



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CIVIL APPEAL NO. 40 OF 2019

JENIPHER ANYANGO OLOO(Suing as legal representative of the

Estate of Victor Owino Oloo(deceased)).....APPELLANT/APPLICANT

VERSUS

BUZEKI ENTERPRISES LIMITED.....1ST RESPONDENT

AFRICAN MERCHANT ASSUARANCE CO. LTD.....2ND RESPONDENT

(Appeal from the Ruling and Order of Hon. J. Ongondo, Principal Magistrate at Siaya in Siaya PM's Court Civil Case No. 36/2019 delivered on 25/06/2019)

RULING

1. This ruling determines the Interested Party/Appellant's **JENIPHER ANYANGO OLOO (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF VICTOR OWINO OLOO - DECEASED)**-application dated 19th September 2020 whose determination has been delayed owing to the other pending issue in the file, relating to legal representation of the 1st Respondent which has now been resolved as Mr. Mugoye advocate who was on record and who, for want of instructions from his client, counsel had to seek leave of court to cease acting which leave was eventually granted on 19/4/2021 thereby paving way for the hearing of this application. The application which was filed on 2/12/2020 seeks the following orders:

(1) That, the Honourable court be pleased to grant stay of proceedings in SIAYA PMCC NO. 30 OF 2019, BUZEKI ENTERPRISES LIMITED -VS- AMACO INSURANCE COMPANY LIMITED AND JENIPHER ANYANGO OLOO (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF VICTOR OWINO OLOO - DECEASED)-INTERESTED PARTY pending the hearing and determination of SIAYA HCCA No. 40 of 2019 JENIPHER ANYANGO OLOO (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF VICTOR OWINO OLOO-DECEASED) - INTERESTED PARTY/APPELLANT-VS- BUZEKI ENTERPRISES LIMITED AND AMACO INSURANCE COMPANY LIMITED.

(2) That in the alternative, the Honourable court be pleased to deem the stay order of 19th September, 2019 as still being in force and do proceed to further issue directions on the instant appeal.

(3) That the Interested Party/Applicant/Appellant be granted leave to amend her memorandum of appeal dated 26th September, 2019 to reflect the correct ruling date against which the appellant is appealing which was delivered on 27th June, 2019 and not 25th July, 2019.

(4) Subsequent to granting Order 2 above, the Honourable court be pleased to deem the Memorandum of appeal filed on the 26th September, 2019 amended to reflect the correct date of the ruling which is 27th June, 2019 and not 25th July, 2019.

(5) Consequent upon granting Order 3 and 4 above the Honourable court be pleased to deem any order and/or pleading indicating the date of the said Ruling as 25th July, 2019 or any other erroneous date amended to read 27th June, 2019.

(6) That costs of this application be on course.

2. The grounds upon which the application is predicated are on the face of the application and substantially, at grounds 3 & 4 thereof is that the interested party has been unable to proceed with this appeal since the lower court file in **Siaya PMCC No. 36 of 2019, Buzeki Enterprises Ltd Vs AMACO Insurance Company Ltd and Jenipher Anyango Oloo (suing as the legal Representative of the estate of**

Victor Owino Oloo - Deceased) - Interested party, is still active and hence the Deputy Registrar has been adamant to fix the appeal for directions until and when the said lower court file will be stayed.

3. In addition, it is asserted that due to the slip of the pen, the date of Ruling against which the Appellant is appealing was erroneously indicated in the Memorandum of appeal as 25th July 2019 in lieu of 27th June 2019. The applicant claims that she shall suffer substantial loss and prejudice should she not be granted the orders sought.

4. It is further asserted that the application has been brought in good time without undue delay and that it is in the interest of justice that the orders sought are granted.

5. The Application is supported by the affidavit sworn by Maureen Akoth Okumu advocate who reiterates the grounds in support of the application, annexing copies of: the impugned Ruling delivered on 27/6/2019 not 25/6/2019; the order granting leave to appeal against the said Ruling, an extract of some proceedings from Siaya PM CC No. 36 of 2019 of 18/2/2020 and 24/10/2019 and explains out herself that she inadvertently indicated the date of the impugned Ruling to be 25/6/2019 instead of 27/6/2019.

6. The Application is opposed. It was subsequently argued by Mr. Otieno Advocate holding brief for Ms. Maureen Advocate for the appellant applicant. In his oral submissions in court on 19/4/2021, Mr. Otieno relied on the grounds and supporting affidavit sworn by counsel for the Applicant/Appellant and urged the court to grant the prayers sought.

7. The respondents did not respond to the application.

DETERMINATION

8. I have considered the application dated 19/9/2020, and the grounds thereof as supported by the affidavit sworn by Ms. Maureen Okumu Advocate for the applicant.

9. I observe that the application is not opposed. However, the fact that the application is not opposed does not give the applicant any express right to the orders sought. This court must be satisfied that the prayers sought are merited.

10. The Applicant seeks for an order staying proceedings in Siaya PM CC No. 36 of 2019 until this appeal is heard and determined and further, for leave to amend her Memorandum of appeal filed in this court, specifically, correcting the date of the Ruling which is impugned, to reflect 27th June 2019 instead of 25th June, 2019.

11. I observe that this appeal was filed in 2019 and to date, the trial court record has not been supplied to enable this court admit the appeal to hearing. At the same time, this court cannot stay its own proceedings on appeal to await the hearing and determination of the suit pending in the lower court where the appellant is an interested party whereas the Respondents are plaintiff and defendant respectively. The plaintiff has a judgment in Siaya PM CC No. 75 of 2016 which judgment she was unable to execute following the impugned Ruling in CC No. 36 of 2019 staying execution thereof until PM CC No. 36 of 2019 a suit between the first respondent herein and its insurer the 2nd respondent is heard and determined.

12. In other words, the Appellant herein has a judgment and decree against the Respondent in a different suit PM CC NO. 75 of 2016. The 1st Respondent filed Siaya PMCC No. 36/2019 against the insurer Africa Merchant Insurance Company Ltd seeking for a declaration that the insurer is liable to settle decree that was passed in favour of the appellant herein.

13. The 1st Respondent also sought and obtained an order of stay of the execution of decree in the suit PM CC NO.75 of 2016 against the 1st Respondent herein until Siaya PMCC 36/2019 which is against the insurer of the 1st respondent is heard and determined.

14. The 1st Respondent in the impugned suit PM CC No. 36 of 2019 is not seeking judgment against the interested party/appellant herein but against its own insurer, the 2nd Respondent. It follows that the applicant's appeal is not frivolous. It is arguable. It is also an appeal which can be disposed of expeditiously as the issues raised are fairly straight forward.

15. Upon this court's inquiry on the status of the trial court file in PM CC No. 36 of 2019, I found that it has hearing date which is 1/7/2021. I am satisfied that there is sufficient grounds to stay the proceedings in Siaya PM CC No. 36/2019 until this appeal is heard and determined.

16. On the prayer for amendment of the Memorandum of Appeal dated 26th September 2019, I have perused the impugned Ruling and I observe that it was delivered on 27/6/2019 and not 25th June 2019 as stated in the Memorandum of Appeal.

17. A Memorandum of Appeal is a pleading on appeal. The error is one of typing of wrong date of the Ruling. It is curable under Section 100 of the Civil Procedure Act which empowers this court to amend any defect or error in any proceeding in a suit. In addition, Order 42 Rule 3 of the Civil Procedure Rules provides that the appellant may amend his Memorandum of Appeal without leave at any time before the court gives directions under Rule 13. However, if the amendment is done after directions are given, leave of court must be sought.

18. No directions have been given in this case because the lower court file has not been supplied to this court. It follows that the applicant did not even require leave of this court to amend the Memorandum of Appeal. Nonetheless, as the application is before the court, I am satisfied that the amendment sought is necessary to correct the date of the impugned Ruling. I grant the prayer for amendment of the Memorandum of Appeal and order that the correct date of the impugned shall henceforth read 27th June 2019 and not 25th June 2019.

19. In the end, I make the following orders:

(1) That there shall be stay of proceedings in Siaya PMCC No. 36 of 2019 Buzeki Enterprises Ltd Vs AMACO Insurance Company Ltd and Jenipher Anyango Oloo (suing as legal Representative of the Estate of Victor Owino Oloo - Deceased pending hearing and determination of this appeal);

(2) That the appellant herein Jenipher Anyango Oloo is hereby granted leave to amend her Memorandum of Appeal dated 26th September 2019 to correct the date of Ruling impugned in this appeal to read 27th June 2019 instead of 25th June, 2019;

(3) That the trial court file proceedings to be typed forthwith and the file thereof-Siaya PM CC No. 36/2019 be submitted to the High Court for admission of the appeal herein to hearing;

(4) That there shall be no orders as to costs of this application.

20. Orders accordingly.

Dated, signed and Delivered at Siaya, this 26th Day of April, 2021

R.E. ABURILI

JUDGE