



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL APPEAL NO 194 OF 2018**

**EASTLEIGH MATTRESSES LIMITED.....APPELLANT**

**VERSUS**

**FRANCIS KARIUKI MAINA.....RESPONDENT**

**(Being an appeal from the Ruling and Order of the Chief Magistrate's Court at Nairobi by the Hon. A.N Makau (Ms), Senior Resident Magistrate delivered on 21<sup>st</sup> March 2018 in Civil Case No 6026 of 2016)**

**RULING**

**INTRODUCTION**

1. The Appellant's Notice of Motion application dated and filed on 17<sup>th</sup> May 2017 was brought pursuant to the provisions under Section 1A, 1B, 3A, 63(e) of the Civil Procedure Act, Order 42 Rule 6 of the Civil Procedure Rules 2010 and Articles 50(1) and 159(2) (d) of the Constitution of Kenya 2010 and all other enabling provisions of the law. Prayers Nos (1) and (2) were spent. It sought the following remaining prayers:-

**1. Spent.**

**2. Spent**

**3. THAT pending *inter-partes* hearing and determination of this Application, this Honourable court be pleased to issue an order of stay of proceedings in Milimani CMCC No 6026 of 2016, Francis Kariuki Maina Versus Eastleigh Mattresses Limited.**

**4. THAT the costs of this Application be in the cause.**

2. The Respondent filed its Grounds of Opposition dated 28<sup>th</sup> May 2018 on even date. The Grounds of Opposition were as follows:-

**1. THAT the application was frivolous, vexatious and an abuse of the process of the law.**

**2. THAT this application was fundamentally defective, a nullity in Law and should be dismissed**

**3. THAT the Application offended the mandatory provisions of the Civil Procedure Rules.**

3. The Appellant's Written Submissions were dated 11<sup>th</sup> June 2018 and filed on 12<sup>th</sup> June 2018 while those of the Respondent's Written Submissions were dated 27<sup>th</sup> June 2018 and filed on 28<sup>th</sup> June 2018.

4. When the matter came before the court on 30<sup>th</sup> July 2018, the parties requested that the court deliver its decisions based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

**LEGAL ANALYSIS**

5. Having analysed the parties' Written Submissions and the case law they each relied upon, it appeared to this court that the issue that had been placed before it was to establish if the Appellant had laid sufficient basis for the grant of an order for stay of the proceedings in **CMCC**

**No 6026 of 2016 Francis Kariuki Maina Versus Eastleigh Mattresses Limited** pending the hearing and determination of its Appeal on the question of whether or not the Learned Trial Magistrate exercised his discretion judiciously when he expunged the Appellant's Witness Statement after the same was filed after the Pre-Trial Conference had been concluded and a hearing date of the case fixed.

6. The Appellant argued that the expunging of the said Witness Statement had the effect of preventing its case from being heard on merit and thus infringe on its right to be heard guaranteed by Article 50 of the Constitution of Kenya, 2010.

7. It added that in the event the stay of proceedings was not granted, then its Appeal would be rendered nugatory. It pointed out that in the event it would not be successful on appeal, then the Respondent could be compensated by costs.

8. It placed reliance on the case of **UAP Provincial Co Ltd vs Michael John Beckett [2004] eKLR** where the Court of Appeal stayed proceedings pending and hearing and determination of an appeal that had arisen from an order that had been made by the High Court. It held that an appeal would be futile if the proceedings before the arbitrator were not stayed.

9. It also placed reliance on **Housing Finance Co of Kenya vs Sharok Kher Mohamed Ali Hirji & Another [2015] eKLR, Daudi Kiptigen vs Commissioner of Lands, Nairobi & 5 Others [2016] eKLR, Justice Philip K Tunoi & Another vs The Judicial Service Commission & Another [2016] eKLR** where the common thread of the holdings was that before he is granted a stay, an applicant must demonstrate that his intended appeal is an arguable one, that a stay will be ordered if an applicant is likely to suffer substantial loss and that every party has a right to be heard respectively.

10. On his part, the Respondent stated that the Appellant's did not demonstrate that it had an arguable appeal. He placed reliance on the case of **Nicholas Kiptoo Arap Salat vs Independent Electoral and Boundaries Commission (IEBC) & 6 Others [2013] eKLR** where it was held that Section 3A and 3B (sic) of the Civil Procedure Act cannot save an incompetent appeal or application.

11. This court carefully looked at the parties' submissions and noted that they had both argued the merits or otherwise of the Appellant's Appeal. It therefore restrained itself in interrogating the same because there was danger in it making determination on issues that had actually not been placed before it for determination. Indeed, the Appellant was yet to file its Record of Appeal. What was before it was an application of stay of proceedings in the lower court.

12. It was evident from the court file that no proceedings had proceeded in the lower court after Thuranira Jaden J granted an interim order of stay of proceedings on 17<sup>th</sup> May 2018 which has subsequently been extended. As the matter is yet to be concluded, it was prudent to establish whether or not the Learned Trial Magistrate exercised her discretion judiciously when she expunged the Appellant's Witness Statement as aforesaid.

13. As the Court of Appeal held in the case of **UAP Insurance Company Ltd vs Michael John Beckett** (Supra), all an applicant is required to show is that he has an arguable appeal which is not frivolous and that the appeal will be rendered nugatory if the stay is not granted.

14. Accordingly, having considered the affidavit evidence, the Written Submissions and the case law that each party relied upon, it was the considered view of this court that the Appellant's intended appeal was arguable and was not frivolous because if the matter proceeded for hearing in the lower court, the appellate court would have been denied an opportunity to determine whether or not there was any justification in the Appellant's Witness Statement having been expunged after the Pre-Trial Conference and after a hearing date had been fixed. It was necessary that the appellate court determine if the Learned Trial Magistrate exercised her discretion judiciously and not shut out the Appellant from tendering oral evidence should there be merit in his appeal.

## **DISPOSITION**

15. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated and filed on 17<sup>th</sup> May 2017 was merited and the same is hereby allowed with costs in the cause.

16. To avoid any delays in the prosecution of the matter in the lower court, the Appellant is hereby directed to file and serve its Record of Appeal within forty five (45) days from the date of this Ruling i.e by 15<sup>th</sup> December 2018.

17. The Deputy Registrar High Court of Kenya Milimani Law Courts Civil Division is hereby directed to facilitate the expeditious typing of the proceedings in the lower court and to undertake preliminaries of ensuring the Appeal is ready for hearing on a priority basis.

18. It is so ordered.

**DATED and DELIVERED at NAIROBI this 30<sup>th</sup> day of October 2018**

**J. KAMAU**

**JUDGE**