



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CIVIL APPEAL NO. 118 OF 2020

1. PETER KARIUKI MBURU

2. CECILIA NYOKABI.....APPELLANTS

VERSUS

NEEMA SHAH.....RESPONDENT

RULING

1. Before the court for determination is an application dated **28th August, 2020** taken by the Appellant/Applicants pursuant to **Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act CAP 21 Laws of Kenya and Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules**. In this Application the Appellant/Applicants are seeking the following orders: -

1. Spent;

2. Spent;

3. THAT the Honourable Court be pleased to issue a temporary stay of the Order and all further proceedings of Honourable Gideon Kiage in CMCC No. 908 of 2017 between NEEMA SHAH VERSUS PETER KARIUKI MBURU AND CECILIA NYOKABI made on 25th August 2020 pending hearing and determination of this Appeal;

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

2. The application is premised on eleven (11) grounds on its face which are explicated in the supporting affidavit of **Peter Kariuki Mburu**, the 1st Appellant/Applicant and sworn on **28th August, 2020**.

3. The Respondents are opposed to the Application and in so doing have filed **Grounds of Opposition** dated **2nd October, 2020** and a **Replying Affidavit** sworn by **Neema Rajnikant Shah**, the Respondent herein on **2nd October, 2020**.

4. Directions were taken that the application be canvassed by way of written submissions and all parties indicated that they would be relying on their said written submissions. The Applicant's submissions were filed on **12th October, 2020** while those of the Respondent, were filed on **23rd October, 2020**.

THE APPELLANT/APPLICANTS' CASE

5. The Appellant/Applicants are seeking for stay of orders issued on **25th August, 2020** with respect to an application filed before the subordinate court dated the **17th July, 2020** for enlargement of time to file a supplementary list of witnesses and documents. The Appellants allege that the trial court without regard to their interlocutory application proceeded with the hearing of the main suit.

6. Further, the Appellant/Applicants seek that this court issues orders of stay of proceedings in **CMCC No. 908 of 2017, NEEMA SHAH - vs- PETER KARIUKI MBURU AND CECILIA NYOKABI** for the reason that the trial court has refused to entertain its interlocutory application dated **17th July, 2020**.

7. It was averred that the Appellants had been granted 30 days within which to put in their pre-requisite documents and a hearing scheduled

for **16th June, 2020**. It is then stated that on **16th June, 2020**, the Appellants'/Applicants' Advocate was indisposed and they sought for a further adjournment of the hearing indicating that they had filed an application dated **17th July, 2020** seeking enlargement of time so as to put in their further documents. The Appellant/ Applicants state that, irrespective of having presented a pending application on **25th August, 2020**, the trial court refused to give directions on their application and proceeded with the hearing of the main suit.

8. In view of this, the Appellants/Applicants state that they have filed an Appeal with respect to the learned Magistrate's order declining to give directions in respect of the hearing of the application dated **17th July, 2020**.

9. In their submissions, the Appellants/Applicants have based the same on stay of proceedings and no arguments have been presented on stay of an order alleged to have been issued on **25th August, 2020**.

10. It was the Appellants' submission that stay of proceedings is a discretionary order and relied on the case of **Global Tours & Travel Ltd (Nrb HC Winding Up Cause No 43 of 2000 and Kenya Commercial Bank Limited –vs- Kenya Pipeline Company Limited**.

11. The Appellants state that they have established an arguable Appeal, sufficient cause and that the application has been filed timeously, having been aggrieved with the decision of the trial court in refusing to hear the Application dated **17th July, 2020**. It is stated that the Appeal will be rendered nugatory if stay of proceedings herein is not issued.

THE RESPONDENT'S CASE

12. The Respondent's case is that the prayer sought for stay of proceedings does not meet the threshold established by law and precedent. It is believed that if this court grants stay of proceedings, the intended Appeal which has been filed is a calculated delaying tactic by the Appellant/Applicants which goes against the timely, cost-effective and proportionate dissolution of disputes in order to ensure access to justice by parties as provided for under **Article 159** of the **Constitution of Kenya** is achieved.

13. The Respondent states that the Appellants/Applicants have misrepresented some facts by not telling the court, the number of times the hearing of the suit did not proceed at their instance. She further avers that the Appellants/Applicants have on several occasions been granted time to put in their documents but have failed to comply. The occasions are as follows: -

i. On 21st November, 2019 the Appellants/Applicants sought leave to put in a supplementary list of witnesses and documents. Leave was granted and matter set for mention to confirm compliance on 17th December, 2019.

ii. On 17th December, 2019, the Appellants/Applicants sought a further 30 days to put in their supplementary list of witnesses and documents. The court directed that the same be done within 30 days and a hearing date for the main suit was set for 16th June, 2020.

iii. By the 16th June, 2020, the Appellants/Applicants had not filed the said documents and did not bother to seek further leave. However, they proceeded to file an Application dated 17th July, 2020 in which they sought leave to file the very documents they had always been directed to file since 21st November, 2019, with no explanation tendered for the inordinate delay.

iv. The Application dated 17th July, 2020 was then set down for mention on 21st July, 2020, but the Appellants/ Applicants did not attend court showing their lack of interest in their application hence leaving the court with no choice but to set down the suit for hearing on 25th August, 2020.

14. The Respondent states that the Appellants/Applicants were unable to convince the court on reasons for the further delay, and the court decided to proceed with the scheduled hearing as guided by Constitutional provisions under **Article 159(2)** which provides that justice shall be delivered without undue delay.

15. It was the Respondent's averment that the Application is still pending and the Appellant/Applicants were still given time by court to set a date for the Application dated **17th July, 2020** to be heard.

ANALYSIS AND DETERMINATION

16. I have considered all the pleadings, submissions raised by the parties together with cited statutory and case law. In my view, only two (2) issues that arise for determination are: -

i) Whether the court can stay the order issued on 25/8/2020;

ii) Whether the Appellant/Applicants have met the threshold for grant of stay of proceedings of CMCC Civil Suit No. 8 of 2017.

i) Whether the court can stay the order issued on 25/8/2020

17. I wish to point the Appellants/Applicants have stated that the court refused to hear their application dated **17th July, 2020** and proceeded

with the hearing of the main suit. However, the Appellants/ Applicants have not attached any Ruling or Order that was issued by the trial court on **25th August, 2020** so as to guide this court on what the said orders were and how they have been prejudiced by the same. This Court is thus unable to stay non-existent orders. The Appellants/Applicants have only attached handwritten proceedings of the lower court without any certified Order or Ruling from the trial court.

18. There being no order or decision of the court showing that the Appellants/Applicants have been denied an opportunity to be heard, the prayer seeking stay thereof cannot issue.

ii) Whether the Appellant/Applicants have met the threshold for grant of stay of proceedings of CMCC Civil Suit No. 8 of 2017.

19. A decision on whether or not to grant stay of proceedings is discretionary and this Court has powers to stay proceedings pending an Appeal. This jurisdiction is derived from of **Order 42 rule 6 (1)** of the **Civil Procedure Rules**.

20. In the case of **Re Global Tours & Travel Ltd HCWC No.43 of 2000 Ringera, J** (as he then was) held that:

“...As I understand the law, 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. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind 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...”

21. For this court to grant stay of proceedings, the Appellants/ Applicants ought to have shown that it has an arguable Appeal with high chances of success such that if stay of proceedings is not granted the Appeal will be rendered nugatory.

22. I have read through the proceedings of the trial court and find that the facts before the Court do not favour the Appellants/Applicants. It is evident that the stay of proceedings as sought is seemingly a delay tactic as the Appellants/Applicants have severally been required to set down the application dated **17th July, 2020** for hearing and have failed to do so.

23. Furthermore, it will be noted that the application dated **17th July, 2020** being the reason for the intended Appeal is still pending before the lower court and as seen from the pleadings before court, it has been upon the Appellants/Applicants to set it down for hearing. It has also been shown that the Appellants/Applicants have had various opportunities to set down the application dated **17th July, 2020** but are yet to do so.

24. It appears that the Appellants/Applicants want to hide their indolence in the guise of an Appeal having squandered the several chances they have had to prosecute their said application. Even then, the application as it stands is not dismissed, meaning the Appellants/Applicants are aware of their right to have it prosecuted but have still chosen to apply for stay so as to further delay the matter.

25. The court in the case of **Kenya Wildlife Service –vs- James Mutembei [2019] eKLR** held that: -

“...Stay of proceeding should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent...”

26. It is my finding that it would be unfair for the Appellants/Applicants to be entertained any further on their indolence and lack of action with regard to having their application dated **17th July, 2020** prosecuted and visiting their indolence on the Respondent, who has been ever present and ready to proceed with the suit.

27. The provisions of **Article 159(2)(a)(b)(c)** and **(d)** of the **Constitution of Kenya** as read with **Sections 1A** and **1B** of the **Civil Procedure Act, Cap 21** enjoin this court to foster and facilitate the overriding objective of the Act to render justice to parties in all Civil Proceedings in a just, expeditious, proportionate and affordable cost to parties.

28. In the instant case, it is my considered opinion that it would not be in the interest of justice to exercise court’s discretion and grant stay of proceedings as the same will only serve the purpose of delaying the suit **CMCC Civil Suit No.908 of 2019** that is pending in the lower court to the detriment of the Respondent. I am therefore not satisfied that the Applicants have demonstrated that they have an arguable Appeal to warrant issuance of the orders being sought.

29. For the above reasons, the Application dated **28th August, 2020** is dismissed with costs to the Respondent.

30. I further direct that Appellants/Applicants to set the application dated **17th July, 2020** for hearing before the trial court within 14 days of this Ruling.

It is hereby so ordered.

DELIVERED, DATED and SIGNED VIRTUALLY at MOMBASA this 30th day of MARCH, 2021.

D. O. CHEPKWONY

JUDGE