



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISCELLANEOUS CIVIL CASE NO.32 OF 2018

NIC BANK KENYA PLC.....APPLICANT

-VERSUS-

JOSHUA ONANI OGEMBO.....RESPONDENT

RULING

1. The applicant by a notice of motion dated the 11th of June 2018 brought under Article 159 of the Constitution of Kenya, Article 47 and 48 of the Constitution of Kenya 2010, Section 3A, 75 of the Civil Procedure Act, Order 43 and 51 of the Civil Procedure Rules 2010 the applicant seeks the following orders;

- i. That there be a stay of proceedings and/or further proceedings in **KISII CMCC NO.239 OF 2015; JOSHUA ONANI OGEMBO –VS- NIC BANK KENYA PLC LIMITED** pending the hearing and determination of this application.
- ii. That leave be granted to the Applicant herein to appeal from the decision and/or ruling of the sub ordinate court made and/or delivered on 6/10/2017.
- iii. That costs be provided for.

The application is based on the grounds on the face of the application and supported by the affidavit sworn by Kenneth Mawira. The grounds are set out as follows;

1. That the subordinate court delivered a ruling in KISII CMCC NO.239 OF 2015 (on 6/10/2017) on a preliminary objection raised by the Respondent herein during Defense hearing on 4/9/2017.
2. That the subordinate court sustained a preliminary objection whose effect barred the defense witness (es) from testifying in the matter therein.
3. That the ruling was delivered in the absence of the Applicant and the Respondent's Advocates.
4. That no Notice of delivery of the ruling was issued to the parties.
5. That no Notice of delivery of the ruling was served upon the Applicant's Advocate.
6. That the Applicant is desirous to appeal against the said decision and/or ruling
7. That the Applicant made the 1st Application (dated 25/11/2017) for leave to appeal before the sub-ordinate court being the court of first instance).
8. That the application for leave to appeal filed in the subordinate court was also dismissed on 17/5/2018.
9. That with the dismissal of the application from leave to appeal by the subordinate court, KISII CMCC NO.239 of 2015 is scheduled to proceed and judgment delivered without the applicant's witness (es) testimony.
10. That the Applicant desires to be heard and should not be condemned unheard.
11. That leave of this Honorable court is necessary.

12. That this Honorable court has powers to grant the orders

sought.

13. That this application is made in good faith and in the interest of justice and fairness.

2. The applicant's filed a supporting affidavit which I have considered. Miss Ondego at the hearing of the application relied on the grounds and the affidavit filed by the applicant. The ground set out the facts of what happened in the lower court. Miss Ondego submitted that there are 3 issues for determination. The first one is whether the Ruling delivered is one that one can appeal of as of right. She submitted that under order 43 of the Civil Procedure Rules and Section 75 of the CPA the Preliminary Objection raised and Ruling to the same is not an issue listed under the said provisions. That the matter listed there can be appealed as of right and they needed leave to appeal against the said Ruling. That under the said provisions they had to seek leave within 14 days from the date of the Ruling but from the background it was not possible to do the same as no notice was served on the parties and Ruling was delivered in the absence. The reason they didn't file the appeal is explained it is because of reasons beyond their control. They filed the application timeously. They filed application in the court which made the Ruling and they were denied the stay. That this court therefore has powers to grant the orders sought. That the Respondent has not shown the prejudice they will suffer if the orders are granted. The applicant also seeks a stay of proceedings of the Lower Court pending the hearing of the application as the matter is pending submissions without the defense hearing.

3. Miss Ochwa for the respondent opposed the application. The respondent filed grounds of opposition dated the 26th of June 2018. The grounds of opposition are as follows;

1. The instant Notice of Motion Application, is Pre-mature, misconceived, Incompetent and otherwise legally untenable.

2. The Applicant herein having hitherto sought for leave to Appeal against the Ruling and/or Order made on the 6th October 2017, pursuant to and in line with the provisions of Order 43 Rule 1 (1) of the Civil Procedure Rules, 2010, which was declined, same cannot mount a similar Application before this honorable Court.

3. In any event, this honorable Court is devoid and/or divested of Jurisdiction to entertain an Application under the provisions of Order 43 Rule 1 of the Civil Procedure Rules, 2010. In the premises, the Application herein, does not lie.

4. Notwithstanding the foregoing, the grant of leave herein shall be an act in futility, in so far as the time for mounting and/or lodging an Appeal, in terms of Section 79G of the Civil Procedure Act, chapter 21, Laws of Kenya has since lapsed and/or extinguished.

5. Nevertheless, the instant application is meant to delay, obstruct and defeat the conclusion of the suit filed in the Subordinate Court, which has been pending since the years 2015.

6. In any event, the instant Applicant has been mounted with undue and inordinate delay, which delay has not been not explained and/or sufficiently explained. Consequently, the Applicant herein is guilty of laches.

7. On the other hand, the notice of Motion Application filed and/or mounted by the, does not disclose and/or capture any reasonable cause of action.

8. Besides, the Notice of Motion Application has brought to Court with unclean hands and hence same reeks of mala-fides. In any event, the Applicant is devoid of candour on account of the conduct ante and hence undeserving of Equitable Discretion of the Honorable Court, whatsoever.

9. Consequently, the Instant Application constitutes and/or amounts to an abuse of the Due process of Court.

10. In the circumstance, the Notice of Motion Application dated 11th June 2018 herein is devoid of merits, whatsoever and/or howsoever.

4. Miss Ochwa submitted that the applicant sought the same orders in the lower vide their application dated the 27/11/2017 and the same was dismissed. The application is res judicata it's improper and should be dismissed. That the applicant should have appealed against the order of the lower court and not sought the same orders. On the issue of leave to appeal it was submitted that the 14 days have lapsed. That the provisions of Order 43 rule provides the application should made within 14 days. That the applicant should have sought extension of the 14 days to extend and then move the court under Order 49 to appeal out of time, if the court is to grant leave to appeal. That Section 75 doesn't deal with extension of time and that where there are statutory provisions provided they must be strictly followed. That a party is bound by their pleading. The orders sought cannot be granted as prayed. That it is deposed by the applicant that there was no notice and at paragraph 10 & 11 of the affidavit Kenneth seems to be swearing on facts not within his knowledge. That it was incumbent upon the deputy of Mr. Onyinkwa to swear an affidavit to state the same. That there is no correspondence as to the inquiry when the Ruling of 6/10/2017 could be delivered. That this issue remains hearsay and hence cannot be relied. That on the issue of stay of proceedings it's a matter that calls upon the court to exercise its discretion on whether to grant the orders or not but it is upon the applicant to establish and demonstrate that if the order is not granted justice will not be seen not to be granted. It is not established the loss the applicant will suffer if the order is not granted. On the basis on how the matter was instituted on the Lower Court it was submitted that the applicant was allowed to defend their case. They were allowed to call their witness. They had to set their defense within 14 days. They didn't appeal against the order and sought extension of the 14 days. The Respondent submitted there is no miscarriage of justice if stay of the Lower Court proceedings is not granted. That justice is a double edged sword and it cuts across. That the Lower case matter was filed in 2015 they have filed one application after another and the Respondent is entitled to this fruits of litigation. There is no memorandum of appeal to persuade the court that they have an arguable appeal. The respondent sought to have the application dated the dated 11/6/2018 to be dismissed with costs to the Respondent.

