



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 17 OF 2017

DISMAS OMBONGI T/A KAMILI DOG FARM.....APPELLANT

VERSUS

INTER SECURITY SERVICES LIMITED.....RESPONDENT

(Being an appeal from the Judgment of Hon D. W. Mburu (Mr), Principal Magistrate (PM) at the Chief Magistrate's Court at Milimani in CMCC No 754 of 2015 delivered 23rd December 2016)

JUDGMENT

INTRODUCTION

1. The Respondent's Notice of Motion application dated 27th March 2018 and filed on 4th April 2018 was brought pursuant to the provisions of Section 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya, Order 42 Rule 6 (1), (2), (4) and Order 50 Rule (1) of the Civil Procedure Rules, and all enabling provisions of Law. Prayer Nos (1) and (2) were spent. It sought the following remaining prayers:-

1. Spent.

2. Spent

3. THAT this Honourable Court be pleased to grant a stay of execution of the decree in Milimani CMCC No 754 of 2015 amended pursuant to its judgment and order dated 8th March, 2018 pending the hearing and determination of the appeal to the Court of Appeal.

4. THAT the costs of this application be borne by the Appellant.

2. The Appellant's Preliminary Objection dated and filed on 5th June 2018 set out the following points of law:-

1. THAT there was no appeal pending determination at the Court of Appeal.

2. THAT the period provided of 60 (sixty) days after lodging a Notice of Appeal, and within which to institute Appeal under Rule 82 of the Court of Appeal rules lapsed on 15th May 2018.

3. THAT the orders sought were not capable of being granted by this Honourable court and the orders issued on the 27th March 2018 should be vacated forthwith.

4. THAT the entire application was a nullity and an abuse of the court process.

3. When the matter came up in court on 7th June 2018, counsel for the Appellant and counsel for the Respondent requested that the aforesaid Respondent's Notice of Motion application and the Appellants Preliminary Objection be heard together. The Respondent's Written Submissions were dated 25th May 2018 and filed on 25th May 2018 while those of the Appellant were dated and filed on 5th June 2018.

4. On 14th June 2018, counsel for the two (2) parties also asked this 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 RESPONDENT'S CASE

5 The Respondent's Notice of Motion application was supported by the Affidavit of Isaac Okwirry that was sworn on 27th March 2018.

6. It contended that it was dissatisfied with the decision Mwongo J delivered on 8th March 2018. In the said Judgment, the Learned Judge allowed the Appellant's Appeal that was lodged on 1st March 2017.

7. It filed a Notice of Appeal on 15th March 2018 at the Court of Appeal and was apprehensive that if a stay of execution pending appeal was not granted, the decretal sum of Kshs 776,000/= it would pay to the Appellant would not be recovered if it was successful on appeal. It stated that this would cause it to suffer substantial loss and render its Appeal nugatory and a mere academic exercise. It pointed out that it was ready and willing to deposit security and emphasised that it had filed its application timeously.

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

THE APPELLANT'S CASE

9. On its part, the Appellant's case was that there was no appeal pending at the Court of Appeal because the sixty (60) days period within which the appeal, herein would have been instituted after lodging the Notice of Appeal lapsed on 15th May 2018.

10. It was his contention that the orders the Respondent had sought were incapable of being granted and that in fact, the orders that were granted on 27th March 2018 ought to be vacated forthwith.

11. He thus urged this court to dismiss the Respondent's application because it was an abuse of the court process.

LEGAL ANALYSIS

12. The Respondent relied on the case of **Butt vs Rent Restriction Tribunal** (citation not given) where it was held that the power or discretion of a court to grant or refuse an application for stay of execution is to not to prevent an appeal but rather that the same is granted so that an appeal is not rendered nugatory should the appellate court reverse the decision being appeal against.

13. It also placed reliance on the case of **Stanley Karanja Wainaina & Another vs Ridon Anyango Mutubwa [2016] e KLR** where it was held that a respondent to an application of stay of execution has the burden of demonstrating that he has resources. It was its contention that the Appellant's financial ability was unknown which would cause it to suffer substantial loss if its Appeal succeeded.

14. It pointed out that Judgment was delivered on 8th March 2018 and that it filed its present application on 4th April 2018 thus satisfying the second condition under Order 42 Rule 6(2) of the Civil Procedure Rules.

15. It added that it was ready to satisfy the third condition in Order 42 Rule 6 (2) of the Civil Procedure Rules by depositing the decretal sum in an account to be opened in the joint names of the advocates.

16. On the other hand, the Appellant relied on the case of **HCCC No 224 of 2001 Andrew Kuria Njuguna vs Rose Kuria** (unreported) where it was held that an applicant had to demonstrate that it would suffer substantial loss if the order for stay was not granted. It also referred to several other cases to buttress its argument.

17. It was his submission that a successful litigant is entitled to the fruits of his judgment and that commencement of execution proceedings does not amount to substantial loss. It was his argument that since the Respondent did not satisfy this particular ground under Order 42 Rule 6 (2) of the Civil Procedure Rule, its application ought to be dismissed.

18. He added that the Respondent had not demonstrated that it had complied with Rule 82(1) of the Court of Appeal Rules that provides that an appeal must be instituted within sixty (60) days from the date the Notice of Appeal is lodged or Rule 82(2) of the Court of Appeal Rules that stipulates that one cannot rely on the proviso to Rule 82 of the Court of Appeal Rules on exclusion of computation of time unless a copy of the letter requesting for proceedings was served upon a respondent. It was his contention that since the Respondent had not applied for certified copies of the proceedings and no appeal had been instituted within sixty (60) days as aforesaid, there was no appeal pending in the Court of Appeal.

19. Order 42 Rule 6(2) of the Civil Procedure Rules provides 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.”

20. Indeed, both the Respondent and Appellant were in agreement that an order under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010

could only be granted if the Appellant demonstrates the following:-

- a. THAT substantial loss may result if an order for stay of execution is not granted; and**
- b. THAT the application has been made without unreasonable delay.**
- c. THAT the applicant furnishes security.**

21. Notably, all the conditions must be met because the key word is **“and”**. The provision is conjunctive and not conjunction.

22. In respect of the first condition of proving substantial loss, this court concluded that the Respondent had satisfied the same as the Appellant opted not to adduce affidavit evidence. He instead filed a Preliminary Objection. As regards the condition of filing its application, without undue delay, this court was satisfied that the Respondent had filed the same timeously on 4th April 2018, the Judgment having been delivered by Mwongo J on 8th March 2018. The Respondent was also ready and willing to deposit security pending the hearing and determination of the appeal to the Court of Appeal.

23. For all purposes and intent, as the Respondent had met all the conditions under Order 42 Rule 6(2) of the Civil Procedure Rules, this court could grant an order to enable the Respondent proceed an appeal.

24. Having said so, the Appellant had argued that the Respondent had not demonstrated to this court that it had an appeal pending before the Court of Appeal.

25. Order 42 Rule 6(4) of the Civil Procedure Rules provides as follows:-

“For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given”.

26. Exhibit “10” annexed to the Respondent’s affidavit in support of its application shows that the Notice of Appeal was filed on 15th March 2018. This was seven (7) days after the decision of Mwongo J. In terms of the provisions of Order 42 Rule 6(4) of the Civil Procedure Rules, an appeal was deemed to have been duly filed in the Court of Appeal.

27. Turning to the requirements of lodging an appeal in the Court of Appeal Rule 5(2) (b) of the Court of Appeal Rules provides as follows:-

“In any civil proceedings, where a notice of appeal has been lodged in accordance with Rule 75 order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just”.

28. That Notice of Appeal must be lodged in accordance with Rule 75 of the Court of Appeal Rules that stipulates as follows:-

- 1. Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.**
- 2. Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.**
- 3. Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision and where it is intended to appeal against a part only of the decision, shall specify the part complained of, shall state the address for service of the appellant and shall state the names and addresses of all persons intended to be served with copies of the notice.**
- 4. When an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal.**
- 5. Where it is intended to appeal against a decree or order, it shall not be necessary that the decree or order be extracted before lodging notice of appeal.**
- 6. A notice of appeal shall be substantially in the Form D in the First Schedule and shall be signed by or on behalf of the appellant.**

29. Going further, Rule 82 (1) and (2) of the Court of Appeal states as follows:-

“1. Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged

- a. a memorandum of appeal, in quadruplicate;**
- b. the record of appeal, in quadruplicate;**

c. the prescribed fee; and

d. security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

2. An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent.

30. Rule 83 of the Court of Appeal further provides that:-

“If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order. The party in default shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served”.

31. Notably, all the provisions in the Court of Appeal Rules must be read together and not in isolation. It was therefore clear that failure by the Respondent to have instituted its Appeal within sixty (60) days from 15th March 2018 and failure to furnish this court with proof of compliance with Rule 82 of the Court of Appeal Rules lent this court to deem that the Respondent withdrew its Notice of Appeal in line with the provisions of Rule 83 of the Court of Appeal Rules.

32. Accordingly, having considered the Respondent’s affidavit evidence and his Written Submissions and those of the Appellant together with the case law they relied upon, this court found itself in agreement with the Appellant herein that there was no appeal herein, time having lapsed on 15th May 2018. For that reason, the orders for stay of execution pending appeal that the Respondent had sought were incapable of being granted herein.

33. Indeed, court must not make orders in vain. Such orders must be enforceable and capable of being acted upon. Granting the orders sought when there was no appeal would be to cause undue hardship to the Appellant. Litigation must now bring to an end and the Appellant allowed to enjoy the fruits of its judgment.

DISPOSITION

34. For the foregoing reasons, the upshot of this court’s decision was that the Respondents’ Notice of Motion application dated 27th March 2018 and filed on 4th April 2018 was not merited and the same is hereby dismissed. The effect of this was that the Appellant’s Preliminary Objection dated and filed on 5th June 2018 is hereby upheld. The Respondent shall bear the Appellant’s costs of the application.

35. It is so ordered.

DATED and DELIVERED at NAIROBI this 27th day of September 2018

J. KAMAU

JUDGE