



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

HC.COMM. NO. 44 OF 2013

KWANZA ESTATES LTD.....PLAINTIFF

VERSUS

DUBAI BANK OF KENYA LIMITED1ST DEFENDANT

KENYA DEPOSIT INSURANCE CORPORATION....2ND DEFENDANT

R U L I N G

1. There is before court a Notice of Motion dated 10/11/2016 seeking Orders that time be enlarged to apply for leave to appeal and that leave to appeal be granted to the Defendant/Applicant to appeal against the court directions dated the 21/9/2016.

2. The grounds advanced to prop the application are that when the directions were given the Counsel then appearing for the Defendant inadvertently failed to seek leave to appeal; that by further inadvertence the application was never made within the 14 days prescribed by the rules; that a notice of appeal has however been filed and served, a letter bespeaking proceedings and the decision has been sent and acknowledged and the Respondent/Plaintiff has since filed and served a Notice of address of service and therefore no prejudice will befall it if the time is enlarged and leave is granted to serve the interests of justice.

3. The application was supported by the affidavit of Stephen Musalia Mwenesi, Advocate who largely reiterated the grounds of the application and asserted that he had reasons to believe that the leave was orally sought and that there was an inadvertence delay to file the application for leave within 14 days. On that affidavit it is not clear whether it is the deponents' position that leave was orally sought or that it was inadvertently not sought hence the need to file a formal application. After being served with a Grounds of opposition the Applicant did file an affidavit in Response to grounds of opposition whose apparent purpose was to deny that the application is frivolous and to demonstrate that the order sought to be appended against was extracted and served upon the Respondent.

4. Equally filed was a list of authorities citing some five(5) decided cases, statutes and the constitution.

5. The application was opposed by the Grounds of opposition dated 15/11/2016. The hallmark of these grounds is that there no substantive order or decree envisaged under section 75 and Order 43 Full 2 of the Civil Procedure Act to merit an appeal as what was done on the 21/9/2016 was essentially directions on case Management incapable of being appealed against and therefore there cannot be any useful purpose to grant the prayers sought. It was equally added that the timing of the application, coming as it deed, on the

eve of the date fixed for formal proof was a clear design to defeat that date by an adjournment and additionally that there was clearly inordinate delay. The Respondent further filed a list of authorities citing are decided case.

6. The parties having filed papers as aforesaid attend court on the 9/3/2017 to argue the application. On that day Mr. Mwenesi appeared for the Applicant while Mr. Buti did appear for the Respondent.

7. Before I delve into the parties oral submissions, it may be useful to reproduce the directions the court made on 21/9/2017. On that day the defendants counsel sought an adjournment of the case conference on the grounds that there had been filed and served an amended plaint on the 1/9/2016 and that on the 16/9/2014, the defendant had filed an application to set aside a default judgment. For those reasons the defendant's counsel contended that the pre-trial conference was premature and ought to be adjourned. That application was declined and the court held that it would be an act of metting out a reward on indolence and recalcitrance on the basis that the application to set aside was two years old in the file and that there was an imperative to have legal disputes timeously resolved. Having declined that adjournment as aforesaid the court then gave trial directions as follows:-

“ i)The suit shall proceed to hearing on a date to be taken at the Registry and on the basis of pleadings and statements and documents on record as at today.

ii) At trial the makers of witness statements will be called for purposes of adopting the statements and producing the documents related to their witness statement and may be cross-examined if the defendant shall deem if necessary.

iii) Todays costs are ordered to be costs in the cause”.

8. Some 24 days later, on the 14/10/2016, one John attended the Registry and had the case fixed for hearing on the 15/11/2016. It would appear that the Defendant was served or came to know about the hearing date and on the 11/11/2016 the current application was filed under Certificate of Urgency. When placed before the duty judge, it was directed that a hearing date for it be taken at the Registry.

9. From the onset this court take the view that the accusation against the Defendant that it came too late in the day merely and purportedly to frustrate the date fixed for formal proof may not be idle at all. Nothing surely stood on the way of the defendant from the day Mrs. Mwenesi attend court and the orders given and 10/11/2016 when the application was drafted, to have been able to stop it from lodging the application. To this court a period of 50 days is not far from being inordinate. However that is not the only reason to determine the application even as it is apparent that no explanation has been preferred why that length of time lapsed without any steps being taken.

10. The next question, beyond the consideration of the reasons for delay, is the nature of the case sought to be pursued and the possible prejudice the applicant will have to contend with if the leave is not granted. That to this court is the all-important and very weighty consideration. It is considered weighty and all important because the core duty of the court is to determine disputes in a fair even and proportionate manner devoid of technicalities so that no party leaves the court discontent that it has been unjustly denied his day in court. That test however must be an objective test weighed on the material. Presented as to show how arguable the case is likely to be.

11. According to the Records of this file, Mr. Mwenesi did on the 28/10/2015 inform the court that he had instruction to concede to an application seeking joinder of the 2nd defendant to the suit. Pursuant to that joinder the plaint was amended and the second defendant made a party to the suit.

12. I take it that the moment that amendment was done the pleadings were opened, at least for the 2nd defendant, who todate has the right to file a defence if it wishes. I say so noting that since the filing of the amended plaint and the service revealed to court by Mrs. Mwenesi to have been on the 16/9/2016, there has never been a request for judgment. With that state of affairs one wonders the necessity to insist on proceeding with the application seeking to set aside the default judgment of 20/5/2013.

13. I am in no doubt that if the parties and counsel were to answer to their obligation to court under section 1A(3) of the Civil Procedure Act, there would be no need to seek to challenge the directions of 21/9/2019 which can only be seen as intended to move the matter towards its conclusion. I see no determination in the directions given on 21/9/2017 as can amount to determine any substantive right between the parties. Those orders were merely a tool the court adopted to help it chart a path to lead the matter its desired destination. And I hold the view that to grant leave would be counter the court's duty to have this matter determined in a timely and proportionate manner.

14. Although, it remains a strong thing to halt a party from proceeding to the appellate court, in this case, I see no arguable point to be urged there which cannot be urged here noting that as at today pleadings remain open. I may only reiterate that in my view to accede to the request by the defendant in this application will not do justice but would be an abdication of courts' duty to avoid delay in the dispute resolution. Such would affront our new found jurisprudence grounded on the constitution that justice shall not be delayed.

15. I find no merit in the application and therefore I decline to grant leave to appeal with the inevitable consequence that there would be no purpose gained by enlarging time to lodge a notice of appeal.

16. I reiterate the directions of 21/9/2016 and direct that the parties attend the Registry at the earliest opportunity and take a date for hearing of the suit.

17. I order that the defendant/applicant pays to the plaintiff/Respondent the costs of the application dated 10/11/2016.

Dated and delivered at Mombasa this 20th day of April 2017.

HON. P. J. O. OTIENO

JUDGE

20/4/2017

Before P.J.O Otieno J

Court Asst. – Bancy

In the presence of:-

Mr. Muyala for Buti for plaintiff

No appearance for the defendant

Ruling delivered.

Hon. Justice P. J. O. Otieno

20/4/2017