



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO. 28 OF 2019**

**TIMBER TREATMENT INTERNATIONAL LTD.....APPELLANT**

**VERSUS**

**KALENJIN AUTO & HARDWARE LIMITED.....RESPONDENT**

**RULING**

[1] This Ruling is in respect of the Notice of Motion dated **21 March 2019**. It was filed herein by the Applicant, **Timber Treatment International Ltd**, pursuant to **Sections 3A and 79G and 95**, of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya; Order 42 Rules 6(1) and Order 51 Rule 1** of the **Civil Procedure Rules, 2010**, for orders that:

- [a] The application be certified urgent and be heard *ex parte* in the first instance;
- [b] That service be dispensed with in the first instance;
- [c] That the proposed Appellant be granted leave to appeal out of time against the Judgment of the Principal Magistrate in **Civil Case No. 385 of 2014** delivered on **5 February 2019**;
- [d] That pending the hearing and determination of this application *inter partes*, the Court be pleased to grant an order of stay of execution of the orders of the lower court in **Civil Case No. 385 of 2014** delivered on **5 February 2019**;
- [e] That the Court do set aside all the orders of the lower court in **Civil Case No. 385 of 2014** delivered on **5 February 2019**;
- [f] That the Court do order for a stay of Proclamation of the attachment of movable property by Seventy Seven Auctioneers dated **14 March 2019**;
- [g] That the Memorandum of Appeal annexed to the application be deemed as duly filed;
- [h] That the costs of and incidental to the application be costs in the intended appeal.

[2] The application was premised on the grounds that Judgment was entered in **Civil Case no. 385 of 2014** in favour of the Respondent herein; and the Appellant is of the humble view that the same was not proved on a balance of probabilities. It was further the contention of the Appellant that the learned Magistrate did not fully consider the defence evidence; and therefore, that the appeal is arguable and has a high probability of success. These and other grounds set out on the face of the application were expounded on in the Supporting Affidavit sworn by the Appellant's General Manager, **Alex Kiplagat Koskei**, sworn on **21 March 2019**. One of the averments therein is that the Appellant is ready to furnish security by way of a Bank Guarantee for the due performance of the decree should the appeal be found wanting in merits.

[3] The Respondent opposed to the application on the grounds that it is fatally defective and that the firm of **M/s Muga Apondi & Associates, Advocates**, is not properly on record. The Respondent also contended that the Appellant is seeking infinite orders which the Court lacks jurisdiction to grant; and that it has not given any reasons to warrant the grant of the orders being sought herein.

[4] Subsequently, the Appellant filed another application dated **16 August 2019** seeking orders that the firm of **Muga Apondi and Associates** be granted leave to come on record on behalf of the Defendant in place of the firm of **Magare Musundi & Co. Advocates**; and that the costs of the application be costs in the cause. The record shows that, on the basis of that second application, leave was granted to the firm of **Muga Apondi & Associates** to come on record as prayed; and with that, the second application was deemed as spent.

[5] The application was urged before me on **19 September 2019**; and while Counsel for the Appellant made oral submissions in support of the application dated **21 March 2019**, the Respondent's Counsel, **Ms. Kuiyaki**, relied on the written submissions filed herein on behalf on the Respondent on **17 September 2019**. Counsel for the Appellant relied on the grounds set out in the application and highlighted the Appellant's assertion that the Respondent did not prove its case before the lower court on a balance of probabilities; and that the defence of the Appellant was not given sufficient attention by the lower court. He was therefore of the view that the proposed appeal is arguable; and therefore that the Appellant should not be denied its constitutional right to a hearing.

[6] The Respondent, on the other hand, took the view that the application is incompetent on the ground that it was filed by the firm of **Muga Apondi & Associates** before a Notice of Change of Advocates was served as required by **Order 9 Rules 9** of the **Civil Procedure Rules**; granted that the Appellant was previously represented by the firm of **Magare Musundi & Co. Advocates**. Counsel relied on **Stephen Mwangi Kimote vs. Murata Sacco Society [2018] eKLR** for the proposal that the provisions of **Order 9 Rule 9** of the **Civil Procedure Rules** are not a mere technicality. Counsel further faulted the Supporting Affidavit for want of compliance with **Section 4** of the **Oaths and Statutory Declarations Act**, therefore submitted that it was wrong for the Supporting Affidavit to be commissioned by **Mr. Muga Apondi**, the very Advocate on record herein for the Appellant.

[7] Having given due consideration to the application in the light of the proceedings herein and the submissions made by the parties, it is manifest that most of the prayers are spent. Thus, prayers 1, 2, 3 and 4 of the Notice of Motion dated **21 March 2019** are no longer tenable. Prayer 5 seeks the setting aside of the orders of the lower court issued on **5 February 2019**, which, in my respectful view, is a matter that properly belongs to the proposed appeal. Accordingly, from prayers 6 and 7, I gather that the only issues in contention are, firstly whether a stay of execution should be issued pending appeal and secondly, whether the appeal should be deemed duly filed. However, before delving into the two issues, it is imperative to address a preliminary point of law raised by the Respondent, on whether the application offends the provisions of the **Oaths and Statutory Declarations Act**.

[8] The Supporting Affidavit was evidently commissioned by **Mr. Muga Apondi** on the **21 March 2019** in support of an application that was filed on behalf of the Appellant by the firm of **Muga Apondi & Associates**; yet **Section 4** of the **Oaths and Statutory Declarations Act** is explicit that:

**“A commissioner of Oaths shall not exercise any of the powers given by the Act in any proceedings or matter in which he is the Advocate for any of the parties to the proceedings or concerned in the matter...”**

[9] **Mr. Muga Apondi** is also the Advocate on record herein for the Appellant. There is no doubt therefore that it was improper for him to prepare and commission the Supporting Affidavit. I would however endorse the position taken by **Hon. Mbogoli Msagha, J.** in **Nanak Body Builders Ltd vs. Akiba Bank Limited [1998] eKLR** that:

**“As commissioning per se does not affect the contents of the affidavit, I can only describe this as an irregularity which does not necessarily call for the striking out of the affidavit. However, the said irregularity must be corrected before the application is heard.”**

[10] In the premises, I would order that the irregularity herein be corrected before a decision on the merits can be made in respect of the application dated **21 March 2019**.

It is so ordered.

**DATED SIGNED AND DELIVERED AT ELDORET THIS 24<sup>TH</sup> DAY OF OCTOBER 2019**

**OLGA SEWE**

**JUDGE**