



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL CASE NO 79 OF 2018

RAJA MATERIAL SUPPLIES.....APPLICANT

VERSUS

LAMECH MBAKA MUTEGI

MILLICENT NYABOKE SWAYA.....RESPONDENTS

RULING

1. Pursuant to leave granted in **Chief Magistrate’s Court Kiambu Misc. Civil Application No. 6 of 2017**, the Chief Magistrate’s Civil Suit No.246 of 2017 was brought by the Respondents against the Applicant herein, under the doctrine of subrogation, for the recovery of material damage. Aggrieved with this outcome, the Applicant filed a motion on 6th April 2018 seeking *inter alia* leave to appeal against the order extending time to file the claim and to stay the resultant suit, pending appeal.

2. The application is based on the grounds on the face of the motion and as further elaborated in the supporting affidavit sworn by **Ramresh Lalji Rabadia**, a director of **Raja Material Supplies**, the Applicant. The gist of the grounds is that the Applicant is aggrieved with the decision of the lower court granting the Respondent leave to file out of time, a suit in respect of material damage claim, as extension in such claims is not provided for under the Limitation of Actions Act. That the Applicant will suffer prejudice, and the appeal rendered nugatory if the suit below is not stayed. For their part, the Respondents have filed a Replying Affidavit through **Eric Ntabo**. The Respondents take the view that the Limitation of Actions Act allows for extension of time for filing suit in both material damage and personal injury claims. They assert the right to be heard.

3. On the date set for the inter partes hearing of the application, only the Applicant was represented. **Ms Musyoka** for the Applicant argued the motion on behalf of the Applicant. She argued that the Applicant has no right of appeal from the lower court order. She placed reliance on the case of **Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi (2014) eKLR** in urging stay of the lower court suit. She further asserted that extension of time to file the primary suit out of time was not available for material damage claims. She cited the case of **Emmanuel Kidaho Ruhengeri v Sadry Dhala (2017) eKLR** to support that proposition.

4. The court has considered the substance of the motion before it. The motion is expressed to be brought under Sections 1A, 1B, 3A, 79G and 95 of the Civil Procedure Act, Order 42 Rule 6(1) and Order 51(1) of the Civil Procedure Rules, *inter alia*. The key prayer sought is leave to appeal against the decision to extend time for the filing of the lower court suit. Such leave to appeal is provided for under Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules. The Applicant has not invoked these provisions on the face of the motion.

5. Order 43 of the Civil Procedure Rules provides that:

“(1)...

(2) **An appeal shall lie with the leave of the court from any other order made under these Rules.**

(3) **An applications for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.”**

6. It appears that the Applicant moved to this court directly rather than lodging his application for leave to appeal before the subordinate court. In my reading, Order 43 rule 3 of the Civil Procedure Rules is couched in mandatory terms. The Applicant seeking leave to appeal an order in respect of which an appeal does not lie as of right must apply in the first instance, before the court that made the order with which he

is aggrieved.

7. This is true even where, as here, the time stipulated under Order 43 rule 3 of the Civil Procedure Rule has lapsed. Section 95 of the Civil Procedure Act and Order 50 of the Civil Procedure Rules may be invoked in appropriate cases. The Applicant herein ought to have made the present application in the lower court therefore.

8. In the interest of justice, I would order that the miscellaneous cause herein be transferred to the lower court so that the application for leave to appeal can be heard afresh between the parties. For this purpose, I hereby set aside all the proceedings taken before the High Court in connection with the said application. The matter is to be placed before the

Chief Magistrate Kiambu Court for purposes of assigning an early hearing date.

DELIVERED AND SIGNED AT KIAMBU THIS 23RD DAY OF NOVEMBER, 2018.

C. MEOLI

JUDGE

In the Presence of: _____

No appearance for the Applicant

No appearance for the Respondent

Court Clerk

Kevin