



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. 448 OF 2012**

RAMESHCHANDRA SOMCHAND SHAH.....1<sup>ST</sup> PLAINTIFF

SAVITA RAMESHCHANDRA SHAH.....2<sup>ND</sup> PLAINTIFF

**-VERSUS-**

PALM HEALTHCARE INTERNATIONAL LIMITED (IN RECEIVERSHIP)....1<sup>ST</sup> DEFENDANT

BERNARD ROP.....2<sup>ND</sup> DEFENDANT

SANJEEV KUMAR SHASHIKANI GADHIA.....3<sup>RD</sup> DEFENDANT

ANWAR MAJID HUSSEIN.....4<sup>TH</sup> DEFENDANT

**RULING**

1. This ruling is in respect to the application dated 28<sup>th</sup> November 2019 wherein the 3<sup>rd</sup> and 4<sup>th</sup> defendants seeks the following orders: -

- 1. That there be a stay of proceedings herein pending the intended appeal to the ruling of 3<sup>rd</sup> October 2019.***
- 2. That the 3<sup>rd</sup> and 4<sup>th</sup> defendants be allowed to appeal the decision of this Honourable court on 3<sup>rd</sup> October 2019 out of time.***
- 3. That the costs of this application be in the cause.***

2. The application is supported by the 3<sup>rd</sup> defendant's affidavit and premised on the grounds that the applicant's deponent was not able to swear this affidavit on time as he was out of the country and only came back on 25<sup>th</sup> November 2019.

3. The applicant's case is that the Memorandum of Appeal is ready for filing and that it will be in the interest of justice to allow this application.

4. The applicants opposed the application through the Grounds of Opposition dated 29<sup>th</sup> January 2020 wherein they state that:

- 1. That the application is a gross abuse of the court process and a deliberate attempt on the part of the applicants to derail the expeditious conclusion of this matter.***
- 2. That the applicants have not advanced any plausible reason for the delay in filing the Notice of Appeal to warrant the court to exercise its discretion in their favour.***
- 3. That the applicants have not demonstrated if they stand to suffer any prejudice if the matter proceeds and is heard on its merits.***
- 4. That the continued hearing of the matter on its merits will not in any way affect and/or prejudice the hearing of the Appeal.***
- 5. That it would be a gross miscarriage of justice to stay proceedings in the matter considering the advanced age of the plaintiffs***

*and that the suit has been pending in court for the past eight years.*

**6. That it is indeed in the interest of justice, saving judicial time and expeditious resolution of the dispute that the court exercises its jurisdiction and allows the proceedings herein to continue to their logical conclusion.**

5. The 1<sup>st</sup> and 2<sup>nd</sup> defendants did not participate in the application. Parties canvassed the application by way of written submissions which I have considered. The main issue for determination is whether the applicants have made out a case for the granting of orders sought in the application.

**Leave to appeal out of time.**

6. Section 75(1) of the Civil Procedure Act provides for the orders against which an appeal would lie as of right and/or with the leave of the court. It provides thus:

***75(1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted-***

***(a) An order superseding an arbitration where the award has not been completed within the period allowed by the court;***

***(b) An order on an award stated in the form of a special case;***

***(c) An order modifying or correcting an award;***

***(d) An order staying or refusing to stay a suit where there is an agreement to refer to arbitration;***

***(e) An order filing or refusing to file an award in an arbitration without the intervention of the court;***

***(f) An order under section 64;***

***(g) An order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;***

***(h) Any order made under rules from which an appeal is expressly allowed by rules.***

7. Order 43 Rule (1) of the Civil Procedure Rules sets out the orders and rules in respect of which appeals would lie as of right. Order 43(2) provides that an appeal shall lie, with the leave of the court, from any other order made under the Rules. This means that unless the order sought to be appealed against falls under the orders which are appealable as of right under Order 43(1), leave to appeal must be obtained before such an appeal can be preferred. The procedure for obtaining leave is provided under Order 43(3) as follows: -

***(3) An application for leave to appeal under Section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.***

8. In the instant matter the impugned ruling that the applicants herein seek to appeal against was delivered on 3<sup>rd</sup> October 2019 in the presence of counsel for both the plaintiffs and defendants. Leave to appeal against the ruling was not sought or obtained at the time of the delivery of the said ruling. The instant application was filed on 28<sup>th</sup> November 2019 one and a half months after the delivery of the impugned ruling.

9. The applicants' deponent has, in the supporting affidavit, explained that his absence from the country contributed to the delay in the institution of the appeal process.

10. This court is of the humble view that it cannot stand in the way of the applicants in exercising their right to appeal. I am satisfied that the delay in filing the application for leave to appeal is not inordinate and that the reasons advanced for the said delay are plausible.

11. I therefore grant the applicants' prayer for leave to appeal this court's decision of 3<sup>rd</sup> October 2019.

**Stay of proceedings.**

12. In **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000 Ringera J** (as he then was) stated as follows regarding the considerations in making a decision on whether or not to grant stay of proceedings: -

***“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”***

13. The Court distilled the following three main principles to guide a Court in such applications:

- a. Whether the Applicant has established that he/she has a prima facie arguable case.
- b. Whether the application was filed expeditiously and
- c. Whether the Applicant has established sufficient cause to the satisfaction of the Court that it is in the interest of justice to grant the orders sought.

14. In ***Christopher Ndolo Mutuku & Another vs. CFC Stanbic Bank Ltd (2015) eKLR***, the Court observed that;

***“...what matters in an application for stay of proceedings pending appeal is the overall impression the Court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice...”***

15. In the present case, I note that the applicants have not indicated that their intended appeal will be rendered nugatory unless the orders of stay of proceedings herein are granted. For this reason, I find that it will not be in the interest of justice to stop the plaintiffs from proceeding with their case which has been pending before this court since the year 2012.

16. My further finding is that looking at the nature of the intended appeal, which is on the jurisdiction of this court to hear and determine the pending suit, should it be successful, it will not be rendered nugatory as any orders made by this court, upon hearing the suit, may still be set aside.

17. In conclusion, while this court allows the applicants’ prayer for leave to appeal out of time, the prayer for stay of proceedings pending appeal is disallowed/dismissed. The costs of the application shall abide the outcome of the main suit.

**Dated, signed and delivered via Skype at Nairobi this 24<sup>th</sup> day of September 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Waigwa for defendant.

Mr. Darr for Chacha Odera for 1<sup>st</sup> and 2<sup>nd</sup> defendants

Miss Nzuki for the plaintiffs.

Court Assistant: Silvia