



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 5 OF 2018

PETER KUNGU WANYOIKE.....APPELLANT

VERSUS

MICHAEL WANG'OMBE.....RESPONDENT

(Being an appeal from the Ruling of Murigi C.M. delivered on the 19th December 2017 and on 28th December 2017 in the Chief Magistrate's Court Thika Civil Suit No.1126 of 2015)

RULING

1. Before me is an application by way of Notice of Motion filed on 7th November, 2018 and brought under Order 42 Rule 6; Order 51 Civil Procedure Rules; Sections 1A & 1B of the Civil Procedure Act and Article 159 of the Constitution. The Applicants seeks order to stay proceedings in **Thika CMCC No. 1126 of 2015 Michael Wang'ombe vs Peter Kungu Wanyoike** pending the hearing and determination of the appeal herein.
2. The Application is premised on the grounds that the appeal has high chances of success and the application made without delay and that the Appellant will suffer substantial loss if the application is disallowed.
3. **Peter Kung'u Wanyoike**, the Applicant/Appellant who was the defendant in the court below herein swore the supporting affidavit. The Application is opposed by the Respondent who was the plaintiff in the court below.
4. The Applicant deposed that he defaulted in filing his witness statement and that during the trial, he sought leave to do so but his application was dismissed. Hence the appeal and application herein. He further deposed that if the suit in the lower court were to proceed, his appeal will be rendered nugatory and he would suffer substantial loss. He stated that his appeal is arguable and has high chances of success.
5. For his part, the Respondent swore that the instant application is without merit as the Appellant had failed to file his witness statement in good time. The Respondent views the application as frivolous pointing out that leave to appeal was not sought before filing this appeal. He deposes that stay of proceedings was unnecessary as the appeal does not raise any triable issues and is merely a delaying tactic, and moreover, the Applicant will not suffer any loss if the orders sought are denied.
6. In his grounds of opposition, the Respondent reiterated that this application and the appeal are bad in law as the court lacks jurisdiction in the absence of an order granting leave to appeal.
7. The Court directed that the application be canvassed of by way of written submissions. The Applicant submitted that this court has jurisdiction to grant an order to stay of proceedings. Reliance was placed in the case of **Mursal Guleid & 2 others v Daniel Kioko Musau (2016) eKLR** where it was stated that stay of execution and/or proceedings can be ordered by the trial court or the appellate court. He further submitted that the appeal is competent and that the Applicant has satisfied the pre-requisites for grant of stay of proceedings as set out in the case of **Elena D. Korir vs Kenyatta University (2012) eKLR**.
8. The Applicant emphasised that if the lower court suit proceeds undefended, judgment would issue against him. It was submitted that the trial court erred in failing to give the Applicant an opportunity to file his witness statement and to give evidence. He argued that the court ought to have exercised its discretion in allowing him file his witness statement. Counsel cited the case of **Raila Odinga & 5 others vs Independent Electoral and Boundaries Commission and 3 others (2013) eKLR**. And the statement in the case of **Marcelius Lazima Chegge vs Mary Mutoro Sirengo & 2 others (2017) eKLR** that the court in granting leave to file further witness statement, the conduct of the parties and the inconvenience that is likely to be caused have to be considered.
9. Counsel for the Respondent submitted that the court should not stay the proceedings as the Appellant had adequate time to comply with Order 11 of the Civil Procedure Rules, 2010 but failed to do so; that the appeal does not raise any triable issues and as such stay of proceedings is unnecessary and unwarranted. Moreover, Counsel contended that failure to seek leave to file the appeal rendered the appeal incompetent. Because the orders sought to be appealed against were made pursuant to Orders 7 and 11 of the Civil Procedure Rules from

which no appeal lies as of right pursuant to Order 43 of the Civil Procedure Rules.

10. Several authorities were cited in support this proposition among them, **Nyutu Agrovot Ltd vs Airtel Networks Ltd (2015) eKLR and Andrew Kimani Ngumba & Another vs Zakaria Muigai Gakibe (1997) eKLR**. In conclusion, it was submitted that the court has no jurisdiction to entertain an incompetent appeal.

11. The court has considered the material canvassed in respect of the motion. Any motion seeking to stay execution or proceedings pending appeal under Order 42 r 6(1) of the Civil Procedure Rules must be premised on the existence of an appeal. The appeal itself must be competent. A reading of Order 42 rule 6(1) in conjunction with rule 6(6) leaves no doubt that the existence of an appeal is a condition precedent to the granting of an orders to stay of execution or proceedings, pending appeal.

12. The appeal herein arose out of proceedings in the lower court suit, and in particular, orders made by the trial court on 19th December, 2017 and 28th December 2017. The first order related to the Applicant's prayer to adduce oral evidence despite having failed to file a witness statement, to which the Respondents objected.

13. The trial court ruled as follows:

“I have considered the defence application to proceed with further hearing with a witness before statements was not recorded, filed and served upon the Plaintiff, and the objection thereto by Ngare for the Plaintiff. It is not in dispute that the Defendant has not filed a witness statement. The purpose of pre-trial directions is to notify the other party the evidence they shall give and rely on.

I find that, the Plaintiff will be greatly prejudiced if this court allows the application as they have closed their case. In the end the application by the defence is dismissed”. (sic)

12. A further attempt to obtain leave to file the defence statement was opposed by the Respondent's advocate. In a ruling delivered on 28th December 2017, the court dismissed the application stating that the Respondent would be prejudiced, having closed his case. Thereafter the matter was set down for submissions.

13. I have perused the memorandum of appeal filed subsequent to the said ruling. The grounds of appeal evidently relate to the proceedings and orders made on 19th and 28th December, 2017. Indeed, the final order sought by the Applicant in the memorandum of appeal is that:

“a) The ruling of the lower court be set aside and be substituted with an order to re-open the defence case and allowing the Appellant's application made on 19th December 2017 to file his written statement and defend the case.” (sic).

14. The Respondents have asserted that the orders appealed from relate to Orders 7 and 11 of the Civil Procedure Rules, and that no appeal lies as of right from these Orders, by dint of Order 43 of the Civil Procedure Rules. The Applicant's response is that the rulings in the lower court did not expressly cite any order of the Civil Procedure Rules; that the Appellant's application were constitutional in substance; that impugned orders were made in the course of prosecution of suits envisaged in order 18 Rule 2 Civil Procedure Rules and are thus appealable as of right.

15. While nobody can argue with the fact that the right to a fair hearing is a constitutional right, the rules of procedure *inter alia* give effect to and regulate the manner in which that right is to be enjoyed or exercised by parties in the context of a civil suit. In **Mumo Matemu v Trusted Society of Human Rights Alliance and 5 Others [2013] eKLR** the Court of Appeal debunked persistent assertions that gained currency post the promulgation of the 2010 Constitution that compliance with the rules of procedure **“was antithetical to Article 159 of the Constitution and the overriding objective principle of section 1A and 1B of the Civil Procedure Act”**. The Court of Appeal stated that:

“Procedure is also a handmaiden of just determination of cases.”

16. Perusing the proceedings of 19th December 2017, it is inescapable that the applications made on behalf of the Applicant, firstly to give oral testimony without having filed a witness statement, and secondly for leave to file a witness statement out of time, fall squarely within the provisions of Orders 7, 11, 17 and 18 of the Civil Procedure Rules. The question before the court on 19th December 2017 was not so much whether the Applicant ought to give oral evidence, but rather whether he could give his evidence without advance notice by way of a filed witness statement, to the adverse party. The trial court accurately captured the issue at hand in its ruling.

17. Similarly, the ruling of 28th December 2017 related to an application for leave, made within the prosecution stage of the suit, for the Applicant to file his witness statement out of time. That too is a matter falling under Orders 11, 17 and 18 of the Civil Procedure Rules. Under Order 43 of the Civil Procedure Rules, an appeal does not lie as of right from orders made under Orders 11, 17 or 18 of the Civil Procedure Rules. The party seeking to appeal against orders arising therefrom must first seek leave of the court. Thus, the Applicant's insistence that his matter falls under Order 18 of the Civil Procedure Rules is of no avail to him. Moreover, an appeal only lies as of right from orders made under Order 7 Rule 12 of the Civil Procedure Rules [rule on exclusion of counterclaim].

18. From the foregoing, it is self-evident that the Applicant was required to obtain leave of the court before filing his appeal. No such leave was sought. Hence the appeal before the court is incompetent and incapable of supporting the application to stay proceedings of the lower court, pending appeal.

19. I agree with the sentiments of **Sewe J, in Edith Wairimu Njoroge v Brooks Holdings Co. Ltd [2018] e KLR** that where an appeal does

not lie as of right from an order but only with leave, such leave “was a prerequisite to the assumption of jurisdiction by this court on appeal.” In **Kakuta Mai Mai Hamisi v Peris Pesi Tobiko and 2 Others [2013] e KLR** the Court of Appeal held that the right of appeal goes to the court’s jurisdiction, is a fundamental matter and that absence of statutory conferment of such right is not a mere technicality.

20. The memorandum of appeal before me is for all the reasons given, an incompetent pleading and is accordingly struck out together with the motion filed on 7th November 2018. Costs are awarded to the Respondent.

DELIVERED AND SIGNED AT KIAMBU THIS 28th DAY OF NOVEMBER 2019

C MEOLI

JUDGE

In the presence of:

Mr. Githiri holding brief for Mr. Mubangi for Appellant

Mr. Njoroge holding brief for Mr. Obuya for Respondent

Court Assistant – Kevin/Nancy