



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI CIVIL DIVISION
CIVIL APPEAL NO. 26 OF 2017

JOHN KAHORO GAKENIA.....APPELLANT/APPLICANT

VERSUS

SHAMSHER LIMITED.....RESPONDENT/RESPONDENT

RULING

1. This is a ruling on an application by Notice of Motion dated 27th January, 2017 for stay of proceedings pending the hearing and determination of the appeal from the decision of the Magistrate in C.M.C.C No. 4374 of 2013.
2. The grounds in support of the application are set out on the body of the same and in the Supporting and Further Affidavits of JOHN KAHORO GAKENIA. The Applicant filed in the trial court an application on 26th October, 2016 to amend his Defence and the same was dismissed on 14th December, 2016. The Applicant had sought to file a counter-claim and argues that unless this application is granted, the Appeal will be rendered nugatory as the said suit will be heard ex parte to his detriment.
3. This Application is opposed by the Respondent vide a Replying Affidavit of Rahim Samji dated 24th February, 2017 on the grounds that it is misplaced having being brought under **Order 42 Rule 6** of the Civil Procedure Rules which deals with stay of execution pending appeal and not stay of proceedings.
4. The court has considered the application, the affidavits on record, and the submissions made by Counsels for both parties as well as the authorities cited and the law applicable on the same. This application is brought under Order 42 rule 6 of the Civil Procedure Rules which I am alive to. The provisions of **Order 42 rule 6** of the **Rules** are straight forward and they only apply to applications for stay of execution of a decree or order issued by a court pending hearing of an appeal but the same does not apply to applications for stay of proceedings such as the one before the court. It is apparent on the face of the application and from the submissions made by the Appellant that, he was operating on the mistaken belief that the conditions prescribed in **Order 42 rule 6** are also applicable to applications for stay of proceedings which is not the case.
5. Therefore, I am persuaded to consider the relevant factors which will guide the Court in making its decision in this case and which factors I will infer from the statements of **Ringera J** (as he then was) when he was confronted by a similar application in the case of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** 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 interest of Justice the sole question is whether it is in the interest 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 or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, 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 expeditiously”

6. From the above extract, the main principles for consideration in granting staying of proceeding are;

- (a) Whether the application was filed expeditiously ;
- (b) Whether the applicant has established that he/she has a prima facie arguable appeal; and
- (c) Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.

7. Looking at the timelines and considering the provisions of Order 50 rule 4 of the Civil Procedure Rules which provides that “*Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) amending, delivering or filing of any pleading or the doing of any other act* ” provided that this rule shall not apply to any application in respect of a temporary injunction. It is clear that the application herein does not fall within that exception, meaning that the prescribed period did not run and therefore it is to be excluded in computation of time. In this regard the court finds that the application herein was filed timeously.

8. On whether the Appellant has an arguable Appeal, the court notes that the Appellant did not submit on this issue. It was merely stated that the appellant has an arguable Appeal and it was left at that. On the part of the respondent, it was submitted that the counter-claim sought to be introduced by the Appellant is time barred as the cause of action arose more than three years before the application to amend the defence was brought.

I appreciate the fact that this court is not entertaining the Appeal at this juncture but as a legal requirement, the Appellant was under a duty to satisfy the court that he has an arguable Appeal. This was not done. In the premises aforesaid, this court finds that the appellant’s Application has not met the threshold required in an Application of this nature. The same is dismissed with costs to the respondent.

It is so ordered.

Dated, signed and delivered at Nairobi this 28th day of June, 2017.

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L. NJUGUNA

JUDGE

In the presence of

..... ***For the Appellant.***

..... ***For the Respondent***