



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL APPEAL NO. E 021 OF 2020

SICHUAN HUASHI DEVELOPMENT COMPANY LTD.....APPELLANT

-VERSUS-

REMAX REALTOR LIMITED.....RESPONDENT

RULING

BACKGROUND

The Appellant vide a Notice of Motion Application brought through a certificate of urgency dated 17th February, 2020 applied to stay proceedings. The Application sought for orders;

1. Spent
2. Pending the hearing and determination of this Application and appeal, a stay of proceedings in ***Milimani CMCC No. 1024 of 2017 Remax Realtor Limited V Sichuan Huashi Development Company Limited*** do issue
3. Costs of the Application.

The Application is premised under **Article 159 of the Constitution of Kenya 2010, Sections 1A, 1B & 3A of the Civil Procedure Act 2010, Order 51 Rule 1 and Order 42 rule 6 of the Civil Procedure Rules 2010**, and all other enabling provisions of law.

The Application was based on the following grounds;

1. The Applicant herein is aggrieved by the ruling of Hon. I.Oreng'e (Mr.) SRM dated and delivered in the absence of parties on **10th January 2020 in Milimani CMCC No. 1024 of 2017** and has filed an appeal thereto
2. The Appeal is meritorious and raises triable issues as evidenced by the Memorandum of Appeal annexed to this Application. The Appeal will be rendered nugatory if the stay is not granted
3. Unless the application is allowed, substantial loss will result to the Applicant as the damages sought are substantial
4. The Respondent will not suffer any prejudice if the Application is allowed
5. This application has been made and filed without delay.

The Application is supported by the Affidavit of PURITY MBETA who is an assistant manager of the Appellant.

REPLYING AFFIDAVIT

The Application is opposed through a Replying Affidavit dated 16th March, 2020 sworn by KEVIN AYODI who is an authorized representative of the Respondent.

The Respondent avers that the Appeal is fatally defective as no leave to appeal was sought or obtained before filing it. That the Appellant has not demonstrated cause for the grant of the stay of proceedings. He further avers that the memorandum of appeal does not disclose an

arguable appeal.

That the subordinate court upheld the objection not to produce Appellant's documents without a certificate, the Appellant challenged the decision by way of review but failed to meet the threshold for grant of an order for review leading to the dismissal of the Application.

Further averment is that the Ruling delivered on 10th January, 2020 was discretionary and the Appellant has not established that the subordinate court erroneously exercised its discretion. That the Memorandum of Appeal has not established in what way it will be prejudiced if the proceedings in **CMCC 1024 of 2017** are not stayed. That the jurisdiction of this court is not properly invoked. That the Appellant only intends to delay the conclusion of the matter which is against **Article 159 (2) (b) of the Constitution of Kenya 2010 and Section 1A of the Civil Procedure Act (CPA)**.

SUBMISSIONS

The Applicant's counsel submitted that courts cannot issue an order for stay of proceedings unless some conditions are satisfied. He submitted while following the three main guiding principles that are used in granting such an Application and placed reliance on the case that laid down the guidelines, **Kenya Power & Lighting Company Limited V Esther Wanjiru Wokabi (2014)eKLR** .

The first guiding principle is whether the applicant has established a prima facie/arguable case. On this the Applicant relied on **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others (2003)eKLR**. He submitted that the Applicant's right to adduce and challenge evidence has been denied as the emails in question are the only evidence the applicant has to rebuttal of the accusation against them in the main suit.

He submitted further that regarding the grounds of Appeal the Applicant has an arguable appeal.

On the second guiding principle of whether the Application was filed expeditiously, Counsel for the Applicant submitted that there was no delay in filing the Appeal since the Lower court issued its determination on 10th January, 2020 and the Appeal was filed on 4th February, 2020.

On the final guiding principle of 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, Counsel submitted that the Applicant would suffer substantial loss if the Application is denied as the damages sought are substantial.

The Respondent's Counsel submitted that the Applicant has not met the threshold for the grant of the order for stay of proceedings. He submitted that the appeal is fatally defective and not arguable. That the Application of 22nd August 2019 was an omnibus application for which no automatic right of appeal lies under **Order 43 (1) of Civil Procedure Rules 2010**. The Applicant ought to have sought leave to appeal against the subject ruling. He relied on **Peter Nyaga Muvake v Joseph Mutunga (2015)eKLR** where the need for leave to appeal was emphasized.

He submitted that the Appeal is not against the decision of 10th January, 2020 but against the decision of 19th August, 2019 since it was the latter that expunged the Applicant's evidence from record.

He has submitted that the Applicant has not established sufficient cause to grant the order for stay of proceedings. He relied on **Kenya Wildlife Service v James Mutembei (2019) eKLR** which held that;

“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 proceedings is high and stringent.”

Counsel for the Respondent submitted that the trial is at an advanced stage, the hearing concluded and the parties are at the stage of writing final submissions therefore the Respondent would suffer grave prejudice on account of delay. Counsel further submitted that the Appeal should fail since the Affidavit supporting the Application was commissioned by an Advocate who did not have a current practicing certificate.

The Applicant's Counsel filed a Supplementary submissions and submitted that the commissioning Counsel had a practicing certificate for 2019 and was licensed to practice at least until the end of February, 2020 as the Law Society of Kenya gives leeway to non-compliant advocates to regularize their position until end of February. The Applicant deposed that the allegation by the Respondent is a procedural technicality which should not be elevated to the level of substantive justice. He relied on the case of **National Bank of Kenya Limited v Anaj Warehousing Limited (2015)eKLR** where the Supreme Court held that ;

“The Appellate Court made the assumption that, since the Law Society of Kenya did publish annually a list of names of duly-licensed advocates, the public would know if a particular advocate had not taken out a practicing certificate. How far does this assumption represent the reality, for the typical client seeking a particular service, and finds a well-known advocate conducting his work from decent chambers? We would take judicial notice that even the Judges in Court, can hardly keep up with the records of advocates who have duly renewed their practice certificates. It is the Law Society of Kenya which is best placed to know which advocate has or has not taken out a practicing certificate.”

The Applicant submitted that as Defendant in the Lower Court he has not closed its case and is was awaiting the outcome of the ruling on whether to expunge the documents or not. The expunged emails are the only evidence the Defendant has and expunging them on a technicality would be tantamount to condemning the Defendant unheard. The case of **Kiai Mbaki & 2Others v Gichuhi Macharia &**

Another (2005) eKLR the Court of Appeal stated that;

“the right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

DETERMINATION

The issue(s) for determination are;

- a) Did the Applicant obtain leave to appeal?
- b) Is the Applicant’s affidavit void as Counsel who signed was not licensed by Law Society of Kenya with Practising Certificate 2020?
- c) Should stay of proceedings be granted pending hearing and determination of Appeal?

Law Applicable

Article 159 Constitution of Kenya 2010

Article 50 Constitution of Kenya 2010

Section 1A IB & 3A Civil Procedure Act

ANALYSIS

After examination of pleadings and submissions, the Application is essentially for stay of proceedings in Milimani CMCC No. 1024 of 2017 Remax Realtor Limited vs Sichuan Huashi Development Company Limited pending the hearing and determination of this appeal.

The 1st issue is whether the Applicant sought leave to appeal. The Respondent submitted that no leave was granted. **Order 42 CPR 2010** provides for right of appeal. The Applicant submitted that it relied on **Article 159 (d) COK 2010** that provides that justice shall be administered without undue regard to procedural technicalities.

The 2nd issue for determination is whether the issue of Counsel who deponed the Affidavit without a practicing certificate affects the Application.

The Affidavit supporting the Application for stay of proceedings was commissioned by an Advocate whose practicing status was inactive. This according to the Respondent fails the whole Application. The Applicant has not denied this but has explained how the said Advocate had a practicing certificate for the previous year and how the Law Society of Kenya allows grace period until end of February of each succeeding year for an Advocate to renew his/her practicing certificate. The Supreme court case National Bank of Kenya Limited v Anaj Warehousing Limited (supra) where the Court held that documents drawn by an advocate who has no practicing certificate are binding upon the client. The defect is curable under **Article 159 COK 2010** and **Order 19 rule 7 CPR 2010** which allows Court to receive affidavits notwithstanding defects and technicalities.

In the Supreme Court of Uganda case; Prof Syed Hug -V- Islamic University in Uganda C.A. No. 47 of 1995 the court considered the effect of commissioning of oaths by a non-practising advocate under a provision similar to our **Section 2 of Oaths and Statutory Declarations Act**, and held:-

“An advocate who practices after the period of grace without a valid practicing certificate commits an offence and is liable to prosecution under Section 14 (1) of the Advocates Act. Therefore, the documents he prepares, signs, and files are illegal as he does so in perpetration of an offence under Section 14 (1) of the Advocates Act. Accordingly, such documents are invalid and of no legal effect as no Court can sanction or condone an illegality which is brought to its notice.”

The grace period is where the Advocates have paid for their current practicing certificate but they are not processed yet and if ready have not been reflected as ‘active’ in the LSK website. The commissioning advocate in question was active for the year 2019 and had a practicing number. He commissioned the document in February, 2020 and as the Applicant submitted, Advocates mostly are allowed a period of until end of February for their precious practicing certificates to be inactive as the new certificate will be in force..

In Microsoft Corporation vs. Mitsumi Computer Garage Ltd & another (2001) KLR 470, at page 481, Ringera J. (as he then was), noted that the plaintiff had attempted to comply with the rule requiring verification of a plaint, but he had fallen short of the prescribed standards. In those circumstances, the learned Judge said,

“It would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form and procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not to be treated as nullifying the legal instruments thus affected. In those instances, the court should rise to its higher calling to do justice, by saving the proceedings in issue.”

Therefore, in light of practical circumstances pertaining to advocates annual renewal of practicing certificates, the Advocate commissioned affidavit is part and parcel of the pleadings in Court. The delay in prompt renewal of the certificate was/is cured by the grace period allowed by LSK upto February 2020 which is the period within which the impugned affidavit was commissioned. Further, in light of **Article 159 2(d) COK 2010** the technicality may not override the substantive claim.

The next issue is **whether the proceedings should be stayed pending hearing and determination of the appeal.**

Stay of proceedings in *Halsbury's Law of England, 4th Edition. Vol. 37* page 330 and 332, provides:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

In the case of **Kenya Power & Lighting Co. Ltd vs. Esther Wanjiru Wokabii Civil Appeal No. 326 of 2013 (2014) eKLR**, the Court quoted Rngera J. (as he then was) in the case of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** ;

“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”

The Court then 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.

1. Prima facie/arguable case

The Applicant submitted that it has a prima facie/ arguable case. I have read the memorandum of Appeal and the grounds of appeal raise prima facie case. The Learned Magistrate expunged from record documents that the Applicant intended to use as their only evidence.

In ***Mrao Limited v First American Bank (supra)*** where Court of Appeal addressed what constitutes a prima facie to include but not confined to a **“genuine and arguable case”**.

The Defendant/Applicant alleged that during the hearing, the documents were expunged from record for lack of a certificate. It is arguable what the Evidence Act provides on electronic evidence.

2. Whether the application was filed expeditiously

The Subordinate court’s decision on review was on 10th January, 2020 while the Appeal was filed on 4th February, 2020. There was no delay. However, the Respondent has raised the issue of review and of appeal. The Respondent’s argument is that the Appeal is against the decision of the subordinate court made on 19th August 2019 and not the one made on 10th January, 2020. The Respondent has argued that the review Application could not hold since it did not raise any new and important matter or evidence therefore the Applicant’s Appeal is not against the review order.

The Defendant/Applicant shall inform Court and party what the appeal is based on and the Respondent shall participate in appellate proceedings to submit which application ought to be pursued but not at this preliminary stage.

3. 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 for stay of proceedings.

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...”

In the case of *Global Tours & Travels Limited (supra)*; Court stated that, “In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order”

The Respondent in the instant case has argued that if the stay of proceedings order is granted, it will be delaying justice and will be contrary to Article 159 (2) (b) COK 2010 and section 1A of the CPA

The same COK 2010 and the same CPA that provides for expedient delivery of justice is the same that provides that matters should be heard justly and nobody should be denied justice. It is the same constitution that provides for a right to fair hearing.

The Applicant has argued that if a stay of proceedings is not granted, the matter in the subordinate court will proceed without the Defendant/Applicant who is the Defendant in the Lower court. The Applicant/Appellant holds the view that if the issue of production of the expunged emails due to non-production of a certificate for electronic evidence is not determined first on appeal and proceedings stayed, the defendant will not be accorded a fair hearing. It would therefore be unfair to send the Defendant away without giving it a chance to prove its case regardless of the outcome.

If the order for stay of proceedings is not granted and the lower court matter proceeds then the Applicant argues its appeal to a successful end, the Appeal will have been rendered nugatory.

This Court sought the Trial Court’s record for perusal through DR Commercial & Tax Division on 10th June 2020. The same was not availed and therefore this Court relies solely on the deposed pleadings filed in this Court. The Applicant stated that the certificate under Section 106B of Evidence Act was produced later and the production was curtailed. The Applicant sought to bring a witness it was declined. These allegations in the absence of the record can only be deemed as true. They tilt the matter at this stage as unjustly shutting out the Defendant/Applicant from a fair hearing. The lack of a fair hearing warrants the proceedings be stayed at this stage to determine the appeal.

DISPOSITION

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, the proceedings are stayed pending appeal.

DELIVERED SIGNED & DATED IN OPEN COURT ON 24TH NOVEMBER 2020 (VIDEO CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

WAIGWA FOR THE APPELLANT

ATAKA, KIMORI & OKOTH ADVOCATES FOR RESPONDENT

COURT ASSISTANT- TUPET