



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 121 OF 2008 (O.S)

COLLINS STEPHEN FORD.....PLAINTIFF

VERSUS

SULTANA FADHIL & OTHERS.....DEFENDANTS

RULING

1. The application before me for consideration is dated 17th March, 2015. It seeks the following orders:-

(i) Spent

(ii) That this Honourable Court be pleased to enlarge the prescribed time to file a Notice of Appeal so that the annexed Notice of Appeal be deemed to have been filed within the prescribed time;

(iii) Spent;

(iv) Spent;

(v) That pending the hearing and determination of the application herein, there be a stay of execution of the orders granted in the ruling delivered on 4th November, 2014 by Hon. M. Muya to the extent that the orders staying the arbitration proceedings be vacated. In other words, the order dated 17th January, 2014 staying the arbitration proceedings be reinstated; and

(vi) That costs of this application be provided for.

The application was based on the grounds on the face of it and the supporting affidavit of the 1st defendant/1st applicant filed on 18th March, 2015.

2. The respondent on 22nd April, 2015 filed a replying affidavit to oppose the application dated 17th March, 2015.

SUBMISSIONS

3. Mr. Gikandi, Learned Counsel for the applicants submitted that he was seeking enlargement of time to enable the applicants to file a Notice of appeal out of time. He expounded that on 4th November, 2014, Justice Muya dismissed the applicants' application dated 26th November, 2013 but they became aware of

the dismissal on 27th February, 2015 after they received a letter from the respondent.

4. Counsel submitted that the applicants were not aware of the date for delivery of the ruling as such they did not file a Notice of Appeal within 14 days. In his view, the ruling was compromised due to failure to be served with a notice for the ruling. He prayed for the application to be allowed under the provisions of Order 50 rule 6 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act.

5. Mr. Ng'eno, Learned Counsel for the respondent on his part informed the court that he fully relied on the replying affidavit filed on 22nd April, 2015. He added that the applicants were aware of the date scheduled for the ruling. He also relied on his written submissions.

ANALYSIS AND DETERMINATION

The issues for determination are:-

(i) If the applicant has made out a case for grant of leave to appeal out of time; and

(ii) If the court should stay execution of the ruling delivered on 4th November, 2014.

6. The supporting affidavit of Sultana Fadhil Advocate filed on 18th March, 2015 gives a chronology of the events surrounding this case. It is clear that the applicants and the respondent entered into an agreement on 20th April, 2005 which provided that if a dispute arose between the parties, it would be referred to a board of three (3) arbitrators appointed by the said parties. When a dispute arose, the respondent moved to court seeking the release of his chattels but the applicants sought stay of the hearing of the respondent's application and for the dispute to be referred to arbitration. What can be gleaned from the said affidavit is that parties dragged their feet until the 14th of June, 2012 when the respondent proposed the names of two arbitrators. On 3rd July, 2012, he proposed a third arbitrator. In paragraph 11 of the supporting affidavit, the deponent states that the respondent's Advocates on 4th July, 2012 filed a hearing date for the application dated 27th May, 2011 seeking directions of the arbitration process, but the said application was not prosecuted. The deponent further deposes that there was no need to seek the court's directions as the agreement of 20th April, 2005 was very clear on the issue of dispute settlement. Furthermore, they (applicants) had supplied the plaintiff with a list of arbitrators.

7. Ms. Fadhil contends in paragraph 15 of her affidavit that the court order of 20th June, 2013 appointing Mr. Mulwa as the single arbitrator was irregular as it was issued by Justice Muya who had never dealt with this matter before and it was issued exparte. Further, the agreement of 20th June, 2013 did not provide for a court appointed arbitrator but an arbitrator appointed by the parties.

8. In paragraph 16 thereof, the deponent states that on learning of the order of 20th June, 2013, they pleaded with the respondent to include other arbitrators by consent but he refused. The deponent made reference to a letter dated 14th August, 2013 attached to her affidavit and marked as SF18 which they sent to the respondent. A perusal of the said exhibit does not reveal a letter of the said date but one dated 18th October, 2013.

9. Following the above, the deponent states in paragraph 17 of her affidavit that the applicants filed an application dated 26th November, 2013 seeking orders for review or variation of the order of 20th June, 2013 that appointed Mulwa Nduya as the sole arbitrator. The said application sought the inclusion of Nyongesa Wafula, Dalmas Omondi and Grace A. Okumu as co-arbitrators.

10. In paragraph 18 of the supporting affidavit, the deponent indicates that on 4th November, 2014, Judge Muya delivered a ruling in which he dismissed the application dated 26th November, 2013. The Hon. Judge also vacated the order for stay of arbitration proceedings. The applicants contend they were not present when the ruling was delivered and they had not been notified of the date for delivery of the ruling

by the court or by the plaintiff.

11. The deponent further states in her affidavit that they became aware of the said ruling on 23rd February, 2015 when the plaintiff wrote to them regarding the same and by then four (4) months had elapsed. They were thus late in filing their Notice of Appeal. It was for the foregoing reason that the applicants seek the orders herein.

12. In a terse replying affidavit sworn by Collins Stephen Ford and filed on 22nd April, 2015, the respondent revisits the frustrations running to ten years which he has encountered from the applicants in his attempt to finalize this case.

13. In paragraphs 3, 4 and 6 of the said affidavit, he states that he has paid the applicants over Kshs. 10,541,690/= in legal fees and that he has made a loss of Kshs. 201,000,000/= in his business since the year 2008 as the applicants are in possession of his chattels constituting six (6) trucks, twelve (12) trailers and other assorted Motor vehicle equipment which are in the applicants' custody.

14. In paragraphs 9 and 10, the respondent deposes that he nominated Mr. Mulwa Nduya as an arbitrator in this suit. The applicants however failed to supply the respondent with their list of arbitrators prompting him to move to court for assistance to compel the applicants to supply their list of arbitrators. He referred to the court proceedings of 6th September, 2012, 18th April, 2013, 3rd June, 2013 and 20th June, 2013 on the said issue.

15. In paragraph 20 of the said affidavit, the respondent states that the court had no option but to confirm Mr. Mulwa Nduya as the sole arbitrator on 20th June, 2013, in the applicants absence, although they were aware of the said date but failed to attend court. The respondent in paragraph 13 of the affidavit deposes that the application of 26th November, 2013 which was dismissed was filed by the applicants and it is therefore absurd for them to wait to be informed by the respondent of its outcome. The respondent further states that he had deposited Kshs. 200,000/= with the arbitrator towards his fees and he will be greatly prejudiced if the applicants will be allowed to appeal out of time.

16. A perusal of the court file reveals that when the case was mentioned on 23rd September, 2014 before Kasango J. Ms. Affwaya was present in court and held brief for Mr. Waithera (for the respondent) while Ms. Maina held brief for Mr. Birir (for the applicants). Hon. Kasango J. stated thus:-

“Since the order of 20.6.2013 which N/M dated 26.11.2013 is directed at was issued by Justice Muya I direct this matter be mentioned on 6.10.2014 before Muya J. for direction or orders.”

17. On 6th October, 2014, Ms. Maina attended court on behalf of the plaintiff. Muya J. noted that the purpose of the mention was to take directions and that both parties had filed their submissions. The Hon. Judge gave a ruling date for 4th November, 2014. On the date for the ruling, Mr. Shimaka attended Court for the respondent. There was no attendance by the applicants or their Advocate. Hon. Muya J. read the ruling and noted in his original handwritten ruling the following remarks:-

“Ruling delivered dated and signed in open court this 4th day of November, 2014 in the presence of Mr. Shimaka for the plaintiff and the absence of the defendants well aware of the ruling date.” (emphasis added)

18. On 5th November, 2014, Hon. Muya J. made further orders for the parties to be furnished with certified copies of the ruling. A typed copy of the said ruling was attached to the 1st applicant's supporting affidavit.

19. In essence this court is being requested to doubt the veracity of Hon. Muya J's notation in his ruling that the applicants were well aware of the ruling date. A Judge who hears any particular matter is in charge of the management of that case. This court cannot speculate on the manner in which the

applicants were made aware of the ruling date. The High Court is a court of record and no sufficient facts have been placed before this court to show that the applicants were not aware of the date of the ruling. I therefore find that submission unsubstantiated and to be of no effect.

20. The applicants seem to be casting aspersions on the issue of how Hon. Muya J. heard and determined the application dated 20th June, 2013 and issued *ex parte* orders. This court is the wrong forum for raising the said issue as it is a Presiding Judge (formerly Resident Judge) who assigns the distribution of work to Judges within a station. Needless to say that the court file reveals that Hon. Muya J. started hearing this case on 18th February, 2013 and not on 20th June, 2013. The foregoing apprehension on the part of the applicants is therefore unfounded.

21. The provisions of Section 1A of the Civil Procedure Act provides as follows:-

(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the process of the Court and to comply with the directions and orders of the Court.

22. In this case, the conduct of the applicants is very telling in that they contributed to the delay in having this case finalized yet they are now crying foul. The court record is very clear that on 5th July, 2012 and 6th September, 2012, Hon. Mwongo J. gave the applicants an opportunity to nominate arbitrators. On 29th April, 2013, Hon. Muya J. gave similar orders and on 3rd June, 2013 he gave them the final opportunity to do so but they did not comply. The applicants failed to attend court on 20th June, 2013, a date which was given in the presence of Mr. Ng'eno for the respondent and Mr. Mulandi for Kilonzo for the applicants. It was on 20th June, 2013 that Hon. Muya J. appointed Mulwa Nduya the sole arbitrator to hear the dispute. It is thereafter that an application for review or variation of the said orders was made on 26th November, 2013.

23. In the case of **Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others**, SC Application 16/2014, the Supreme Court laid down the following as the underlying principles that a court should consider in exercise of discretion to extend time:-

(i) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;

(ii) The party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court;

(iii) As to whether the court should exercise the discretion to extend time, is a consideration to be made on a case basis;

(iv) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.

(v) Whether there will be any prejudice to be suffered by the respondents if the extension is granted;

(vi) The application should have been brought without delay; and

(vii) In certain cases, like election petitions public interest should be a consideration for extending

time.

24. Applying the foregoing principles to the present application, it is this court's finding that the applicants have failed to lay a sound basis for grant of the orders sought for leave to appeal out of time. The ruling of Hon. Muya J. is indicative of the fact that the applicants were well aware that the ruling in issue would be delivered on 4th November, 2014 but did not attend court. There is therefore no reasonable explanation given on the applicants failure to file the appeal within time.

25. On the principle of whether any prejudice will be suffered by the respondent if extension is granted, the conduct of the applicants is borne out by the court record as being one of indolence and failure to comply with the overriding objective of the Civil Procedure Act as provided in Section 1A(3). Maxims of equity state that he who comes to equity must come with clean hands and equity does not aid the indolent but the vigilant. This case was filed by the respondent in the year 2008. In his affidavit he deposes that he has suffered a large financial loss as a result of his chattels which include trucks, trailers and other equipment being retained by the applicants due to the dispute the subject of this suit.

26. I have considered the affidavits filed by the parties on record, their written submissions as well as the authorities cited, I am persuaded by the decision cited by Mr. Nge'no in his written submissions in the case of **Bi-Mach Engineers Limited vs James Kachoro Mangi** [2011] eKLR where Waki, J.A., denied an applicant leave to appeal out of time in a case that had dragged on in court for 12 years. The instant case has dragged on in court for eight (8) years now and the applicants have failed to demonstrate that they are deserving of the orders sought. The application dated 17th March, 2015 and filed on 18th March, 2015 is hereby dismissed with costs to the respondent. The orders issued on 26th March, 2015 staying arbitral proceedings are hereby vacated.

DELIVERED, DATED and SIGNED at MOMBASA on this 23rd day of February, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms. Njeri Chege holding brief for Mr. Gikandi for the defendants/applicants

Mr. Njenga holding brief for Mr. Ngeno for the plaintiff/respondent

Oliver Musundi - Court Assistant