



IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 71 OF 2018

ELGON KENYA.....APPELLANT/APPLICANT

VERSUS

BAYER EAST AFRICA LIMITED.....RESPONDENT

RULING

FACTS

1. The appellant/applicant brought the instant application dated 29th July, 2019 under the provisions of Order 42 Rule 6 and 9, Order 51 of the Civil Procedure Rules and Sections 1A, 1B and 63 of the Civil Procedure Act Cap 21 of the Laws of Kenya seeking for the following orders;-

i) Spent

ii) Spent

iii) That the Honourable Court be pleased to grant an order of stay of proceedings in Nyeri CMCC No.63 of 2017 be granted pending hearing and determination of the appeal;

iv) That the costs of this application be provided for.

2. The application is premised on the grounds on the face of the application and the supporting affidavit of George Mahugu who stated that the appellant/applicant has preferred this instant appeal against the Ruling delivered on 7/12/2018 by the trial court;

3. The application was disposed of by oral submissions; Learned Counsel Mr. Mahugu appeared for the appellant/applicant; Learned Counsel Mr. Ndichuheld brief for M.Nyakundi for the 1st respondent; Learned Counsel Mr. Njoroge appeared for the 2nd and 3rd respondents and the 4th respondent was not in attendance; a summary of each parties' submissions is as follows;

APPELLANT'S/APPLICANT'S CASE

4. Counsel submitted that the application is anchored on the supporting affidavit dated 29th July 2019 in which he stated the following;-

a) On 11th July 2017 the appellant filed a third party notice in the lower court proceedings seeking for third party directions after a third party was allowed onboard;

b) The respondent filed an application seeking to strike out the said application for third party directions;

c) On 7th December 2018, the Chief Magistrate's court allowed the application to strike out the application for third party directions. The said order shut out the appellant from proceeding against the respondent contrary to the rules of natural justice;

d) On 16th March 2019 the applicant's counsel was instructed to file an application for stay of proceedings in the lower court pending hearing and determination of the appeal on the orders of 7th December 2018;

e) The said application was heard and fixed for ruling on 5th July 2019. However the application was withdrawn on 3rd July 2019 upon counsel's realization that it is the High Court which has jurisdiction to grant such orders of stay of proceedings;

f) If the proceedings in Nyeri CMCC No.63 of 2017 are not stayed this application will be rendered nugatory;

RESPONDENT'S CASE

1. In reply the respondent's counsel relied on the replying affidavit dated 14th October 2019 sworn by Esther Kinyenje-Opiyo advocate who stated as follows:-

a) On 4th July 2017 the appellant obtained orders from the trial court to join the respondent herein to the proceedings in Nyeri CMCC No.63 of 2017. The appellant issued a third party notice dated 11th July 2017 upon the respondent. On 31st October 2017 it filed an application for third party directions in accordance with Order 1 Rule 22 of the Civil Procedure Rules 2010.

b) The respondent entered appearance following service of the third party notice as required by Order 1 rule 22 of the Civil Procedure Rules. On 20th August 2018 the respondent filed its replying affidavit to the application for third party directions. The respondent sought for striking out of the third party notice for failure to disclose any proper question to be tried as to the liability of the third party.

c) The trial magistrate agreed with the respondent and struck out the third party notice thereby removing the respondent from the proceedings.

d) By withdrawing a similar application for stay of proceedings at the lower court the appellant breached other parties' right to fair and expeditious hearing under Article 51(1) of the Constitution of Kenya, 2010.

e) The other parties are not joined to this appeal and will be deprived of an opportunity to be heard and respond to an application that may adversely affect them.

f) The respondent is not the proper party to respond to the instant application since it is no longer a party in the lower court's proceedings.

ISSUES FOR DETERMINATION

5. After hearing the oral presentations made by the respective counsel the only issue that this court has framed for determination is;

(i) whether the applicant has made out a case that warrants an order for stay of the proceedings in the lower court;

ANALYSIS

6. In deciding whether the applicant has made out a case that merits the orders sought this court is guided by the three (3) main considerations set down in the case of **Kenya Power & Lighting Company Ltd vs Esther Wanjiru Wokabi [2014] eKLR**; which principles are as set out hereunder;

(i) Whether the application was filed expeditiously;

(ii) Whether the applicant has established that he has a prima facie arguable case;

(iii) Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the best interest of justice to grant the orders sought.

7. The appellant/applicant had filed a Third Party Notice seeking directions on how to proceed with the matter; the respondent in opposing it filed an application seeking to strike out the application and the same was allowed; the ruling dismissing the application for Third Party directions was delivered by the trial court on the 7/12/2018;

8. The applicant then proceeded to lodge its Memorandum of Appeal on the 20/12/2018; and then moved this court by filing this instant application under a certificate of urgency on the 30/07/2019;

9. The applicant is found to have filed the appeal in a timely manner; as for the instant application this court notes that it was filed under a certificate of urgency after a period of close to seven (7) months; there are legions of cases that have held that a period of four (4) months can be perceived to be an inordinate delay; but the saving grace is the diligence shown by the applicant in filing the appeal in a timely manner; this court is satisfied that the applicant is not guilty of laches and the application is deemed to have been filed expeditiously;

10. The second criteria that the applicant must satisfy this court relates to whether it has a prima facie arguable appeal; this court has noted that the applicant had filed its Memorandum of Appeal against the Ruling of the trial court; the appeal relates to the striking out of the Third Party Notice; the action of striking out removed the Third Party from the proceedings which may then deprives the applicant an opportunity to canvass issues touching on the question of the liability of the Third Party which may adversely affect the applicant;

11. This court is satisfied that the applicant has a prima facie arguable appeal and is satisfied that it is in the interest of justice that the order sought be granted;

FINDINGS AND DETERMINATION

12. In the light of the foregoing this court makes the following findings and determinations;

13. The application is found to have merit and is hereby allowed; the applicant is hereby granted an order for stay of proceedings in Nyeri CMCC No.63 of 2017 pending the hearing and determination of the instant appeal on the following terms;

- (i) The applicant to file and serve its Record of Appeal within the thirty (30) days from the date hereof;
- (ii) Mention date on the 19th day of March, 2020 for compliance and admission of the appeal;
- (iii) In default the order for stay of proceedings stand vacated.
- (iv) The applicant to bear the costs of application.

Orders Accordingly.

Dated, Signed and Delivered at Nyeri this 18th day of December, 2020

HON. A. MSHILA

JUDGE