REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO 24 OF 2018

EZEKIEL MULE MUSEMBI.......................................APPELLANT

versus

H. YOUNG & COMPANY (E.A) LIMITED.............RESPONDENT

(Being an appeal against the judgement of Hon. K. Kibelion delivered on 14th February, 2018 in Machakos CMCC No. 772 of 2008)

BETWEEN

EZEKIEL MULE MUSEMBI..PLAINTIFF

versus

H. YOUNG & COMPANY (E.A) LIMITED............DEFENDANT

RULING

1. The appellant herein was the plaintiff in Machakos CMCC No. 772 of 2008 in which he sued the Respondent for damages arising from a road traffic accident. According to the appellant, though the suit had been set down for hearing, before its conclusion, his advocates noted an error in the pleadings regarding the manner in which the accident occurred which error necessitated an amendment to the plaint to reflect the true position of the case particular how the accident took place. However, the application for amendment was dismissed. It would seem that subsequently, the appellant filed an application for review but the trial court declared that it was functus officio. It would seem that it was the denial to grant the application for review that provoked this appeal which in his view is arguable with very high chances of success.

2. In this application, the appellant seeks stay of proceedings before the trial court pending the hearing and determination of this appeal.

3. However, as the proceedings before the trial court are still ongoing, and the parties have been directed to file submissions in the main suit, the appellant believed that a stay of proceedings is necessary to enable the court to effectively and completely adjudicate upon and settle all the questions involved in the suit. In his view, unless a stay is granted he stands to be highly prejudiced as his appeal will be rendered nugatory as his application for stay before the trial court was dismissed. On the other hand, the appellant believed that the grant of the orders sought herein will not be prejudicial to the respondent.

4. In his submissions, the appellant contended that the principles set by precedence in granting orders for stay of proceedings pending an appeal were echoed by **Githua, J** in the case of **Kenya Power & Lighting Company Limited vs. Esther Wanjiru Wokabi (2014) eKLR**.

5. The appellant further relied on **Bethuel Muirui Benjamin –vs- Development Bank of Kenya (2006) eKLR,** and **Housing Finance Company of Kenya –vs- Sharok Kher Mohammed Ali Hirji& Anor [2015] eKLR** and submitted that the courts discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by any of the following three main principles: whether the applicant has established that he/she has a prima facie arguable case; whether the application was filed expeditiously and whether the application has established sufficient cause to the satisfaction of the court that it is the interest of justice to grant the orders sought. Based on **Mrao vs. First American Bank of Kenya Limited & 2 Others (2003) KLR 125,** and **Daniel Ngetich & Anor vs. K-Rep Bank Limited [2013] eKLR**, the appellant submitted that he satisfied the conditions for grant of the orders sought.

6. The application was however opposed by the respondent through a replying affidavit sworn by **Veronicah Njoki**, the Respondent’s Corporate Affairs Officer. According to the deponent, following the close of pleadings, the appellant together with a police officer testified

for the plaintiff while the defence did not call any evidence and the case was thereafter closed after which the court directed the parties to file written submissions and fixed the matter for 27th January, 2017 reservation of a judgement date. However on 17th January, 2017, 8 years after the filing of the suit, the appellant filed an application dated 23rd December, 2016 seeking leave to amend his plaint in order to correct glaring inconsistencies in the appellant's case that arose during cross-examination which application was on 29th June, 2017 dismissed on the ground that the same was made after undue delay and that the same was mischievously made to correct glaring inconsistencies in the plaintiff's case exposed during cross-examination.

7. It was averred that when the mater came up for mention on 18th August, 20017 to take directions parties were directed to file submissions and the matter fixed for 14th September, 2017 for reservation of judgement date. However, the appellant filed an application dated 7th September, 2017, seeking a review of the ruling dated 29th June, 2017 which application the trial court declined to hear on the grounds that it had no legal or factual basis and directed the appellant to seek redress in the appropriate forum. A further oral application seeking to review the said decision was made on 14th February, 2018 but the court found that it was functus officio and according to the respondent it was this decision that provoked this appeal.

8. It was disclosed that the appellant filed an application before the trail court seeking stay of proceedings pending the hearing of this appeal which application was on 14th June, 2018 dismissed for lack of merits. Subsequently, pursuant to the directions of the trial court the respondent filed its submissions.

9. According to the respondent since this matter was filed on 31st July, 2008 it is in the interest of justice that the same be expedited to its conclusion. It was further averred that there has been an unreasonable delay on the part of the appellant in bringing this application and that the appellant has not advanced any justifiable legal or factual reason for the grant of the orders sought herein as no substantial loss has been demonstrated by the appellant. Further, the appellant has failed to demonstrate that he has a prima facie arguable appeal. To the respondent since the matter has been pending for 10 years and as both parties had closed their cases, the grant of stay sought will greatly prejudice the respondent.

10. On behalf of the Respondent it was submitted based on **Kenya Power & Lighting Company Limited vs. Esther Wanjiru Wokabi** (supra) that it would not be in the interest of justice to grant the orders sought since the Appellant's Application is only meant to further delay this matter which was filed in the Lower Court on 31st August, 2008. Based on the facts narrated in the replying affidavit, it was submitted that the Appellant has filed three [3] interlocutory applications in the lower court and the present Application before this honourable Court, all without merit. It was therefore submitted that there are no legal or factual grounds on which the Court should grant the Appellant the orders sought in this Application and that it is in the interest of justice that this matter be expedited to its conclusion. Further, the Appellant has failed to demonstrate what loss he would suffer if the orders sought are not granted.

11. According to the Respondent, based on the reasoning of the trial court, the Appellant has no prima facie arguable Appeal.

12. It was further submitted that the Appellant's Application has been filed after undue delay. On 14th February, 2018, the Lower Court gave its order declining to review its decision of 29th June, 2017 dismissing the Appellant's Application to amend his Plaint. On 2nd October, 2018, the Appellant filed its Application for stay of proceedings. A period of Seven [7] Months, eighteen [18] Days had lapsed since the Lower Court gave the Order appealed against. This Suit was instituted on 31st July, 2008. It has been Eleven [11] Years yet the Suit has not been concluded. It was therefore submitted that an order for stay of proceedings will only serve to delay this matter further.

13. The Respondent therefore urged this court to dismiss the Appellant's Application with costs.

Determination

14. I have considered the issues raised in this application. I agree with

15. It is not in doubt that this Court has powers to stay proceedings pending appeal and this jurisdiction is derived from both Order 42 rule 6 of the ***Civil Procedure Rules*** as well the inherent jurisdiction reserved in section 3A of the ***Civil Procedure Act***. See **George Oraro vs. Kenya Television Network Nairobi HCCC No. 151 of 1992.**

16. This jurisdiction is meant to avoid a waste of valuable judicial time; prevent the court from duplication of efforts and prevent multiplicity of suits and applications being filed and where if the stay is not granted and defendant were to succeed it would have rendered the appeal nugatory. In such applications the Court aims at ensuring that the object of the application is not rendered nugatory and that substantial loss and irreparable harm is not suffered by the applicant once the Plaintiff proceeds with the suit and the appeal succeeds. Obviously the decision whether or not to grant stay of proceedings being discretionary, the application must be made without unreasonable delay. Whereas I agree that delay is neither the sole factor nor the predominant factor to be considered, I am convinced that delay is a factor that ought to be taken into account. In **Re Global Tours & Travel Ltd HCWC No. 43 of 2000** **Ringera, J** (as he then was) held that:

> **"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 matter, it should bear in mind such factors as the need for expeditious disposal of case, 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."**

17. In my view delay in making an application where the Court is expected to exercise discretion must always be a factor for consideration

since it is an equitable principle that delay defeats equity as equity aids the vigilant, not the indolent.

18. Whereas the Court in such an application may be entitled to look at the intended appeal and see whether or not the intended appeal is not frivolous so as to satisfy itself that it is not being asked to suspend the proceedings so as to frustrate the hearing and delay the expeditious disposal of the matter, care must, however, be taken to ensure that the Court does not purport to preside over the intended appeal so as to avoid usurping the powers of the appellate Court.

19. In **David Morton Silverstein vs. Atsango Chesoni Civil Application No. Nai. 189 of 2001 [2002] 1 KLR 867; [2002] 1 EA 296** the Court of Appeal citing **Kenya Commercial Bank Ltd vs. Benjoh Amalgamated Ltd & Another Civil Application No NAI 50 of 2001** held that it is not the law that a stay of proceedings cannot be granted but that each case depends on its own facts. In **Niazons (Kenya) Ltd. vs. China Road & Bridge Corporation (Kenya) Ltd. Nairobi (Milimani) HCCC No. 126 of 1999 Onyango-Otieno, J** (as he then was) held that:

> **"Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay…should be granted."**

20. Similarly, the Court of Appeal in **Wachira Waruru & Another vs. Francis Oyatsi Civil Application No. Nai. 223 of 2000 [2002] 2 EA 664** held that:

> **"In an application for stay of proceeding pending appeal where the Judgement is entered in an application for striking out a defence, it cannot be gainsaid that unless a stay is granted the appeal will be rendered nugatory since if the process of assessing damages goes on and the appeal is allowed that process would be an exercise in futility."**

21. In the present case, the appeal is challenging the decision made on 14th February, 2018. According to the Respondent, and this has not been disputed by the Appellant who has not set out the background of the suit, on 14th February, 2018, the Appellant made an oral Application for review of the Court's orders of 14th September, 2017 dismissing the Appellant's application for review. In other words, the appellant was seeking to review an order made on review. Order 46 rule 6 of the ***Civil Procedure Rules*** provides as follows:

> ***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.***

22. Therefore, if an order is made on an application for review a subsequent application for review of the said order cannot be entertained. In this case however, the decision made on 14th February, 2018 was seeking to review an order made on 14th September, 2017. From the Respondent's own averment, on 14th September, 2017, the Lower Court declined to hear the Application for Review on the ground that it had no legal or factual basis. **Madan, J** (as he then was) in **Official Receiver vs. Sukhdev Nairobi HCCC No. 423 of 1966 [1970] EA 243** held that:

> **"In a court of justice parties are entitled to be heard and to insist upon every possible objection. It would be wrong for this or any other court to refuse to hear an objection even if it appears meritless and tedious. Woe be to the day when this will be allowed to happen. It would be honourable to abdicate from the seat of justice than to allow such a performance of denial to take place. The court may disallow an objection, reject a motion or refuse a plea but it must never refuse to hear it. A court of law is for the preservation not usurpation of rights of the parties."**

23. It is therefore arguable whether it was proper for the court to decline to hear the application for review on that ground that it had no legal or factual basis. Nevertheless, in those circumstances Order 46 rule 6 of the ***Civil Procedure Rules*** would not apply as there was no order made on review as the application was never heard.

24. As regards delay, the order sought to be appealed against was made on 14th February, 2018. This appeal was filed on 12th March, 2018 while the application for stay of proceedings was filed on 18th October, 2018. While the delay was clearly inordinate, in my view considering the interest of justice and the need to avoid wastage of judicial resources, the proceedings in the lower court ought to be put on hold. As was appreciated by the Court of Appeal in **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229**:

> **"Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice."**

25. Accordingly, I hereby stay the proceedings appealed against pending the determination of this appeal or further orders of this court. However, as was appreciated by **Platt, JSC** in **Henry Bukomeko & 2 Others vs. Statewide Insurance Co. Ltd Uganda Supreme Court Civil Appeal No. 13 of 1989:**

> **"Whereas on the authorities, if the delay is caused by the court registry, and the applicant has taken every step possible to prosecute the appeal, further time will be allowed to a blameless intending appellant, there is an overriding factor in this case, and that is that where an interlocutory appeal is taken great care must be exercised in getting the appeal on as quickly as possible, in order that the trial may proceed with the minimum of delay. It is obvious that the longer an interlocutory appeal intervenes in the trial, the greater is the risk that the trial may be prejudiced. Therefore, rule 4 of the Court of Appeal Rules would be read as requiring an intending appellant to show sufficient cause in the light of the fact that the appeal is an interlocutory appeal which must be brought forward as soon as possible. Indeed, the court itself has a duty to see that such**

appeals are disposed of with special urgency."

26. In the premises I direct the appellant to ensure that the record of appeal is prepared and directions on the appeal taken within 30 days from the date of this ruling. In default, the orders of stay issued herein shall stand vacated.

27. In light of the delay in filing the instant application, the costs of the application are awarded to the respondent.

28. It is so ordered.

Ruling read, signed and delivered in open court at Machakos this 26th day of June, 2019.

G V ODUNGA

JUDGE

In the presence of:

Mr Maina for Mr osino for the Respondent

Mr Kioko for Mrs Wambua for the Appellant

CA Geoffrey