



**IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: OMOLO, SHAH & BOSIRE JJ.A)
CIVIL APPLICATION NO. NAL.367 OF 2001 (194/2001 UR)
BETWEEN**

KENYA POSTS & TELECOMMUNICATIONS CORPORATION....APPLICANT

AND

**PAUL GACHANGA NDARUA
RESPONDENT**

**Being an application for stay pending the determination
of the intended appeal against the judgment and
decree of the High Court of Kenya at Nairobi
(Justice Aluoch) dated the 11th day of October 2001**

in

**H.C.C.C. NO.2863 of 1996)

RULING OF THE COURT

Following the striking out of its written statement of amended defence and entry of summary judgment against it in High Court Civil Case No.2863 of 1996, Kenya Posts & Telecommunications Corporation, (the Corporation) was aggrieved and promptly filed a notice of appeal declaring its intention to challenge that decision in an intended appeal to this Court. The said Corporation also took out the present motion, expressed to be brought under rule 5(2)(b) of the Court of Appeal Rules (the Rules) seeking an order that the execution of the aforesaid decision be stayed pending the lodgment and determination of its intended appeal.

It is now trite that for an applicant to succeed in an application brought under rule 5(2)(b), above, it must, on the main, show not only that its appeal or intended appeal is arguable, but also that its appeal or intended appeal, if successful, will be rendered nugatory unless it is granted a stay or injunction prayed for in the application. The jurisdiction of the Court under the aforesaid rule is discretionary and that being the case, the court, as in all cases where judicial discretion is involved, must act on sound evidence and clear legal principles, some of which, as regards applications of this nature we have already set out above.

High Court Civil Case No.2863 of 1996, was commenced by Paul Gachanga Ndarua, the respondent, by plaint which made a liquidated demand of Kshs.44,261,519.50 allegedly being the unpaid outstanding amount for services he rendered to the Corporation as a project co-ordinator at its request for an agreed period of about three years. He also claimed interest at the rate of 30% per annum for delayed payments which according to his computation worked out to Kshs.53,068,872.45 as at the date of the suit. In the alternative the respondent prayed that he be paid interest at commercial rates on the principal sum from

20th June, 1998, when he alleged the money should have been paid, until the date of full payment.

The Corporation on being served with summons to enter appearance and the plaint and later with an amended plaint filed a written statement of defence to the amended plaint in which it denied owing the respondent both the principal sum and interest. It raised various defences, among them the following:

(11)"... that the plaintiff has no contract for and is not entitled to the interest claimed or any interest.

(12)"As shown by paragraph 12(of the plaint) and the particulars interest is alleged to have arisen more than one year before the suit was filed. All the alleged claims of the plaintiff arose at the latest by November, 1993. The suit not having been filed within 1 year from that date all claims are barred by section 109(b) of the Kenya Posts & Telecommunications Act (Cap 411).

(13)"No claim for interest prior to suit filed is maintainable as alleged or at all."

The decision from which an appeal is intended was given pursuant to an application by the respondent under Order VI rule 13(1)(b)(c) and (d); Order XII rule 6 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The grounds which were proffered for the application were, that the Corporation had admitted the principal claim after the date of the suit and paid the same; that having settled the principal claim it forfeited any right to a demur; that its denial that it was liable to pay interest to the respondent was frivolous, vexatious and was merely aimed at delaying the hearing of the suit; that by its actions the Corporation was liable to pay interest on the principal sum as prayed in the plaint; that the averment in the amended defence that the respondent had no contract with the Corporation to pay interest was belated and an afterthought; that the Corporation was deliberately misleading the Court in order to cause undue delay in the final determination of the suit; and that the defendants were estopped from denying liability at that "late stage" of the suit.

There was an affidavit in support of the application, but this not being the appeal the Corporation wanted to file we do not propose to examine it in detail. But we consider it important to look at the correspondence on which the respondent anchored his application. In the Corporation's letter to the respondent dated 27th August, 1997, it penned, in pertinent part, as follows:-

"Thanks for accepting payment for the outstanding principal as tabulated below which we consider will be in full and final settlement of your claim.

We also inform you that it is our wish that we clear your payment within the shortest time. However it is not possible to pay you all the amount within 30(thirty)days as proposed due to other financial commitments. We propose to pay you in 10(ten) equal instalments of Kshs.4,426,151.95 per week with effect from the date of acceptance of our proposal."

The letter then proceeded to ask the respondent to affix his signature on an acceptance declaration which was appended to the letter and which read as follows:-

"I P.G. NDARUA, hereby accept to be paid the outstanding payments in 10(ten) equal instalments of kshs.4,426,159.50 in full and final settlement of my claim in H.C.C.No.2863 of 1996.

Signed ...

DATE "

In his reply dated 29th August 1997 the respondent categorically said he would not relinquish his claim for interest but offered to give a rebate of Kshs.12,132,505.90, and amended the acceptance declaration, in pertinent part, to read as follows:-

"... instalments of Kshs.4,426,151.95 per week totalling kshs.44,261.519 in full and final settlement of the principal amount which I am claiming in HCCC No.2863 of 1996."

He then signed the declaration as amended and sent it to the Corporation which thereafter made payment presumably, in terms. It refused to pay any interest. So as at the date of the application aforementioned the entire principal sum had been paid in full and we can confidently say the application only related to the claim on interest.

At the hearing of the application it was contended on behalf of the respondent that since the Corporation admitted the respondent's principal claim during the pendency of his suit it was taken to have waived any defence of limitation it might have had under s.109 of the Kenya Posts & Telecommunications Corporation Act and additionally, the admission amounted to an acknowledgement of the debt within the meaning of the provisions of Sections 23 and 24 of the Limitations of Actions Act, Cap 22 Laws of Kenya. Besides, that although there was no contract as to the payment of interest the Court had the discretion to order interest to run from the date the cause of action arose at such rate as it deemed reasonable.

The superior court (Aluoch J.) ruled that the payment by the Corporation of the principal sum in the face of the clear provisions of section 109, above, denied them the right to rely on the defence of limitation. Besides, that court held that the settlement of the principal claim made the respondent's claim for interest automatically payable since, in her view, it flowed from the delayed payment of the principal sum. The court then proceeded to hold that the Corporation's amended defence did not raise any triable issues and ordered it to be struck out and thereafter entered judgment for the principal sum and interest.

In his submissions before us Mr. Le Pelley for the Corporation urged the view that in absence of any contract to pay interest the respondent's claim on it could only be viewed as a claim for damages, which under the rules of court have to be proved by evidence. Besides, he said the correspondence the respondent relied upon having not specifically admitted that interest was payable it is arguable whether there was any admission that interest was payable. It was further his submission that acknowledgement of a debt, per se, does not revive a cause of action which becomes extinguished at the close of the limitation period. Consequently he said the Corporation's defence raised serious issues for which it should have been allowed a trial.

On the other hand Mr Kilonzo for the respondent submitted, inter alia, that interest specifically claimed cannot and should not be taken as being in the nature of damages. He said there was a specific claim for interest which, although not based on any agreement was denied in the Corporation's amended defence which denial the court regarded as frivolous, more so because the Corporation did not challenge the rate. In his view the court had power to award interest at such rate as it considered reasonable in the circumstances of the case.

On the issue of limitation Mr. Kilonzo submitted that the respondent's claim was merely a case of a debt arising from ordinary law of contract and had nothing to do with the enforcement of or ignoring the provisions of the Kenya Posts and Telecommunication Corporation Act, and as a result, he said, section 109, above, does not apply.

Striking out a pleading is a draconian measure and is only resorted to in very clear cases. In the matter before us at least two important issues were raised by the Corporation in its amended defence. First, there was the issue of limitation. Two, in absence of any contract to pay interest, whether interest on delayed payment of the principal sum claimed was payable; and upon what basis and at what rate. Whether or not interest is payable is a matter for the discretion of the court. The power of the court to order the payment of and the rate of interest in a suit, is donated by section 26 of the Civil Procedure Act. That section provides, in pertinent part, that:

"26(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit..."

It is quite clear that the court has jurisdiction to order interest to be paid both for the period before the

suit, and after. The jurisdiction is discretionary and as we stated earlier exercise of judicial discretion requires material. On the material before us it is arguable whether the superior court had material before it upon which it awarded the respondent interest at the rate of 30% or at all.

Besides, the Corporation having raised statutory limitation as a defence, it is arguable whether the admission of part of the claim took away the defence and if it did, whether interest on the principal sum at whatever rate would accrue from the date the cause of action arose or from the date of the acknowledgement.

There was another issue which Mr. Le Pelley raised which merits mention. The respondent's application for judgment on admission was based on without prejudice correspondence which, in ordinary circumstances is not admissible in evidence (see section 23 of the Evidence Act, Cap 80 Laws of Kenya). The trial Judge ruled that in the circumstances of this case they were admissible as negotiations with a view to a settlement terminated with a settlement and that no prejudice was expected to result from their admission in evidence. Mr. Kilonzo supported that view. Whether section 23, above, has an exception is arguable.

From the foregoing it is quite clear that the Corporation intended appeal is arguable.

But will its intended appeal if successful be rendered nugatory unless we grant it a stay? The Corporation's case is that the respondent does not have any assets known to it. The Corporation also attached to its application before us a copy of a charge sheet showing that the respondent has criminal charges against him pending before the Chief Magistrate Nairobi relating to conspiracy to defraud and abuse of office, presumably to show that the respondent cannot be trusted. These charges were not brought to the attention of the trial court and we think that they were unfairly introduced in the present application considering that until his trial is concluded against him, they in no way show he is guilty of those charges. We place no weight on them in this matter and disabuse our minds from them.

Returning to the nugatory aspect, the respondent's answer to the Corporation's assertion that he has no known assets deponed in a replying affidavit as follows:

"11. That I am not a man of straw as alleged or at all. If I receive the decretal sum the sum will not go beyond the reach of the applicant, nor will restitution be impossible should the appeal succeed. I have a right to the result of the judgment of the superior court.

12. That if it is the wish of the court and it so orders I am willing to provide suitable security which will be binding as required by court."

True, a party who has a decree in his favour is entitled to the fruits of his litigation unless circumstances exist which justify denying the immediate realization thereof. We have already held that the Corporation's intended appeal is arguable and upon hearing there is the possibility that the decision in the respondent's favour might be interfered with.

There is also the possibility that it may be affirmed in whole or in part. Whatever the position will be this Court has a duty to guard against the Corporation's success in its intended appeal being rendered nugatory. The respondent has not fully answered the Corporation's assertion that he has no known assets. The decree in his favour is for a whopping Kshs.53, million odd. That by ordinary standards is a very large sum of money and it was incumbent upon the respondent to satisfactorily counter the Corporation's assertion that he had no known assets by showing the basic assets he has which if need would arise, he would depend on to repay the decretal sum. Of course, ordinarily the burden was on the Corporation to show that were its appeal to succeed, the success would be rendered nugatory because the respondent would be unable to restore the decretal sum if that sum was immediately paid out to respondent immediately. But in a case such as this where it is alleged that the respondent has no known assets, the evidential burden must shift to him to show that he has assets from which he can refund the decretal sum. That must be so because the property a man has is a matter so peculiarly within his knowledge that an applicant such as the Corporation may not reasonably be expected to know them. He did not do so. An

undertaking to give security by way of a bank or insurance bond is, in the circumstances of this matter, not sufficient.

Before we conclude this matter, an issue with regard to the jurisdiction of this Court to entertain the present application was raised by Mr. Kilonzo. The basis of his assertion is that the copy of the notice of appeal in the record of the present application is not endorsed by the Registrar although it has a court date stamp indicating that it was lodged in the superior court on 16th October, 2001. In Mr Kilonzo's view in absence of such endorsement the notice of appeal is invalid, and under rule 5(2) (b) of the Rules it is only a party who has filed a valid notice of appeal who may make an application under the rule. We have no evidence as to whether the original copy of the notice of appeal in the court file is also unendorsed. Considering that the respondent has not as yet taken any steps to have the notice of appeal struck out and also, considering that, if he wished to raise the issue, the respondent should have but did not check the superior court record to see if the original was also not endorsed we are disinclined to rule that the notice of appeal is invalid as we lack adequate material to so rule.

In the result and for the foregoing reasons we are satisfied that the Corporation has made out a case for the grant of a stay of the decision and decree of the superior court given at Nairobi on 11th day of October, 2001. Accordingly, we order that there be a stay of the said decree pending the lodgment, hearing and determination of the Corporation's intended appeal. The costs of the motion shall be in the appeal.

Dated and delivered at Nairobi this 16th day of November, 2001.

R.S.C. OMOLO

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR