REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO.114 OF 2011

MORDEKAI MWANGA NANDWA ..... APPELLANT

VERSUS

C.F.C. STANBIC BANK LTD ..... RESPONDENT

RULING

On 8th July 2011 *Hon. P.N. Areri Resident Magistrate* at Kakamega dismissed the appellant's suit being *CMCC No.309 of 2009*. Aggrieved by that decision, the appellant lodged a memorandum of appeal to his court dated 1st August 2001 and thereafter, filed an application for stay of execution pending the hearing and determination of the appeal. The application was finally heard and on 31st October, 2013 this Court *(Dulu, J.)* granted stay of execution. The learned Judge directed the appellant to ensure that the appeal was heard during the year 2014. That did not happen.

By a chamber summons dated 14th March, 2015 brought under *sections 3A, 3B* and *79* of the Civil Procedure Act (Cap 21) laws of Kenya and filed in court on 20th April 2015, *CFC STANBIC BANK LIMITED*, (the appellant), moved this court to have the memorandum of Appeal filed by *Mordekai Mwnga Nandwa*, (the appellant), struck out with costs of both the application and the appeal itself. The chamber summons was no supported by any affidavit but was said to be based on some ten (10) grounds. According to the applicant, the appellant filed his memorandum of appeal on 1st August, 2011, from a decision of the trial court delivered on 8th July, 2011. Subsequently, the appellant filed an application for stay of execution pending appeal which was heard and the court ordered that the appeal be heard during the year 2014. Thereafter on 25th September, 2014, the lower court file together with typed proceedings was forwarded to this court but to-date the appellant has not taken any steps to have the appeal heard or serve the record of appeal on the respondent/applicant. The applicant therefore says that it appears the appellant has lost interest in the appeal which has highly prejudiced the appellant's right to proceed with execution. The applicant complains that the appellant has no justifiable reason for his failure to comply with orders of the court to prepare the appeal for hearing. The applicant therefore feels it is time the memorandum of appeal was struck out to bring this matter to a conclusion.

The respondent filed a replying affidavit sworn on 3rd July, 2015, and filed in court on the same day in opposition to the application. The respondent in a nutshell says that he and his counsel were not to blame for the delay, that they applied for copies of proceedings and paid for them timeously but proceedings were not supplied in time. And when the proceedings were finally supplied, they were incomplete thus making it difficult to file a record of appeal with incomplete proceedings. The respondent further says that they were only supplied with exhibits on 2nd July, 2015, and they have since filed a record of appeal albeit with incomplete proceedings. He therefore says that it is not in the interest of justice to strike out the memorandum of appeal at this stage.

The application was ordered to be disposed of by way of written submissions and both parties have filed their submissions which the court has duly considered.

The applicant has sought to strike out the memorandum of appeal and as a consequence, this appeal, on the ground that the respondent has not taken steps to have the appeal heard as ordered by this court (*Dulu J.)* on 31st October, 2013. On that day the court (Dulu, J.) granted a stay of execution pending appeal as follows:-

> *"I allow the application and grant prayer 3. However the applicant should ensure that the appeal is heard within the year 2014.*

That is the order the applicant seeks to rely on and have the memorandum of appeal struck out. The applicant has said that the lower court file was forwarded to this court on 25th September, 2014, through the Deputy Registrar of this court. The applicant further contends that since proceedings were ready by that date, the respondent ought to have prepared the record of appeal and set down the appeal for hearing. The respondent on his part says that he is not to blame since it is the court that delayed in finalising proceedings.

First and foremost, the applicant has moved this court by way of chamber summons. I doubt if that is proper. Applications are governed by *order 50* of the Civil Procedure Rules, 2010 under the heading '*Applications'*. Rule 1 of that order provides:-

> *"All applications to the court shall be by motion and shall be heard in open court unless the court directs the hearing to be conducted in chambers or unless the rules expressly provide."*

It is clear from the above rule that all applications to court unless otherwise provided, must be by way of motion and not otherwise. The applicant having chosen to move the court by way of chamber summons, has violated clear rules of procedure which would make the application incompetent and subject to striking out. However it is important that this court disposes of the application on merit rather that striking it out at this stage.

This is an appeal from a decision of the subordinate court. *Section 79B* of the Civil Procedure Act (cap 21) Laws of Kenya provides as follows:-

> *"Before an appeal from a subordinate court to the High Court is heard, a Judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of the decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily.*

Appeals to the High Court are governed by *order 42* of the Civil Procedure Rules. Rule 11 thereof provides as follows:-

> *"Upon filing of the appeal the appellant shall within thirty days cause the matter to be listed before a Judge for directions under section 79B of the Act.*

According to *Rule 12*, if the Judge does not reject the appeal summarily under *section 79B* the appeal is admitted to hearing and the registrar is required to notify the appellant to serve the concerned parties with the memorandum of appeal after which the matter is supposed to be fixed for directions under *rule 13*. However before the Judge allows the appeal to go for hearing, he is to satisfy himself that the appeal complies with *rule 13(4)* and contains the documents that must be in the appeal. Compliance with the above rules opens the gate for preparation of the appeal, for eventual hearing..

The applicant has said that the lower court file was transmitted to the High Court on 25th September, 2014. He has not however told the court when, if at all, the appellant was notified by the registrar to file the record of appeal as required so as to trigger the process of preparing the appeal for hearing.

It is true that the Judge ordered the appellant to ensure that the appeal was heard within 2014, but the appeal had to go through the process as provided for under *order 42* of the Civil Procedure Rules. It is also clear that the lower court's record was not ready until 25th September, 2014, and I have not been told that the appellant ignored any orders or direction from the registrar to prepare the appeal for directions. Moreover *order 42 rule 35* is clear and provides as follows:-

> *"1.) Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant. The respondent shall be at liberty either to set down the appeal for hearing or to apply for summons for its dismissal for want of prosecution.*
>
> *2.) If, within one year after the service of the memorandum of appeal the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a Judge in chambers for dismissal."*

According to the record the appeal has not been admitted to hearing and directions have not been taken pursuant to *rule 13.* Only then can the applicant elect to have the appeal dismissed for want of prosecution. Alternatively the registrar could place the file before a Judge for dismissal of the appeal if it was not set down for hearing within one year.

The respondent has said that he has now filed a record of appeal and that the appeal should be allowed to proceed to hearing instead of being struck out. Indeed I have seen a copy of the memorandum of appeal on record. The appeal arises from a decision of the lower court in which the dispute involves a chartels mortgage in form of a motor vehicle which is threatened with repossession against which this court has granted stay of execution. The applicant has on the other hand sought the exercise of this court's discretion in striking out the memorandum of appeal. There is no doubt that the appeal was filed in time. The only complaint being that it has not been processed for hearing.

Striking of pleadings or documents is a draconian act that courts should be slow in taking to alleviate hardship on the parties. Whereas it is true that *order 42* rule *13* has not been complied with which has delayed the appeal moving forward to hearing, the discretion to strike out appeals or pleadings for that matter should be exercised sparingly and judicially and only in cases which cannot be mitigated. I am of the view that this court should have the latitude to do substantial justice rather than rush to strike out the memorandum of appeal. The prejudice that will result from such an act is much more than allowing the appeal to go to hearing. That is what the overriding objective embodied in *sections 1A* and *1B* of the Civil Procedure contemplates; that is just, expectations and proportionate determination of disputes where the court endeavours to do substantial justice.

The respondent may not have moved with speed to have this appeal heard but going by the applicant's own admission, the proceedings for the lower court were forwarded to this court on 25th September, 2014, it is not possible that the appeal could have been heard between then and December, 2014. There is now a record of appeal and in my considered view, the appeal can now move forward to hearing.

In the words of *Sir Georges, CJ* in <u>*Essanji & Another vs Solanki*</u> [1968] EA 218 at page 224:-

> *"The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that error and lapses should not necessarily debar a litigant from the pursuit of his rights."*

I am well guided by the words of the learned Chief justice. The core business of courts is to do justice and it is important that courts allow parties to have their day in court if the omission is such that it causes no greater prejudice to the other side.

For the foregoing reasons I am disinclined to allow this application. Consequently the chamber summons application dated 14th March, 2015, is hereby dismissed. I however make the following orders:

(1) The appeal is hereby admitted.

(2) The appellant do serve the record of appeal on the respondents immediately and in any event not later than thirty (30) days from the date of this ruling.

(3) The appeal be mentioned for directions on 2rd March, 2016.

(4) Costs of the application to abide by the result of the appeal.

Dated and delivered Kakamega this 26th day of January, 2016.

E.C. MWITA

JUDGE