



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO 46 OF 2019

NYAHURURU LIFTING KENYA LTD.....APPLICANT/APPELLANT

VERSUS

POWER MANAGEMENT SERVICES LIMITED..... RESPONDENT

RULING

1. This is an application by the Applicant that is brought under Sections 1A and 3A of the Civil Procedure Act, Order 42 Rule 6(1) and Order 51 rule 1 of the Civil Procedure Rules primarily seeking stay of lower court proceedings in **Mavoko Resident Magistrates Court Civil Case No. 1353 of 2016** pending the hearing and determination of the filed appeal.

2. The appeal is from a ruling delivered in court on 29th March, 2019. The Application is supported by Supporting Affidavit by Justus Kinywa Mwangi, the director of the appellant company sworn on the 3rd April, 2019.

3. The Applicant deposes that the respondent who was the plaintiff in the trial court filed an application on 8.2.2019 seeking to reopen their case and adduce evidence of special damages that they had left out and which application was allowed on 29.3.2019 thereby preventing the Appellant from proceeding with its defence case. The deponent averred that the trial magistrate openly exhibited bias by pronouncing herself on the application without going through the Appellant's replying affidavit and as such the appellant has lodged the instant appeal. The deponent averred that if the trial proceeds in the trial court, the appeal will be defeated and cause irreparable damage and substantial prejudice to the appellant. Further that the civil case is coming up for mention on 5th April, 2019 to take a hearing date for the defence case. The applicant had not annexed the Memorandum of Appeal to the application, however the same is on record and it has listed 11 grounds exhibiting their dissatisfaction with the ruling of the Learned Trial Magistrate.

4. The Application is opposed vide a replying affidavit dated 12th April, 2019 deposed by a legal officer in the claims department of Mayfair Insurance Company Limited who are the insurers of the respondent. The deponent points out that by the time the plaintiff's case was closed in the trial court, the respondent realized that three crucial documents had not been produced and which led to the filing of the application dated 8th January, 2019 which was rightly decided in its favour. Secondly, the deponent averred that nothing had been placed before court to justify grant of stay of proceedings and that the said order will clog the judicial process and affect the rights of the 2nd Defendant. He averred that the applicant stands to suffer no loss if the order of stay is not granted for it still has a right to appeal against the judgement and in any event the applicant will still have an opportunity to cross-examine the Respondent's witnesses and tender additional evidence to rebut the Respondent's case therefore the application ought to be dismissed.

5. Vide supplementary affidavit deposed on 23rd April, 2019 by Justus Kinywa Mwangi, the deponent averred that the Respondent deliberately withheld documentation that was within its knowledge and that it ought to have disclosed all the documents that it intended to rely upon during the pre-trial conference. According to the deponent the respondent could only seek to produce evidence that was not within their knowledge.

6. The Application was canvassed by way of written submissions.

7. The applicant vide submissions filed by Learned Counsel Kabathi and Co Advocates on 23rd April, 2019 framed two issues for determination, *to wit*; Whether the applicant is entitled to stay of proceedings pending hearing and determination of the appeal and Whether the Appellant is entitled to the costs of the application.

8. On the first issue, Learned Counsel commenced by setting out the provisions of Order 42 rule 6(1) of the Civil Procedure Rules and citing among others the case of **Stanley Kangethe Kinyanjui v Tony Keter & 5 Others (2013) eKLR**. Learned Counsel submitted that the appellant has established a prima facie arguable case because the issue in contention is whether the Respondent ought to have been allowed to re-open its case to produce additional documentary evidence. Learned counsel urged the court that their application was filed expeditiously

as the decision they seek to appeal against was made on 29th March, 2019 and the instant application was filed on 4th March, 2019. Learned counsel submitted that the stay of proceedings will not occasion the respondent any prejudice and in any event the delay was occasioned by them since the appellant was ready to proceed with their defence hearing on 18th February, 2019. Learned counsel submitted that if the stay is not granted, then the matter shall proceed in the trial court for defence hearing on 6th May, 2019. On the issue of costs, learned counsel submitted that the appellant be awarded costs.

9. The Respondent in opposing the application through learned counsel J. K. Mwangi and Co Advocates submitted that the singular issue for determination was whether the trial court rightly exercised its discretion to permit the Respondent to reopen its case and tender further evidence which was discovered after the plaintiff had closed its case and the defendants had not yet testified. Learned counsel cited the case of **UAP Provincial Insurance Company Limited v Michael John Beckett, Civil Application Number 204 of 2004** where the court listed the requirements to be met for a grant of order of stay of proceedings, to wit; an arguable appeal and that if the application is not allowed, then the appeal will be a futile exercise. Learned counsel submitted that the stay of proceedings will occasion delay in the conclusion of the case for the same is yet to be heard and disposed of by the trial court.

10. The issue for determination is whether the Applicant is entitled to orders for stay of proceedings. Order 42 Rule 6 of the Civil Procedure Rules is the operative provision in determining this issue.

11. The case of **Antoine Ndiaye v African Virtual University (2015) eKLR** analyzed the guiding principles for stay orders, in line with the provisions of Order 42 Rule 6 of the Civil Procedure Rules; *to wit*,

a. The Application was brought without undue delay

b. Substantial loss occasionable to the applicant if the order is not granted

c. Security for performance

12. I have looked at the application herein, and with regard to the condition of undue delay, and agree with the applicant that the delay is not inordinate. With regard to the issue of substantial loss, I am unable to find the substantial loss that the applicant shall suffer save that its right to be heard on appeal will be extinguished if the order is not granted. On the issue of security for performance, the applicant has not indicated willingness to deposit security as court directs. Therefore I am satisfied that the applicant has partially met the basic requirements for grant of this order. The appeal challenged the exercise of discretion of the trial court in admitting evidence and the applicant shall not have an opportunity to air out its grievances if the application is not allowed. However the applicant was under a duty to satisfy the court that the pending appeal is an arguable one and not frivolous. This condition is crucial as the applicant is seeking an order of stay of proceedings and should therefore convince the court that the pending appeal is not a mere academic exercise. This position was stated by the Court of Appeal in the case of **UAP Provincial Insurance Company Limited v Michael John Beckett, Civil Application Number 204 of 2004**.

13. Looking at the ruling of the trial magistrate as against the applicant's appeal, I find that the applicant is determined to have the respondent shut out from re-opening their case since if that is allowed then the applicant would be home and dry to proceed with its defence hearing and ensure that the respondent loses an opportunity to bring forth the new evidence. I find that to be rather unfair and unjust since every party is entitled to be given their day in court and to avail all the requisite material so that the court could thrash out the issues in conflict with finality. The applicant's opportunity to cross examine the respondent's witnesses will still be available. There is also evidence that there is a second defendant whose interests must be considered and hence the delay might prejudice that said defendant. The applicant herein has not convinced me that the exercise of discretion by the trial court was based on a wrong principle of law. Indeed the order that had been sought by the respondent was a discretionary one and which the court duly exercised in the circumstances of the case. It is noted that the trial court granted the applicant costs of the application in issue and which was quite reasonable to cushion the applicant. The applicant has not complained that the costs awarded are not sufficient. I am of the considered view that the applicant will not suffer any prejudice if the order of stay of proceedings is not granted since it shall have the opportunity to not only cross-examine the respondent's witnesses but to prefer an appeal once the matter is heard by the trial court. To deny the respondent a chance to reopen its case even where the applicant's defence had not started would be prejudicial to the respondent as it will have been elbowed out by the applicant in circumstances akin to stealing a match from the respondent. Hence I find the applicant's appeal may not be arguable as the applicant has not demonstrated that it has a probability of success so as to justify the grant of an order of stay of proceedings.

14. In the result it is the finding of this court that the Applicant's application dated 3rd April, 2019 lacks merit. The same is ordered dismissed with costs to the respondent.

It is so ordered

Dated, delivered and signed at Machakos this 26th day of April, 2019.

D.K. KEMEI

JUDGE