



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1458 OF 2005

VIJAY KUMAR MANDAL.....PLAINTIFF

VERSUS

RAJINDER KUMAR MANDAL.....DEFENDANT

RULING

The application dated 13th August 2021 which is supported by the affidavit of the second applicant sworn on even date seeks the following orders:-

1. Spent

2. Spent

3. THAT this Honourable Court be pleased to grant an order of Stay of proceedings in this suit pending the hearing and determination of the intended appeal against the ruling of Honourable S. J. Chitembwe J delivered on the 4th March 2021.

4. THAT the cost of this application be provided for.

Counsel for both parties agreed to determine the application by way of written submissions. The respondent filed a replying affidavit sworn on 8th September, 2021 as well as grounds of objection dated 1st September, 2021. According to counsel for the applicant, the application raises only two issues namely:-

i. Whether the intended appeal is fatally defective.

ii. Whether the proceedings should be stayed.

On the first issue, it was submitted that the grounds of objection attacks the notice of appeal to the Court of Appeal. This court lacks jurisdiction to entertain that objection. Counsel referred to the case of **KANYOTTA HOLDINGS LIMITED –V- KENYA SHELL LIMITED (2012) eKLR** where Mabeya J held:-

“It is not for this Court to inquire into the validity or otherwise of such a Notice. That is the preserve of the Court of Appeal. It is for this reason that I agree with the submission of learned Counsel for the Defendant that Order 42 Rule 6 does not require the filing of a “valid notice of appeal” but only a Notice of Appeal.”

On the same issue of jurisdiction to deal with the validity of a notice to the court of appeal, the court was referred to the case of **SAMWEL KIMUTAI KORIR –V- NYANCHWA ADVENTIST SECONDARY SCHOOL & NYANYWA ADVENTIST COLLEGE (2017) eKLR** where Onkwany J stated:-

“I find that this court lacks jurisdiction to determine the validity of a Notice of Appeal issued pursuant to the provisions of the Appellate Jurisdiction Act. A similar position was taken by Murgor JA . . . when she observed that Rule 53 of the Court of Appeal Rules stipulates that the validity of a Notice of Appeal are a preserve of the full bench of the court.”

According to counsel for the applicant, the respondent is at liberty to file an application before the Court of Appeal seeking to have the notice of appeal struck out.

On the issue of stay of proceedings pending the intended appeal, it was submitted that the appeal is arguable and is not frivolous. The appeal

raises arguable points of law. Counsel relies on the case of **PKM –V- RPM (2015) eKLR** where the court explained an arguable appeal as follows:-

“As stated by this Court on many occasions, an arguable appeal does not mean an appeal which would ultimately succeed. The authorities show that an applicant is only required to show that the grounds raise a serious question of fact or law which can go either way for consideration by the Court on appeal.”

Counsel for the applicant also referred to the holding by Ringera J in the unreported case of **GLOBAL TOURS & TRAVEL LIMITED, Nairobi Winding up Case No. 43 of 2000** that was cited in the case of **EZEKIEL MULE MUSEMBI –V- H. YOUNG & COMPANY (E.A) LIMITED (2019)eKLR** where it was held:-

“...whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. such factors as the need for expeditious disposal of case, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

According to the applicant, should the proceedings be allowed to continue and the intended appeal succeeds, substantial loss will be suffered. In case the appeal succeed, it would be rendered nugatory.

Counsel for the plaintiff/respondent vehemently opposed the application. It was submitted that the application does not meet the threshold for granting of stay of proceedings pending an intended appeal. Counsel referred to **HALSBURY’S LAWS OF ENGLAND, 4th edition Vol 37 page 330 and 332** where it is stated as follows on stay of proceedings:-

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

Counsel for the respondent also relies on the case of **KENYA POWER & LIGHTING COMPANY LIMITED –V- ESTHER WANJIRU WOKABI (2014) eKLR** where the court gave some of the issues for consideration in an application for stay of proceedings as follows:-

- a) Whether the Applicant has established that he/she has a prima facie arguable case.
- b) Whether the application was filed expeditiously and
- c) Whether the Applicant has established sufficient cause to the satisfaction of the Court that it is in the interest of justice to grant the orders sought.”

Further reliance was placed on the case of **CHRISTOPHER NDOLO MUTUKU –V- CFC STANBIC BANK LIMITED (2015) eKLR** where it was held:-

“...what matters in an application of stay of proceedings pending appeal is the overall impression the court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice...”

“The Court is aware the Defendant has unfettered right of appeal which it has sought to exercise. But that right has to be balanced against the right of the Plaintiff to equal treatment in law and to have his case determined without unreasonable delay. That constitutional desire demands that proceedings should not be hindered without just and sufficient cause. That position of the law is informed by the principle of justice in Article 159 of the Constitution which expresses the now commonly principle of law known as the overriding objective of the law; that cases should be disposed of in a just, proportionate, expeditious and affordable manner.”

According to counsel for the respondent, it is not necessary to have the proceedings stayed since the administrators of the estate of the deceased were enjoined in the proceedings. No prejudice will be occasioned to the applicants should the claim be prosecuted.

Regarding the issue of the validity of the notice of appeal, Counsel for the respondent contend that the notice is fatally defective as it was filed four (4) months before the applicants were substituted as the administrators of the deceased defendant. The applicants lacked the *locus standi* to file the notice of appeal. Counsel also contend that the appeal is not arguable.

The dispute herein exhibits unique elements in that both the original plaintiff and defendant are since deceased. The original defendant had raised a counter-claim which in essence amounts to a suit against the plaintiff. Both parties delayed in substituting their respective deceased parties. The plaintiff died on 5th November 2014. The defendant also died on 1st July, 2018. The suit was dismissed for non-attendance on 4th May, 2019, almost five years after the demise of the plaintiff. The respondents applied for the revival of the suit and substitution of the deceased plaintiff with his legal representative. This court allowed that application vide its ruling delivered on 4th March, 2021 which ruling is the subject of appeal. The applicants were equally allowed to be substituted as the legal representatives of the deceased defendant.

With respect to the issue of the validity of the Notice of Appeal dated 10th March, 2021, I do agree with the applicant's submissions that this court lacks jurisdiction to interrogate the veracity and validity of such notice. The High Court does not have the role of interrogating or evaluating notices of Appeal filed by litigants who are not satisfied by the court's decisions. The court's jurisdiction under Article 165 of the Constitution does not include the jurisdiction of sieving notices of appeal. Although such notices are normally filed in the High Court, the intended appeal is a preserve of the Court of Appeal. It is the Court of Appeal which can determine whether the intended appellants lacked *locus standi* when they lodged the appeal. Further, striking out the notice of appeal by this court would be tantamount to the court shielding itself from subjecting its decision to evaluation by the Court of Appeal and would deny the intended appellants their right to seek redress before another superior court. I do therefore associate myself with the findings of Mabeya J and Onkwany J in their respective findings that the High Court lacks jurisdiction to determine the validity of a notice of appeal. The Notice of Appeal notifies the High Court that its decision is being subjected to an appeal. The respondent can raise the issue of *locus standi* of the intended appellants before the Court of Appeal. I have also noted that the notice of appeal dated 10th March 2021 does not capture any of the parties herein but refers to the deceased parties.

The application is seeking to have the proceedings stayed pending the hearing of the intended appeal. The dispute herein was filed in 2005 and the original litigants have since passed on. The applicants would like to have the issue as to whether the revival of the suit after the demise of the plaintiff was proper. The applicants will equally have to explain whether the taking up of the role of the deceased defendant was proper. This issue will have to be dealt with by the Court of Appeal amongst other issues the appellants may consider relevant. I do find that the appeal is arguable. It would be imprudent for the court to continue hearing the matter only for the court of Appeal to make a finding that the suit had abated or was improperly revived.

For purposes of good order, it would be unfair to grant the applicants a blanket order staying proceedings in this matter. It has not been indicated that the applicants have taken any action from the time of filing the Notice of Appeal. The proceedings have been typed and the applicants can pursue their intended appeal without any limitation.

I do find that the application dated 13th August, 2021 is merited and is granted in the following terms:-

- i. The proceedings in this suit are hereby stayed for a period of six (6) months.**
- ii. The applicants to take further action in their intended appeal within the period of those six (6) months.**
- iii. After the expiry of six months, this court shall be at liberty to determine whether to continue hearing the matter or wait for the determination of the appeal and the plaintiff shall be at liberty to fix it for hearing.**
- iv. Costs of the application shall be in the cause.**

DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2022

S.J. CHITEMBWE

JUDGE