



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 496 OF 2019

PACIS INSURANCE LIMITED.....APPELLANT/RESPONDENT

VERSUS

KEVITA INTERNATIONAL CO. LIMITED.....RESPONDENT/APPLICANT

RULING

1. Kevita International Co. Limited, the respondent/applicant (“the applicant”) herein, took out the Notice of Motion dated 6th July, 2020 and sought orders to the effect that the appellant’s/respondent’s appeal be dismissed for want of prosecution and that the stay order issued by this court on 19th December, 2019 be set aside consequently.
2. The Motion is supported by the grounds set on its face and the facts stated in the affidavit of the applicant’s advocate, Seth Ojienda.
3. To oppose the Motion, advocate Bett Daniel N swore a replying affidavit on 10th November, 2020 on behalf of the appellant/respondent (“the respondent”).
4. When the Motion came up for *inter partes* hearing before the court, the parties were directed to file and exchange written submissions.
5. I have considered the grounds set out on the face of the Motion, the facts deponed in the affidavits supporting and opposing the Motion, the contending written submissions and authorities relied upon.
6. The twin issues for determination before me are whether the appeal filed by the respondent is ripe for dismissal and whether the stay orders ought to be set aside as a result.
7. Under the first issue, Seth Ojienda in his supporting affidavit avers that, since filing the memorandum of appeal on 23rd August, 2020 and obtaining stay orders, the respondent has not taken any steps towards prosecuting the appeal to its conclusion. This position was echoed in the submissions of the applicant with reference to the case of **Njai Stephen v Christine Khatiala Andika [2019] eKLR** where the court appreciated that, it is the responsibility of an appellant to cause the appeal to be listed for directions.
8. The applicant further submits that, the respondent has demonstrated lack of seriousness and has not given sufficient reasons as to why the appeal should not be dismissed.
9. In reply, advocate Bett Daniel N states that the instant Motion is premature since the stipulated period of one (1) year from the time of filing the appeal has not lapsed. The advocate further states that certified copies of the typed proceedings and impugned judgment have not been availed for purposes of proceeding with the appeal, hence the respondent cannot be blamed for the delay in prosecuting the appeal.
10. In its submissions, the respondent adds that there is nothing to show that the lower court file has been forwarded to this court and hence the appeal is not ripe for dismissal.
11. **(1) Order 42, Rule 35** of the **Civil Procedure Rules, 2010** provides for the circumstances and manner of dismissal of an appeal as follows:

***“(1) Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.*”**

(2) If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.”

12. From the record, it is apparent that the respondent filed its memorandum of appeal on 26th August, 2019.

13. The respondent annexed to the replying affidavit of advocate Bett Daniel N copies of various letters addressed to the Executive Officer of the Chief Magistrate’s Court requesting for certified copies of the typed proceedings and judgment/decree. It is apparent that no response received.

14. From the foregoing and the record, it is clear directions are yet to be given in respect to the appeal and consequently, the appeal is yet to be set down for hearing. It therefore follows that, the appeal cannot be deemed to be ripe for dismissal under the provisions of **Order 42, Rule 35(1)** (supra).

15. Furthermore, there is nothing to indicate that the Deputy Registrar has since listed the appeal before a judge for dismissal pursuant to the provisions of **Order 42, Rule 35(2)** (supra).

16. More importantly, I have established from the record that the lower court file has not been made available to this court, and the appeal may not be admitted and/or set down for directions in absence of the file. I therefore find the Motion to be premature in the circumstances.

17. On the second issue, it is the assertion of the applicant that the respondent has not complied with the conditions set by this court in ordering a stay of execution, and that the bank guarantee offered on behalf of the respondent bears inconsistencies.

18. In reply, the respondent contends that it has fully complied with the conditions for stay.

19. The record shows that following the respondent’s application seeking an order for a stay of execution, this court vide its ruling delivered on 19th December, 2019 granted a stay on the condition that the respondent deposits a sum of Kshs.4,000,000/= in a joint interest earning account and secures the balance of the decretal sum by way of a bank guarantee.

20. Going by the memorandum of appeal the decretal amount is in the sum of Kshs.8,000,000/. It is clear that the respondent has since complied with the conditions set out hereinabove.

21. The respondent annexed to the replying affidavit a copy of the bank guarantee dated 21st January, 2021 from Bank of Africa confirming the bank guarantee for the sum of Kshs.4,000,000/ on behalf of the respondent. It is however noted that according to the said letter, the bank guarantee is set to expire on 10th January, 2021. In my view, it is plausible that this was a typo error on the part of the bank, which may need to be corrected to avoid confusion. Suffice it to say that I see no reason to set aside the stay orders, having declined to dismiss the appeal.

22. Consequently, the Motion dated 6th July, 2020 is dismissed. However, I hereby make the following orders:

(a) The Executive Officer (Chief Magistrate’s Court-Milimani Commercial Courts) to avail certified copies of the typed proceedings, judgment delivered on 30th July, 2019 and decree in CMCC NO. 2025 of 2016 to the appellant/respondent within 20 days from the date of this ruling.

(b) The appellant/respondent shall thereafter compile, file and serve its record of appeal within 14 days from the date of receipt of the aforementioned documents.

(c) The Executive Officer shall avail the lower court file to the High Court-Civil Appeals Division within 30 days from the date of this ruling.

(d) The parties shall fix a date before the Deputy Registrar to confirm availability of the lower court file and to take further directions.

(e) The appellant/respondent shall obtain a valid bank guarantee from Bank of Africa Kenya Limited or any other reputable bank to be agreed upon by the parties, within 14 days from the date of this ruling.

(f) Each party shall bear their own costs of the Motion.

Dated, Signed and Delivered at Nairobi this 22nd day of April, 2021.

A. MBOGHOLI MSAGHA

JUDGE

In the presence of:

Okoth Obera h/b for Mr. Ojienda for the Appellant/Respondent

Ms. Sang h/b for Mr. Njoroge for the Respondent/Applicant