



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCA NO 33 OF 2017

EASY COACH LIMITED.....APPELLANT/APPLICANT

VERSUS

PATRICK WATANI MAENDE.....1ST RESPONDENT

TSUSHO CAPITAL KENYA LTD.....2ND RESPONDENT

EASY PROPERTIES.....3RD RESPONDENT

RULING

Background

1. There is pending before the court an appeal from the decision of the trial court of 24/10/2017 refusing the applicant's application to join third parties to the suit. Similar applications for joinder of third parties in related suits arising from the same accident, namely Eldama Ravine PMCCC No. 52 of 2016, 38 of 2017 and 50 of 2016 were allowed by the same court.
2. Following the decision of 24/10/2017, the appellant unsuccessfully sought from the trial court a stay of proceedings pending appeal, and the appellant now seeks the court to set aside the trial court's order of 21/11/2017 thereon.

The application

3. The application subject of this ruling is therefore seeking two principal orders namely, that there be a stay of proceedings and/or further proceedings in Eldama Ravine SRMCCC No 85 of 2016 and/or any action pending the hearing and determination of the appeals and that the orders of the Subordinate Court made on 21/11/2017 be set aside.
4. The application is supported by the affidavit of counsel sworn on 21/11/2017 setting out the applicant's case with regard to the appeal from the decision of the court the effect of which is urged as being to allow the suit to proceed to "*hearing without regard to the appellant/applicant's desire to enjoin a third party to the suit*". It was argued that there was before the Subordinate Court (4) cases namely SRMCCC No 85/2016, 52/2016, 38/2017 and 50/2016 and that the court had allowed joinder of third parties in three of the four cases arising from the same incident/case of cause of action but declined to grant the same in regard of SRMCCC No. 85/2016 "for unknown reasons." It was contended that "decision on liability in the said matters are likely to vary yet all the matters arose from the same accident hence the need to have the orders sought herein so as to allow this appeal to proceed before the subordinate case is heard."
5. By a further affidavit of Isiji Johnson, advocate for the appellant, sworn on 30/11/2017 the appellant attached copies of the application of 24/10/2017 and ruling of 21/11/2017, respectively, and the joinder application and stay for proceedings both determined by the trial court.
6. The 1st Respondent filed a replying affidavit sworn on 7/12/2017 principally urging the court to dismiss the application on the ground of delay in seeking to commence third party proceedings the application wherefore was dismissed on 24/10/2017 by the trial court and was the subject of the appeal herein, and that three (3) witnesses had already testified in the suit.
7. The 2nd and 3rd Respondents did not file any response to the application for stay of proceedings herein.
8. Counsel for the parties - the 1st respondent and the applicant - have made oral submission on the application in support of their respective contentions and ruling was reserved. There was no appearance for the 2nd and 3rd Respondents.

Determination

9. I have considered the submissions. The appellate court has jurisdiction to consider the application for stay of execution on proceedings under Order 42 Rule 6(1) of Civil Procedure Rules notwithstanding that such an application has been refused by the trial court, as follows:

“[Order 42, rule 6.] Stay in case of appeal.

6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

10. The court also observes that under Order 43 Rule 1(1) (a) Civil Procedure Rules “an appeal shall lie as of right” from the order of the trial court under Order 1 on parties to suit as was the case here on the application for joinder of parties under Order 1 Rules 14 and 15 of the Civil Procedure Rules.

11. In discussing the application for stay of proceedings, the trial court found that the appellant’s appeal will not be rendered nugatory should it eventually succeed:

“I will only determine whether there is sufficient reason to stay these proceedings. The reasons I gave in my ruling which dismissed the defendant’s application were indolence on the part of the defendant and their intent to delay conclusion of this case which ultimately causes injustices on the plaintiff. It is now submitted that the appeal will be rendered nugatory if proceedings herein are not stayed.

I wish to point that in the event that appeal in Kabarnet High Court succeeds, its effect will be to set aside the proceedings herein whereby two plaintiffs have testified. The evidence of those witnesses is not less important than the evidence of any other witnesses who will testify on the 28/11/2017 or thereafter and that is to say the High Court has power to set aside the proceedings, ruling of 24/10/2017 and any consequential orders thereto. Once it does that then the appeal will not be rendered nugatory. As a matter of fact, the applicant should have sought from the High Court orders staying these proceedings pending hearing and determination of their appeal. More so because in their opinion the appeal has merit whereas in my opinion I still stand with my decision of 24th October, 2017 until the High Court finds otherwise.”

12. The diligence of the trial court and the attitude towards expedited disposal of cases is to be commended. And although the decisions of the trial court of 24/10/2017 and 21/11/2017 are exercise of discretion the interference with which, by the appellate court, is circumscribed by the principle in ***Mbogo v. Shah*** [1967] EA 93, the provisions of Order 42 Rule 6(1) of the Civil Procedure Rules give the appellate court equal and independent jurisdiction to consider the application for stay of execution or stay of proceedings a fresh. The appellate court in ruling on this application for stay of proceedings will, therefore, in truth, be exercising its own discretion rather than upsetting, should it come to that, the discretion of the trial court as sought by the prayer for setting aside of the trial court’s order of 21/11/2017.

13. It is trite law that in considering whether there is sufficient reason required by Order 42 Rule 6 of the Civil Procedure Rules to grant stay of execution or stay of proceedings pending appeal, the court will consider whether an arguable case is established, and whether the appeal, if successful, shall be rendered nugatory. See ***NBK v. Geoffrey Wahome Muotia*** [2016] eKLR.

14. Having looked at the Memorandum of Appeal filed on 1/11/2017, I consider that there is an arguable case in seeking to have all the proper parties brought into the suit for a final determination on the question of liability and in the object of avoiding conflicting determination on the question of liability in the four (4) separate suits arising from the same accident or cause of action. The appellant also invokes Article 159 of the Constitution to ameliorate the effect of Order 1 Rule 15 (1) (c) requiring application for joinder within 14 days from close of leadings.

15. As regard the question whether the appeal, is successful, will be rendered nugatory, the case law authorities cited by the appellant ***National Bank of Kenya Limited and another v. Geoffrey Wahome Muotia*** supra; ***Rev. Jackson Kipkemboi Koskey & 7 others v Samuel Muriithi Njogu & 4 others*** [2007] eKLR and ***Sammy Mutua Makobe v. Statutory Manager United Insurance Company Limited and 198 others*** [2010] eKLR relate to loss of liberty by threatened imprisonment and allegation of bias and prejudice in the court in the last decision, which matters are not relevant the circumstances of this case.

16. I, however, consider that the appeal in this case could be rendered nugatory if the proceedings trial court proceeded to conclusion and determination before the appeal is heard. The appellant may have been compelled to satisfy a decree of the trial court without indemnity or contribution by the intended 3rd parties. Although, the High Court may set aside the proceedings of the trial court, substantial loss may have been occasioned by way of execution of any judgment obtained by the plaintiff against the appellant as to make it impossible to reset the parties to the original positions and restart the hearing with the 3rd Parties enjoined. It is, with respect, not just a question of setting aside the testimonies of the two or three witnesses who have testified as there is nothing to stop the trial court from proceeding to full hearing and determination and judgment in the matter which may then be executed to the detriment of the appellant who seeks to bring in 3rd Parties in accordance with the Civil Procedure Rules. Section 1A of the Civil Procedure Act, moreover seeks the just, expeditious, proportionate and affordable dissolution of disputes. A retrial occasioned by successful appeal after the trial has closed and judgment rendered would only escalates costs.

17. The consideration of the delay in presenting the application for joinder of 3rd Parties may properly be redressed by an award of costs against the appellant. The appellant had in the application dated 17/10/2017 sought, and the court had power to grant, extension of time under

Order 50 Rule (6) of Civil Procedure Rules

Order

18. Accordingly, for the reasons set out above, I grant the application for stay of proceedings in terms of Order 42 Rule 6 (1) of the Civil Procedure Rules pending hearing and determination of the appeal.

19. In the interest of expedited disposal of dispute, I direct that the appeal be listed for hearing within 30 days hereof.

20. Cost of the application for stay of proceedings in this court shall abide with the outcome of the appeal.

DATED AND DELIVERED THIS 21ST DAY OF MARCH 2018

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Nyairo & Co. Advocates for the Appellant

M/S Nancy W Njoroge & Co. Advocates for the 1st respondent

N/A for the 2nd and 3rd Respondents.