



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 315 OF 2003

LEISURE LODGES LIMITED.....PLAINTIFF

VERSUS

TELKOM (K) LIMITED.....DEFENDANT

RULING

1. Through an application dated 21st September, 2018 brought under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya and Order 12, Order 18 rule 10, Order 42 rules 6, 7 and 8 and all other enabling provisions of the law, the defendant (applicant) seeks the following orders:-

i. Spent;

ii. That the orders made on 23rd August, 2018 by Hon. Justice Amin at Sarova Whitesands be set aside pending the hearing and determination of the application;

iii. That the proceedings in this matter be stayed and or be set aside pending the hearing and determination of the appeal; and

iv. That the costs of this application be provided for.

2. The application is supported by the affidavit of Christine Chesaro, Advocate sworn on 21st September, 2018. The plaintiff (respondent) filed a replying affidavit on 26th September, 2018, sworn by its Executive Director, John K. Mutua on 1st October, 2018. The respondent's Advocate filed grounds of opposition.

3. At the hearing of the application, Mr. Paul Magolo Advocate appeared for the applicant on instructions of Mrs Chesaro, Advocate. He submitted that on 23rd August, 2018 the application dated 17th August, 2018 was dismissed and the Hon. Judge stated that the applicant would have an opportunity to be heard through submissions.

4. Mr. Magolo further submitted that Article 50 of the Constitution gives parties the right to be heard and that in an affidavit attached to the application, Mrs Chesaro explained that she had gone to attend to someone who was sick and that was the reason she did not attend court. Counsel for the applicant further submitted that there was a counter-claim filed with the defence and it was in the interest of justice for the applicant to be heard.

5. He urged that the mistakes of the applicant's Counsel should not be visited on her client. He further stated that the defendant stands to lose a colossal amount of money if it was not heard. He cited the case of **Amal Hauliers Limited vs Abdunasir Abukar Hassan** [2017] eKLR where the court held that its discretionary powers should be exercised in a manner such as not to prevent an appeal. It was submitted that the application herein was filed timeously on 21st September, 2018 after the order in issue was made on 23rd August, 2018.

6. Mrs Kibe, Learned Counsel for the respondent opposed the application. She stated that the application by the applicant lacks *bonafides* as it was given an opportunity to be heard on 12th October, 2017 but they were not ready to proceed. Again on 5th February, 2018 when the matter came up for hearing, they were not ready to proceed. She added that the case came up for mention for final submissions on 8th March, 2018 but instead of filing submissions, the applicant filed an application on 8th March, 2018 which was a day before the mention date and a month after the matter was lastly in court.

7. Counsel for the respondent stated that she conceded to the said application through a consent letter dated 22nd March, 2018 in which it was agreed that the plaintiff's witness was to be recalled for cross-examination. This court was reminded that on 24th July, 2018 the plaintiff was

ready to proceed but the defendant was not and the court scheduled the matter for mention on 24th September, 2018.

8. Counsel for the respondent submitted that in her order of 23rd August, 2018, F. Amin J., held that the applicant had failed to demonstrate the prejudice it would suffer if the order was not made.

9. It was further stated by Counsel for the respondent that since the said order was made, the applicant waited until the 21st September, 2018 before filing the present application and that it had done everything possible to obstruct the cause of justice in breach of Section 1A (3) of the Civil Procedure Act.

10. Mrs Kibe argued that instead of the Advocate for the applicant assisting the court, she has hindered progress of the case and as such the applicant and its Counsel lack the requisite *bondafides*. She stated that this case was filed in the year 2003. The hearing commenced on 12th October, 2017 but before that, it had been listed for dismissal.

11. It was also submitted that the conduct of the applicant and its Advocate is not in furtherance of the overriding objectives. Counsel for the respondent further submitted that the application seeking to set aside the orders of 23rd August, 2018 was not supported by any reasons as well as an explanation as to why this court should stay the proceedings of this case, pending appeal or that the applicant will suffer any prejudice.

12. In making reference to the notice of appeal, it was indicated that it was dated 11th September, 2018 which was more than 14 days after the order of 23rd August, 2018 was made. This court was therefore informed that there was no competent appeal before the Court of Appeal.

13. Mrs. Kibe submitted that the authority relied on is not relevant to the present circumstances as there was no judgment that was delivered, hence no threat of execution.

14. In response to the forgoing, Mr. Magolo stated that the prejudice the applicant will suffer is that the statement of defence contains a counter-claim that needs to be argued and the applicant prays to be heard as the amount claimed therein is colossal. He argued that if the orders sought are not granted, the appeal will be rendered nugatory. He submitted that the provisions of Articles 49 and 50 of the Constitution override Section 1A (3) of the Civil Procedure Act.

ANALYSIS AND DETERMINATION

15. The issue for determination is if this court should stay the proceedings herein pending appeal.

16. The Learned Counsel for the respondent articulately captured the chronology of the events that have unfolded since this case commenced hearing. I do not wish to add or subtract from the same.

17. It has been evident and the record bears witness that the applicant and its Advocate have not treated this case with the seriousness it deserves. Even when the respondent extended an olive branch to the applicant's Counsel to attend court to cross-examine the respondent's witness, there was no attendance by the applicant's Advocate. No plausible explanation was given about her absence from court or why she failed to instruct another Advocate to cross-examine the respondent's witness since the evidence of PW1 was available in the court file.

18. This case was filed on 15th December, 2003. It has been in court for the last 14 years and since it commenced hearing, the applicant and its Counsel have tried to stall it.

19. On the other hand, I do agree with Mr. Paul Magolo that litigants have a right to be heard as provided in the Constitution. They are however obliged to take positive strides to prosecute and defend their cases. Cases cannot be allowed to drag on in perpetuity.

20. In the case of **Global Tours & Travels Limited, Nairobi HC Winding Up Cause No. 43 of 2000**, Ringera J held that:-

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests of justice to order a stay of proceedings, and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously.”

21. The reasons given by Counsel for the applicant in asking for stay of the proceedings herein is for the reason that on 11th September, 2018 they filed a Notice of Appeal to the Court of Appeal against the decision of Justice F. Amin. Counsel for the respondent submitted that the said notice was filed late. I do not wish to ascend into that arena as it falls in a different jurisdiction and such arguments shall be made before the Court of Appeal.

22. In the circumstances of this case and in order for this court to avoid a situation where it will proceed with the case just for the Court of Appeal to give orders that may affect the proceedings that will have been taken, I grant the applicant the order sought for stay of proceedings. I however decline to set aside the orders of F. Amin J. The said orders form the subject of appeal. The defendant/applicant has however without a doubt occasioned the situation it finds itself in by failing to comply with the provisions of Section 1A (3) of the Civil Procedure

Act. It will therefore pay the costs of the present application to the plaintiff/respondent.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 30th day of November, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Sidinyu holding brief for Mrs. Chesaro for the defendant/applicant

Mr. Mathare holding brief for Mrs. Kibe for the respondent

Mr. Oliver Musundi - Court Assistant