



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 89 OF 2019

(CORAM: F. GIKONYO J.)

EXECUTIVE SUPER RIDES LIMITED.....APPELLANT/APPLICANT

VERSUS

JAMES GIKUNDI.....RESPONDENT

RULING

1. I am being asked to enlarge time for filing appeal and stay proceedings in **MERU CMCC NO 102 OF 2019** pending the hearing and determination of this Appeal. See the application dated 13th August 2019 expressed to be brought under Order 22 Rule 22 and Order 42 Rule 6 of the Civil Procedure Rules 2010.

2. The application was supported by the sworn affidavit of **Antony Wambugu** the general manager of applicant. He averred that applicant entered into a sale agreement with the Respondent for the sale and purchase of motor vehicle registration No. **KCJ 086G TOYOTA HIACE** for Kshs 3,200,000/=. That the respondent breached the agreement and upon the applicant demanding the settlement it precipitated the suit in the trial court. The appellant filed a notice of preliminary objection on the jurisdiction of the court to hear and determine the matter as it does not reside in Meru and being a corporation the suit ought to be instituted where it is based. That the applicant's preliminary objection challenging the jurisdiction of the Court was dismissed vide the trial court's Ruling dated 18th June 2019.

3. He averred that the trial court erred in failing to appreciate that the cause against the appellant violated the provisions of **Section 11 and 15 of the Civil Procedure Act**. That in the meantime unless a stay of the proceedings is granted, there is all likelihood that the Respondent will proceed to the hearing of the suit at the subordinate court rendering the appeal nugatory.

4. The Respondent opposed the application vide Replying affidavit dated 24th September 2019. It was his averment that the application is untenable since the Ruling was delivered in the presence of the applicant hence it cannot therefore seek enlargement of the time to file appeal. That the applicant has also not shown sufficient reasons for the delay. That the application for stay of proceedings cannot be available at this stage of the proceedings. That the affidavit sworn by **Antony Wambugu** is scandalous, irregular and ought to be struck out as the appellant has not filed an authority as required by the law hence the same has been filed by a stranger.

5. On 7/11/2019 the court directed the parties to canvass the application through written submissions. The applicant relied on its list of authorities citing the following cases; **Winfred Mumbua Makau & 2 others v Hellen Syokau Njagi (2019) Eklr**, **Butt v Rent Restriction Tribunal (1982) Klr 417**, **Attorney General v Okiya Omtatah Okoiti & Another (2019) eklr**.

6. The Respondent submitted that the applicant has not shown the steps he has taken to bring the appeal. That it was using the application as a delay tactic to delay justice. That it has also not raised a prima facie case hence does not warrant orders for stay of proceedings. He cited the case of **Global Tours & Travels Limited: Hc Winding up cause No. 43 of 2000**, **Samuel Mwaura Muthmbi v Josephine Wanjiru Ngugi & Another [2019] eKLR**, **Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi [2014] eklr**.

Analysis and determination

7. I have carefully considered the instant application and the rival submissions by the parties. This is essentially an application for enlargement of time to file the appeal and stay of proceedings in **Meru Cmcc No. 102 of 2019** pending the hearing and determination of this appeal.

Enlargement of time to file Appeal.

8. Section 79G of the Civil Procedure Act is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. The section provides as follows:

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

9. In **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another [2018] eKLR** the court cited Court of Appeal decision in **Mwangi v Kenya Airways Ltd [2003] KLR** which suggested some of the factors to be considered to include the following:

- a. **The period of delay;**
- b. **The reason for the delay;**
- c. **The arguability of the appeal;**
- d. **The degree of prejudice which could be suffered by the Respondent if the extension is granted;**
- e. **The importance of compliance with time limits to the particular litigation or issue; and**
- f. **The effect if any on the administration of justice or public interest if any is involved.**

10. In this case Ruling of the trial court was made on 18th June 2019. I do note from the proceedings attached the applicant was not present when the Ruling was delivered. This much was noted by the trial court. However, the applicant applied for certified copies of proceedings as well as the Ruling on 19th June 2019. It filed this application on 13th August 2019. Accordingly, the delay herein was not inordinate. The application was therefore brought without unreasonable delay. Applying for the certified copies of the proceedings in the trial court is a considerable steps taken to present the appeal.

11. Is the appeal arguable? In **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another (supra)** the court held that;

“...All one is required to demonstrate is the arguability of the appeal: a demonstration that the Appellant has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict....”

12. The intended appeal is on jurisdiction of the trial court. This point seems to be indomitable. Except, I am concerned that section 18 of the Civil Procedure Act has not been utilized yet the objection on jurisdiction is based on place of suing. I will nonetheless, extend time for the filing of appeal in deference to the right of appeal. But, the concern I have expressed will feature again when I am considering the request for stay of proceedings. I therefore direct that the applicant shall file appeal within seven days from the date of this Ruling.

Stay of Proceedings

13. In **Kenya Wildlife Service v James Mutembei [2019] eKLR** I espoused on stay of proceedings as opposed to stay of execution as follows;

“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...”

14. Ringera J in the case of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** persuasively stated thus;

“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 cases, 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” (emphasis added)

15. It was stated in **Ezekiel Mule Musembi v H. Young & Company (E.A) Limited [2019] eKLR**

Whereas the Court in such an application may be entitled to look at the intended appeal and see whether or not the intended appeal is not frivolous so as to satisfy itself that it is not being asked to suspend the proceedings so as to frustrate the hearing and delay the expeditious disposal of the matter, care must, however, be taken to ensure that the Court does not purport to preside over the intended appeal so as to avoid usurping the powers of the appellate Court.

16. The Court also cited the case of **Niazons (Kenya) Ltd. vs. China Road & Bridge Corporation (Kenya) Ltd. Nairobi (Milimani) HCCC No. 126 of 1999 Onyango-Otieno, J** (as he then was) held that:

“Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay...should be granted.”

17. The Respondent instituted the suit in the trial court seeking judgement against the appellant for;

a. An order of permanent injunction restraining the defendant whether by its agents employees and/or any other person working under its instructions from repossessing, attaching and selling by public auction the plaintiffs motor vehicle registration Number KCJ 086Y TOYOTA HIACE

b. Cost and interest of the suit.

18. Without evaluating the potency or otherwise of the appeal, it is worth noting that, in disallowing the preliminary objection, the trial court found that the applicant had not proved that it resides or carries business or the cause of action arose in Nairobi. I am aware that place of suing is determined by varied factors stated in the CPA including place where the defendant resides or works for gain or carries out business or where property is situated etc. Notably, the suit involves the protection of the movable chattel as well as the settlement of the outstanding consideration on sale of a motor vehicle. The two prayers are distinct and may ascribe to different territorial jurisdictions. See sections 11 to 15 of CPA. In light of the matters disclosed, it will be ruthless act to stay proceedings on account of this interlocutory appeal.

19. In the upshot, the application dated 13th August 2019 succeeds only to the extent that the time of filing the appeal herein is extended; appeal be filed within seven days from the date of this Ruling. The request for stay of proceedings is denied.

20. Costs of the application shall be borne by the applicant.

Dated, signed and delivered at Meru this 30th day of September 2020

F. GIKONYO

JUDGE

Representation

Ochieng for applicant

Kiogora for respondent – Muchiri holding brief.