



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 137 OF 2016

CHARLES JUMA.....APPELLANT

VERSUS

P M N and E M M(Minor suing on their own

Behalf and as the Administrators of the Estate

of the late A N M).....RESPONDENT

RULING

The Application

The application before the court is a Notice of Motion dated 17th December 2016, filed by the Appellant, seeking orders that there be a stay of proceedings in **Kangundo CMCC No. 60 of 2015 – P M N and E M M (Minor suing on their own Behalf and as the Administrators of the Estate Of the late A N M) vs Charles Juma**, pending the hearing and determination of the appeal filed herein.

The Appellant's grounds are set out on the face of the Notice of Motion and in a supporting affidavit and Supplementary affidavit sworn on 17th December 2016 and 16th January 2017 respectively by Maureen Andeje, the Claims Director at Directline Assurance Company Limited, who are the insurers of motor vehicle registration number KAE 076Y at whose instance the claim is being defended. Kairu & McCourt Advocates for the Appellant also filed submissions dated 20th April 2017.

The main ground is that on 18th November 2016 the Appellant called a police officer from Kangundo Police Station to testify in the trial Court, which police officer was stood down by the trial magistrate, and the Defence were forced to close their case as the other witnesses had not arrived in Court. In addition, a judgment date given for 20th January 2016 after parties were directed to file submissions. The Appellant who was the defendant in the trial Court has appealed the said ruling delivered on 18th December 2016, and avers that unless the stay orders are granted, his appeal will be rendered nugatory and he will be greatly prejudiced. The Appellant annexed a copy of his Memorandum of Appeal.

The Appellant relied on Article 159 of the Constitution on the mandate of the Court to administer justice without undue regard to procedural technicalities, and Article 50 on the right to a fair trial. Reliance was also placed on section 1A of the Civil Procedure Act, and the decisions in **Christopher Ndolo Mutuku & Another vs CFC Stanbic Bank Limited (2014) eKLR**, and **Hashmukhlal Virchand Shah & 2 Others vs Investment & Mortgages Bank Limited (2014) e KLR** for the position that there are no limits or restrictions on the court's discretion to stay proceedings, and that the main concern of the court is to do justice to the parties.

Lastly, the Appellant contended that the orders against which he seeks leave to appeal are appealable as of right under the Civil Procedure Act and Civil Procedure Rules.

The Response

The Respondents opposed the Appellant's application in a Replying Affidavit sworn on dated 10th January 2017 by James Ndungu, their Advocate, wherein it was urged that the Appellant's application is fatally defective as it has been brought under the wrong provisions of law, as Order 12 Rule 7 of the Civil Procedure Rules provides for setting aside of judgments and no judgment has been entered in the lower court matter; Order 22 Rule 22 provides for the stay of execution of decree and there is no decree has been obtained in the lower court; and Order 42 Rule 6 provides for stay of execution pending an appeal while what is sought to be stayed are lower court proceedings.

The Respondents gave an account of the proceedings in the trial Court leading to the ruling given on 18th November 2016, and averred that the trial magistrate gave the Appellant's advocates a fair hearing, an opportunity to advance their case, and the prejudice suffered by the Appellant will be purely their own doing. Further, that the Respondents will be prejudiced if the application is granted as it will hinder the just and expeditious disposal of their suit.

The Respondents Advocates, S.N. Ngare & Co Advocates, filed submissions dated 24th March 2017 wherein it was further urged that the criteria for grant of stay of proceedings as set out in **Chris Munga Bichage vs Richard Nyagaka Tongi & 2 Others (2013) e KLR** had not been met, as the Appellant had not demonstrated that the intended appeal is arguable, and that if the application is not granted the appeal will be rendered nugatory. It was contended in this respect that the appeal is not arguable as the order from which the Appellant has appealed do not fall within the provisions of section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules from which an appeal lies as of right, and the Appellant ought to have sought leave to appeal.

The Issues and Determination

I have read and carefully considered the pleadings and submissions filed. The issue before the Court is whether the proceedings of the trial Court in **Kangundo CMCC No. 60 of 2015 – P M N and E M M (Minor suing on their own Behalf and as the Administrators of the Estate Of the late A N M) vs Charles Juma**, should be stayed pending the hearing of the appeal herein.

I note in this regard that the failure to cite the applicable provisions of the law is not fatal to the application herein for two reasons. Firstly, this Court is now enjoined by Article 159(2)(d) to dispense substantive justice and not to be unduly fettered by procedural technicalities. Secondly, the applicable law on stay of proceedings is not clear cut and no express provisions apply as unlike the provisions on stay of execution that are found in Order 42 Rule 6 of the Civil Procedure Rules.

The legal considerations to be applied in an application for stay of proceedings have been laid down in various judicial decisions, and particularly by **Ringera J.** (as he then was) in **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** wherein it was held as follows:

“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

The courts discretion in deciding whether or not to grant stay of proceedings is thus to be guided by the

main principle of the interest of justice, as determined by three main factors;

- a) Whether the applicant has an arguable appeal.
- b) Whether the application was filed expeditiously, and
- c) *The need for expeditious disposal of the cases and optimum utilization of judicial time.*

The Respondents have in this respect argued that the Appellant has no arguable appeal as no leave to appeal was granted to him in the trial Court. Section 75 of the Civil Procedure Act provides as follows as regards orders from which appeals lie:

(1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted—

(a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;

(b) an order on an award stated in the form of a special case;

(c) an order modifying or correcting an award;

(d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;

(e) an order filing or refusing to file an award in an arbitration without the intervention of the court;

(f) an order under section 64;

(g) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;

(h) any order made under rules from which an appeal is expressly allowed by rules.

(2) No appeal shall lie from any order passed in appeal under this section.

It is not contested in the present application that leave was not granted to the Appellant to appeal the ruling given by the trial Court on 18th November 2016. I note in this regard that Order 43 (1) (i) of the Civil Procedure Rules provides that an appeal shall lie of right from sanctions against witnesses and parties in certain cases made pursuant to Order 16, rules 10, 12 and 18 of the Civil Procedure Rules. In particular Order 16 Rule 18 provides as follows:

“Where any party to a suit present in court refuses, without lawful excuse, when required by the court, to give evidence or produce any document there and then in his possession or power, the court may pronounce judgment against him or make such order in relation to the suit as it thinks fit.”

A perusal of the pleadings shows that the ruling by the trial Court on 18th November 2016 was made after the Appellant failed to produce the investigating officer to testify in non-compliance with previous directions by the Court, and in my view therefore falls within the ambit of Order 16 Rule 18 and can be appealed from as of right.

I therefore find that to the extent that the Appellant is allowed by law to call such witnesses as he

considers necessary for his defence, he has an arguable appeal. In addition if proceedings in the trial Court are not stayed, the Appellant's appeal will be rendered nugatory as judgment will be delivered in the trial Court without the benefit of his evidence. This eventuality would not only prejudice the Appellant, but would also militate against the promotion of substantive justice that is now required to be dispensed by Courts under Article 159 of the Constitution. The Respondents will also have the opportunity to challenge any such new evidence in the trial Court in the event that the Appellant's appeal succeeds, and will not be prejudiced in this regard.

These findings notwithstanding, the Court also notes that the proceedings in the trial Court were at an advanced stage, and it is in the interests of justice that no undue delay is caused in the finalization of the said case. The necessary conditions will be therefore be imposed by the Court to avoid any prejudice to the Respondents in this regard.

The order that accordingly commends itself to me is that the Appellant's Notice of Motion dated 17th December 2016 is allowed on the terms that there shall be a stay of proceedings in **Kangundo CMCC No. 60 of 2015 – P M N and E M M (Minor suing on their own Behalf and as the Administrators of the Estate Of the late A N M) vs Charles Juma**, pending the hearing and determination of the Appellant's appeal, on the condition that Appellant shall prosecute his appeal within six (6) months from the date of this ruling, failing which the stay orders herein shall stand vacated.

The costs of the said Notice of Motion shall follow the appeal.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 27th day of June, 2017.

P. NYAMWEYA

JUDGE