



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS CIVIL APPLICATION NO 489 OF 2018

ASSOCIATED CONSTRUCTION COMPANY (K) LIMITED...APPLICANT

VERSUS

JUNE WANJUGU KOINANGE

JANE NJERI NGURE

SAMUEL GITAU MBUTHIA (Suing as the administrators of the estate of

DINAH MUTHONI MBUTHIA.....RESPONDENTS

RULING

INTRODUCTION

1. The Applicant's Notice of Motion application dated and filed on 21st September 2019 was filed pursuant to the provisions of Section 3A, 78, 79G and 95 of the Civil Procedure Act, Order 42 Rule 6(1) of the Civil Procedure Rules and all the enabling provisions of the law. Prayer Nos (1) was spent. It sought the following remaining orders:-

a. Spent.

b. THAT this Honourable court be pleased to grant leave to the Applicant to appeal out of time against the ruling made by Hon Chief Magistrate Mr. Gesora on 7th December, 2017 in Nairobi Milimani CMCC NO 4639 of 2014.

c. THAT the said leave do operate as a stay of proceedings.

d. THAT the Memorandum of Appeal filed herein be deemed to have been filed within time and admitted into record.

e. THAT the cost of this application be provided for.

2. The Applicant's Written Submissions were dated 12th November 2018 and filed on 13th November 2018 while those of the Respondents were dated 30th November 2018 and filed on 15th January 2019.

3. The parties requested the court to render its decision based on their Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE APPLICANT'S CASE

4. The Applicant's present application was supported by the Affidavits of its advocate, Christine Githii and its Director, Nanak Singh Bansal. They were both sworn on 21st September 2018.

5. Its case was that it was never served with Summons to Enter Appearance whereupon *ex parte* judgment was entered against it on 20th

February 2015. Its advocates filed an application seeking to set aside the said judgment but the same was dismissed on 7th December 2017.

6. Upon the said dismissal, its advocates filed an application seeking to review the said Ruling but again, the said application was dismissed on 5th September 2018.

7. It was now seeking leave to file an appeal against the Ruling of 7th December 2017 out of time as the time to appeal had run out.

8. It therefore urged this court to allow its application as prayed.

THE RESPONDENT'S CASE

9. In opposition to the said application, the Respondents filed Grounds of Objection dated 11th October 2018 on 30th October 2018.

10. They averred that the Applicant never took steps to appeal and that it did not even apply for a copy of the Ruling and proceedings, either formally or informally after the decision was delivered

11. They added that the application to stay the proceedings was not made in good faith as it ought to have been made before the Trial Court and further that the said stay of proceedings would cause a delay, the suit in the lower court having been filed in 2014.

12. It was their further contention that the grounds of appeal the Applicant had relied upon were incapable of supporting an order for stay of proceedings.

13. Further, they averred that the Applicant had not advanced good grounds why it did not file an appeal out of time and hence the order for a stay of proceedings should not be granted.

14. They were categorical that the Applicant would not suffer any substantial loss if the application was not allowed and thus urged this court to dismiss the same as it was bad in law, incurable in law and did not lie.

LEGAL ANALYSIS

15. The Applicant argued that the delay in filing its present application was occasioned by the fact that it first filed an application for review which is one of the legal redresses that was open to it to challenge the Ruling that was delivered on 5th September 2018. It was its submission that the decision to appeal was not an afterthought but rather that it was merely exercising its right to appeal as provided for under the law.

16. It pointed out that the court had power to enlarge time for a party to file an appeal out of time. In this regard, it relied on the provisions of Section 79G of the Civil Procedure Act and the cases of **Samuel Mwaura Muthumbi vs Josephine Wanjiru Ngugi & Another [2018] eKLR** and **Mwangi vs Kenya Airways Ltd [2003] eKLR**.

17. It submitted that it had an arguable appeal and that the Respondents would not suffer any prejudice if its application for extension to file suit out of time was allowed.

18. Its further argument was that if a stay of the proceedings was also not granted, then its appeal would be rendered nugatory. It placed reliance on the case of **Chris Munga Bichange vs Richard Nyagaka Tongi & 2 Others [2013] eKLR** where it was held that before an order for injunction, stay of execution or stay of proceedings could be granted, the applicant had to demonstrate that his appeal was arguable and that if the order was not granted and it was to succeed on appeal, his appeal would be rendered nugatory.

19. It also averred that it was not mandatory that security for costs be provided and it was at the discretion of the court as was provided in Order 42 Rule 14 of Civil Procedure Rules. It was emphatic that the Respondent had not demonstrated why it ought to pay security for costs.

20. On their part, the Respondents relied on the case of **Nyeri Motor Services Ltd vs Mutua Kaluku [2018] eKLR** where the court held that:- **“a party ought not to be permitted to rely on its own failure to follow up on proceedings against it as basis for seeking favourable discretion any orders based on its own assumptions.”**

21. They also submitted that a court ought to consider the length of delay, reason for delay, the chances of appeal succeeding if the application was granted and the degree of the prejudice if the application was allowed, grounds that the Applicant also agreed ought to be taken into account before an extension could be granted to a party to appeal out of time.

22. They relied on the cases of **Daphne Parry vs Murray Alexander Carson [1963] EA 546**, **First American Bank of Kenya vs Gulab P Shah & 2 Others [2002] 1 EA 65** to buttress their argument that a court must consider the above mentioned principles before it could exercise its discretion to enlarge time.

23. It was also their submission that the application for a stay of proceedings ought not to be granted as the Applicant had not offered any security or demonstrated the substantial loss that it would suffer if the application was not allowed as was provided in Order 42 (sic) of the Civil Procedure Rules.

24. They relied on the case of **Kenya Power & Lighting Co Ltd vs Esther Wanjiru Wokabi [2014] eKLR** which cited with approval the case of **Global Tours and Travel Limited Nairobi HC Winding Up Cause No 43 of 2000** in which Ringera J (as he then was) held that in

deciding whether to grant an order for stay of proceedings, it should weigh the pros and cons.

25. They also referred this court to several other cases, copies of which they did not annex to their Written Submissions.

26. Right at the outset, this court addressed the question of costs as both parties relied on different provisions of the law.

27. The Applicant relied on Order 42 Rule 14 of the Civil Procedure Rules which provides as follows:-

1. At any time after the memorandum of appeal has been served the court, in its discretion, may order the appellant to give security for the whole or any part of the costs of such appeal.

2. If the appellant is not ordinarily resident in Kenya and has no sufficient property in Kenya (other than property to which the appeal relates) the court shall order the giving of security for the whole or part of the costs of the appeal within a time to be limited in the order.

3. If security for costs is not given within the time ordered the court may dismiss the appeal.

28. On the other hand, the Respondents relied on Order 42 Rule 6 (2) of the Civil Procedure Rules that stipulates as follows:-

“No order for stay of execution shall be made under subrule (1) unless-

a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

29. It was clear that the Applicant misapprehended the provisions the Respondents were relying upon to argue that it had not offered to furnish security before it could be granted an order for stay of proceedings.

30. Be that as it may, it was evident from the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules that security is to be furnished when granting an order for stay of execution and not in a case of stay of proceedings. Having said so, in exercising its discretion to grant an order for stay of proceedings, it can grant the same and make such order thereon as it may deem fit to grant.

31. Having considered the parties Written Submissions on the issue of costs, this court determined that the same were not relevant in the circumstances of this case. In any event, the Ruling delivered by the Trial court was incapable of being executed. It was a negative order.

32. This court also considered the parties' submissions in respect of the arguability of the intended appeal herein. Although the Applicant had to demonstrate that its intended appeal was not frivolous, this court could not consider the merits or otherwise of the same as it was a matter of the appellate court. Its concern was whether or not the Applicant had advanced sufficient or good explanation to show why it had not filed an appeal within the stipulated time and what prejudice the Respondents would suffer if the application herein was allowed for the reason that extension of time to file an appeal out of time is permitted by the law.

33. Section 79G of the Civil Procedure Act states that:-

“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. (emphasis court)

34. Order 45 Rule (1) of the Civil Procedure Rules further stipulates as follows:-

1. Any person considering himself aggrieved—

a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

35. Order 45 Rule 6 of the Civil Procedure Rules provides that:-

“No application to review an order made on an application for a review of a decree or order passed or made on a review shall be entertained.”

36. It was evident that the Applicant could opt to seek redress through a “**review**” or “**appeal**”. In view of the fact that it could not review the order dismissing its application for review, it was perfectly in order to appeal against the initial decision that had aggrieved it.

37. Notably, the decision dismissing the Application was made on 5th September 2018. It filed the present application on 21st September 2018. It therefore acted with speed in seeking redress from this court.

38. Since the intended appeal was on the question of whether or not the Trial court correctly dismissed the Applicant’s application seeking to set aside the *ex parte* judgment that was entered against it, it would be more prudent to hear the same first before the formal proof can proceed.

39. Indeed, restraint must be exercised to avoid a matter proceeding *ex parte*, in the absence of a defendant only for him to demonstrate on appeal that he was wrongly shut out from defending the suit. Indeed, it would be a waste of judicial time to set aside the entire proceedings of the Trial court on appeal. It would be more prudent to stop the proceedings before the matter proceeds for formal proof.

40. It is also important to point that a court must balance between the right of a party to have his case heard expeditiously under the principle that justice must not be delayed as enshrined in Article 159 (2) (b) of the Constitution of Kenya and the equally important fundamental right of the other party to have a fair hearing as guaranteed in Article 50 (1) of the Constitution of Kenya.

41. It therefore follows that a person ought not to be shut out from accessing court or having his day in court. This court did not see the prejudice the Respondent would suffer if this court first heard the Applicant’s appeal. If they did, they did not demonstrate the same to this court.

42. However, this court came to the firm conclusion that there would be more injustice to and prejudice suffered by the Applicant if it was denied an opportunity to ventilate its case on merit.

DISPOSITION

43. For the foregoing reasons, the upshot of this court’s Ruling was that the Applicant’s Notice of Motion application dated and filed on 21st September 2018 be and is hereby granted in terms of Prayer Nos (2) and (3) in the following terms:-

1. THAT the Applicant is hereby directed to file and serve its Memorandum of Appeal within fourteen (14) days from the date of this Ruling i.e by 14th June 2019.

2. THAT there be a stay of proceedings in Nairobi Milimani CMCC No 4639 of 2014 pending the hearing and determination of the Appellant’s Appeal and/or until further orders and/or directions by the court.

3. THAT the Applicant is hereby directed to file and serve its Record of Appeal within sixty (60) days from today i.e by 2nd August 2019.

4. THAT the Deputy Registrar High Court of Kenya Milimani Law Courts is hereby directed to facilitate the placing of the typed certified proceedings and lower court file to enable the Appellant comply with Para 43 (2) hereinabove.

5. Costs of the application herein shall be in the cause.

6. Either party is at liberty to apply.

44. It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of May 2019

J. KAMAU

JUDGE