



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL DIVISION

CIVIL APPEAL NO. 57 OF 2017

ELDORET EXPRESS LTD.....APPELLANT

VERSUS

ZACKAYO WAMUKOYA SEMBEH.....RESPONDENT

RULING

Introduction

1. By way of the notice of motion dated 28.04.2017 brought pursuant to the provisions of order 46 Rule 6 and order 5 rule 6 of the Civil Procedure Rules 2010 and Section 3A and 79(a) of the Civil Procedure Act, the applicant/appellant seeks for a stay of execution of the judgment and decree in Kakamega CMCC No. 72 of 2012 – ZACKAYO WAMUKONYA SEMBEH – VS – ELEDRETE EXPRESS LTD issued on 08.03.2017. The appellant also seeks to file his appeal from the Judgment and decree in the above case out of time and is asking for a stay of execution pending the lodgment, hearing and determination of the appeal.

2. The application is premised on the grounds set out on the face of the application and supported by the affidavit of Omondi Okoyo shem an Advocate of the High Court of Kenya.

The Response

3. The application is opposed. There is the replying filed affidavit on the 29th May, 2017 by one Mukisu Mukoyandali an Advocate of the high court of Kenya. He depones that the application has been brought solely to delay the cause of justice and that there is no competent appeal upon which the application can be entertained. He maintains that the respondent is a man of straw and will suffer great prejudice if the appellant's prayers are granted/allowed.

4. He depones that the appellant and his counsel are indolent and should not be allowed to take advantage of their wrongful acts to defeat the cause of justice.

Submissions

5. The application herein was canvassed by way of written submissions which the parties herein filed and exchanged. In his submission counsel for the appellant makes mention of Section 79(a) of the Civil Procedure Act Cap 21 on when the time to file an appeal starts running and he states that the said time stops the moment the lower court certifies a decree or order.

6. That from the date of such certification an appeal should be filled within 30 days. He adds that the law provides a leeway to filing an appeal and that is when there is shown sufficient cause as to why it wasn't filed within the time prescribed.

7. He has relied on the case of GERALD M'LIMBINE – VS- JOSEPH KANGANGI 2009 eKLR to buttress why he has attached the memorandum of appeal together with the application herein.

8. He has also laid emphasis on the prerequisites for granting stay of execution as laid out under order 42 Rule 6 of the Civil Procedure Rules 2010. He adds that the applicant herein will suffer substantial and irreparable loss because if the decretal sum is paid to the respondent he may be unable to repay the same since he has not revealed his financial status.

9. He submits that they are ready to deposit the decretal sum in court within forty five(45) days. In their submissions the respondents maintain that the application is bad in law and incompetent as it is being entertained in a Civil Appeal Nol. 57 of 2017 whereas the judgment being challenged was arrived at on 8th March, 2017. He argues that the appeal was therefore filed out of time and without the leave of the court and should be dismissed. He adds that the said application is brought under wrong and/or irrelevant provisions of the law. He could under that the allegation that the responding is a under of star has not basis.

Determination

10. Before this court can determine the substantive issues in the application it will be important to iron out a few issues as raised by counsel for the respondent. The 1st issued being hat the application has been brought in as Civil Appeal No. 57 of 2017 which means that the appeal was filed out of time and without leave of the court. The appellant ought to have filed a miscellaneous application in order to usher in his appeal if the said miscellaneous application was to be allowed. Having not done that and also by bringing the application under the wrong provisions of the law which provisions totally provide for arbitration award I find that the application is not properly before this court. The appellant should have at the earliest opportune time filed a supplementary affidavit to make a clarification of the errors which are glaring and cannot be cured by this court.

11. For the above reasons I find no merit on the said application and the same is dismissed with costs to the respondent.

Orders accordingly

Ruling delivered, dated and signed in open court at Kakamega this 27th day of June 2017

RUTH N. SITATI

JUDGE

In the presence of;

.....Mr. Elungata for Omondi (present).....For appellant

.....Mr. Mukisu - absent.....for Respondent

.....Polycap.....Court Assistant