



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

MISCELLANEOUS APPLICATION NO. E 203 OF 2019

CECILIA NAMSI..... 1ST PLAINTIFF

NAMSI LIMITED..... 2ND PLAINTIFF

VERSUS

MATTY PROPERTIES LIMITED.....RESPONDENT

RULING

1. The Application of 18th July 2019 is spent and what remains for determination is the Notice of Motion dated 29th May 2019 for the following two prayers:-

[3] That the honourable Court be pleased to issue orders to stay the execution of the warrants of arrest issued against the 1st Applicant on the 30th of April 2019 pending hearing and determination of the 2nd Applicant's intended appeal against the ruling of Honourable Magistrate issued on 23rd November 2018.

[6] That this Honourable Court be pleased to grant leave to the Applicant to file an appeal to the Ruling dated 23rd November 2018 out of time.

2. From the rival affidavits placed before Court, the Court is able to sketch out the route leading to the present Application. There is a decree in CMCC 6831 of 2015 **Matty Properties Limited –vs- Namsi Interior Limited** by Matty properties against Namsi Interior Limited. By an order of 20th July 2018, the lower Court lifted the corporate veil of the Directors of Namsi Limited and made them personally liable for the unpaid decretal sum owed by the Company. One director of the Company is Cecilia Namsi, the 1st Applicant herein.

3. The decision of 23rd November 2018 which is sought to be appealed against by the Applicants was the lower Court answer to the Application dated 26th July 2018. That Application is not before this Court. But gleaned from the body of the Ruling, it was an Application seeking to reinstate the Application dated 22nd September 2017 which had been dismissed on 20th July 2018. On the same day the Court made an order lifting the corporate veil upon allowing the Notice of Motion dated 29th November 2017.

4. The Application of 22nd September 2017 was for the following orders:-

1. That this Honourable Court be pleased to set aside the orders issued on the 10th day of August 2016 pending the hearing and determination of this application.

2. That the Honourable Court be pleased to issue orders compelling the Respondents to release all the goods, documents, personal effects and money belonging to the applicant that are in their possession and an inspection be done to ascertain the condition of the returned items pending the hearing and determination of this application.

3. That this Honourable Court be pleased to issue orders compelling the Respondents to issue an inventory of all the goods, documents, personal effects and money they took that belonged to the applicant pending the hearing and determination of this application.

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

5. This Court has heard and considered the arguments for and against the present application.

6. The first is for leave of Court to appeal the Ruling dated 23rd November 2018 out of time. It would seem that the 2nd Applicant intended to promptly file an appeal against the Ruling of 23rd November 2018 and prepared a Notice of Appeal dated 27th November 2018. That would be the wrong way to prefer an Appeal in view of the express provisions of Order 42 Rule 1 of the Civil Procedure Rules which reads:-

“(1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

(2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively”.

7. Attached to the further affidavit of the 1st Applicant is now a draft Memorandum of Appeal. For the fact that the delay in filing the Appeal was caused by Applicant adopting the wrong procedure, I will excuse the delay. I will extend time for filing an Appeal. And if leave to appeal was required in the first place, as suggested by the counsel for Respondent, then I also grant it.

8. Should this Court grant stay of execution as sought in the Application of 21st May 2019? The application is to stay of execution against the 1st Applicant which was taken upon the lifting of the corporate veil. The 1st Applicant is not party to the intended Appeal and I am not sure that she can benefit from the orders of the Court.

9. Yet even if I was wrong in my finding above, I note that the decree herein is not challenged and it is common ground that an amount is still owing on account of the decree. If I was to grant the order then this Application would have to satisfy four grounds of stay:-

i The Application is brought without delay.

ii The Appeal is arguable.

iii The Applicant has demonstrated substantial loss.

iv The Applicant furnishes security for the ultimate performance of the decree.

10. The 1st Applicant says that she risks arrest if stay is not granted. Serving of a jail term may amount to substantial loss. That I agree.

11. But the decree has been outstanding for far too long. For a stay to be granted, then it must be conditional.

12. The Courts final orders:

a) Leave to Appeal is granted as sought. The Memorandum of Appeal to be filed and served within 7 days of the date of this Ruling.

b) Stay of execution is granted only upon the Applicants paying half of the decretal sum within 45 days and providing security for the balance in form of a guarantee from a Bank or a performance bond within the same period.

c) Costs of the application to the Respondents.

Dated, Signed and Delivered in Court at Nairobi this 28th Day of February 2020

F. TUIYOTT

JUDGE

PRESENT:

Ikua for Okatch for Applicant

No Appearance for Respondent

Court Assistant: Nixon