But it should be remembered that I was seized of a consolidated case made up of four cases. When I therefore said in paragraph 2 at page 5 that

"The Plaintiff has said nothing about the claim of the third defendant in H.C.C.C. No. 4694/87 and that claim has not, of course been proved." that meant that while the Plaintiff had said nothing about the claim of the third

Defendant in H.C.C.C. No.4694/87, the third defendant, because of its absence, had not proved its claim. In such a situation, who loses? It is the owner of the case, the third defendant, who lost H.C.C.C. No.4694/87 as it was the duty of the third

Defendant to prove mat case before me on that day. It could not mean that that case remained pending, unless one is saying that case had not been consolidated with the other three.

From the final orders I made in that judgment therefore, the implication was clear that the third defendant's case, H.C.C.C. No. 4694/87, had failed, not having been proved, and therefore stood dismissed, although I may not specifically have said the case was dismissed. That case's subsistence cannot be consistent with the final orders I made in the judgment dated 11th November 1997.

However after saying all that above, I should remark that I do understand all the authorities cited during the hearing of this application. I have no problem with any of them. As I have already indicated elsewhere, the Applicant should be allowed to file his appeal in the absence of worry about execution of the decree in this suit. The condition I will impose is that the stay I grant will be limited.

Accordingly the Chamber Summons dated 28th October 1998 be and is hereby granted in terms of prayers 2 and 3 with the limitation that the stay in respect of prayer 2 will subsist only up to the date of filing the appeal in the Court of Appeal by the Applicant.

The Respondent is at liberty to apply to this court if filing of the appeal delays.

Costs of this application be in the cause.

Dated this 2nd day of December, 1998.

J.M. KHAMONI

JUDGE