



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
ORIGINATING SUMMONS NO. 342 OF 2016 (O.S)
IN THE MATTER OF PAN AFRICAN BANK LIMITED (IN LIQUIDATION)
AND
IN THE MATTER OF SECTION 13(2), 55(2) AND 76(7) OF
THE KENYA DEPOSIT INSURANCE CORPORATION ACT 2012
BETWEEN
UHURU HIGHWAY DEVELOPMENT LIMITED.....APPLICANT
VERSUS
KENYA DEPOSIT INSURANCE CORPORATION.....RESPONDENT
AND
ETHICS & ANTICORRUPTION COMMISSION.....1ST INTERESTED PARTY
CENTRAL BANK OF KENYA.....2ND INTERESTED PARTY
RULING

1. For consideration is the Notice of Appeal dated 18th March 2020 for the following prayers:-

- i. The Court enlarge the time for the Applicant to file the application for leave to Appeal.*
- ii. The Applicant does have leave to appeal against the Ruling and order of 23rd September 2019.*
- iii. There be a stay of proceedings pending the hearing and determination of the intended Appeal.*
- iv. The cost of this application be in the Appeal.*

2. The decision sought to be appealed is the Ruling of this Court of 23rd September 2019 which directed that these proceedings continue as if the cause had begun by way of Plaintiff.

3. In an affidavit of Paul Mwangi, sworn on 18th March 2020, he explains that his firm did not have instructions to appeal the Ruling at the time it was delivered and it was also necessary to review it and give advice to the client (the Applicant).

4. Further, that the application was not made immediately as the matter was fixed for mention on 18th October 2019. On that day, he made an oral application for leave to appeal and for stay of proceedings and because of insistence of the Respondent's advocate, the Court directed that the applicant files a formal application.

5. In the meantime, the firm representing the Applicant had filed Notice of Appeal of 7th October 2019. The deponent says that the delay is

not so inordinate.

6. The 1st and 2nd Interested Parties oppose the Motion. The gist of the opposition is that the Applicant has not demonstrated reason for Court to grant leave to enlarge time or to stay proceedings.

7. This Court has considered the submissions made by counsel. A preliminary matter raised by the Applicant is that the opposing parties, being Interested Parties are peripheral parties, and in the absence of any opposition to the application by the Respondent, it is doubtful whether the Court should consider the protests of Interested Parties. The Applicant cites the decision of the High Court in Philomena Mbeti Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae) [2019] eKLR in which the Court held:-

“415. What emerges from the above decisions is that an interested party is a peripheral party and cannot introduce new issues for determination by the court. Further, that in determining the matters before it, the court will only consider the issues raised in the pleadings by the principal parties. This rule will be particularly unyielding when the matter before court is a private as opposed to a public interest claim.”

8. In the matter at hand, the two Interested Parties find themselves in these proceedings as they were joined by the Plaintiff right from the outset. It is not that they joined the proceedings on their own. And while no order is sought against them, their supposed role in the woes of the Applicant is revealed in paragraph 18 of the affidavit of Mukesh Vaya sworn on 23rd August 2016 in support of the Originating Summons:-

“[18] THAT due to the Respondent’s dilatory conduct, the Applicant has been deliberately subjected to unnecessary financial hardship, which can only be mitigated through the summary issuance of the declarations and orders hereby sought, more so as:-

18.1 The 1st Interested Party negotiated and settled the claim, both on behalf of the state and the CBK, and both the Respondent and the 2nd Interested Party have a duty to ensure that the negotiated settlements is given full effect.

18.2 To the best of the Applicant’s knowledge and belief, it is the officers of the 2nd Interested Party that are subverting and/or unjustifiably blocking payment by the Respondent by insisting on giving prior consent to payment or settlement, yet failing to do so without any justifiable cause.

18.3 KDIC is expected to discharge its duties independent of the CBK, but refuses to do so as most, if not all of the staff of the Respondent are employees of the Central Bank of Kenya, seconded to it.”

9. In their responses to the summons, both Interested Parties raised a public interest element; for example in the replying affidavit of David K. Ruto sworn on 11th May 2017, the 2nd Interested Party states:-

“[14] THAT it is plain from the claim made in HCCC No. 1111 of 2003 (O.S) that the funds recovered from Kamlesh Patni and the Applicant herein were not sufficient to cover the claim made by the Commission and it would be unfair to uphold the claim of the Applicant for funds whose source has not even been verified and may not be verifiable due to passage of time.”

10. In the decision of Philomena Mbeti Mwilu (*Supra*) cited by the Applicant, the Court, while alluding to the peripheral role of an interested party noted that the outsider role is more accented in private disputes. Here, there is an undoubted element of public interest. Here, the Interested Parties did not join the fray on their own volition. They find themselves in the proceedings at the invitation of the Applicant. In the circumstances of this case, I am unable to find the Interested Parties to be peripheral parties.

11. And the Interested Parties would have an interest in whether the Ruling of the Court of 23rd September 2019 is subjected to an appeal because it is the 2nd Interested Party who prompted the debate on the suitability of an originating summons as a process to determine the matter, which gave rise to the Ruling that aggrieves the Interested Parties.

12. The principles upon which a Court should allow extension of time to file an application for leave to file an Appeal are well settled. The Applicant cites the Court of Appeal decision in Savings Tea Brokers Ltd v Kenya Tea Development Agency Ltd & 7 others [2018] eKLR:-

“The proper considerations for a single Judge to bear in mind when deciding whether or not to extend time have been restated in numerous cases. They are not exhaustive but merely indicative as aspects of the logical quest for the doing of justice on a case by case basis. They include;

(a) The length of the delay

(b) The reason for the delay

(c) (Possibly) the prospects of the appeal succeeding

(d) The degree of the prejudice (if any) that may be suffered by the respondent in the case of grant

(e) The general conduct of the parties, so that concealment, non-disclosure, lack of candour or any inequitable conduct is more likely to disentitle an applicant.”

13. The uncontested sequence of events is as follows. The Court delivered its Ruling on 23rd September 2019. On 7th October 2019, the fourteenth day of the Ruling, the Applicant filed a Notice of Appeal. Had it been that an appeal of this nature did not require leave of Court then that Notice of Appeal would have the proper way of lodging the intention to appeal.

14. There was a Court attendance on 18th October 2019. The Applicant’s counsel made an oral application for leave. The Respondents insisted on a formal application. A formal application was then filed on 30th October 2019 but inadvertently without the prayer for extension hence the amended Motion of 18th March 2020.

15. When one considers the time from when the Ruling was delivered to the time the current motion was filed, then substantial time has passed. However, there were very earlier signs that the Applicant intended to appeal the decision but it took the wrong steps. Promptly filed a Notice of Appeal without leave when leave was required. Soon thereafter filed an application for leave to appeal as time had lapsed without including a prayer for enlargement, another failing.

16. The delay is explained and as the opposing Parties do not establish prejudice they would suffer because of the delay then the Court is willing to accept it.

17. The Applicant intends to argue that the Court erred in its Ruling as there was no significant issues before it. It proposes to argue that the Court has sufficient material by way of affidavit evidence to enable it determine the issues between the parties. While I was of a contrary view, I do not think that the issues intended to be raised by the Applicant are frivolous. The Court of Appeal will have an opportunity to look at the affidavit evidence filed herein *vis-à-vis* the issues raised in the matter and determine whether the decision made by this Court should stand.

18. On the limb for stay of proceedings, the Applicant submits that the application was filed without delay and that if stay is not granted then the Applicant will be greatly prejudiced as its intended appeal will be rendered nugatory. It contends that the Respondent and Interested Parties on the other hand will suffer no prejudice. It further asserts that efficient use of the Court’s time and resources will be achieved by allowing stay as it ensures that judicial resources are optimized. The Applicant alludes to the expense of a trial and that where a party can have matters determined through summary procedure, then they should do so and the Court should facilitate it.

19. The 1st and 2nd Interested Parties argue that it is in the interest of justice that the matter be disposed of without further delay and stay of proceedings only achieves the opposite.

20. I start by considering whether a trial instead of the summary procedure prejudices the parties in terms of presentation of their respective cases. The Court has not heard the Applicant complain that the trial prevents it from presenting its case efficaciously. It does not say that a trial will prejudice it in that way. The Respondents think that quite to the contrary, a trial offers the parties a better chance of them making out their respective cases. This might be so because the evidence presented will be subjected to cross examination. On this aspect the Court sees no prejudice to be suffered by the Applicant.

21. The Applicant then says that Trial is an expensive affair and parties who can employ summary procedure should avoid it as much as possible. That may be true, but if the Applicant is confident of the strength of its case then concern should be whether or not it will recoup the costs and expenses incurred in presenting its case. Here, the Applicant does not doubt the ability of the Respondent and Interested Parties to meet those costs and there can be no apprehension about the more “expensive” process.

22. Again, the Court must add that the Applicant does not say that it is financially constrained or for some other reason inhibited from calling witnesses.

23. While it is true that judicial time is scarce, I do not think that on this occasion that outweighs the need for this matter to move forward to conclusion.

24. This is the outcome of the Amended Notice of Motion dated 18th March 2020. Prayers 1 and 2 are allowed. The Notice of Appeal to be filed within 14 days hereof. Prayer 3 is declined. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED IN COURT AT NAIROBI THIS 26TH DAY OF MAY 2021

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17TH April 2020, this Ruling has been delivered to the parties through virtual **platform**.

F. TUIYOTT

JUDGE

PRESENT:

Kimani Kiragu SC for the Applicant.

Ouma for the 2nd Interested Party.

No Appearance for 1st Interested Party.

No appearance for the Respondent.