



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL CASE NO. 181 OF 2010

SAAREL INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

PYRAMID CONSTRUCTION LIMITED.....1ST DEFENDANT

KENYA RURAL ROADS AUTHORITY.....2ND DEFENDANT

RULING NO. 2

1. The plaintiff is aggrieved by the order dismissing the suit for want of prosecution. The order was made on 18th November 2014. The plaintiff lodged a notice of appeal on 25th November 2014. In the meantime the plaintiff has filed a notice of motion dated 15th January 2015. The motion is expressed to be brought under sections 1A, 1B and 3A and 95 of the Civil Procedure Act; Order 42 Rule 6, Orders 51 and 52 Rule 4 of the Civil Procedure Rules 2010.
2. At the hearing of the motion, learned counsel for the plaintiff abandoned prayers 1, 2 and 3 of the motion. The remainder of the prayers is two-fold: first that the J.N. Njuguna & Company Advocates (named in the motion as the 3rd respondent) do deliver to the plaintiff's counsel the particulars of the joint interest earning account held in trust for the litigants in the names of Mwinamo Lugonzo & Company Advocates and J.N. Njuguna & Company Advocates. Secondly, that that the respondents be restrained from liquidating the monies in that account until the hearing of the appeal.
3. The application is supported by a deposition of Paul Suter, a director of the plaintiff. He avers that pursuant to an order made on 3rd August 2012, the 2nd defendant was required to deposit Kshs 5,300,000 into a joint interest earning account of Mwinamo Lugonzo & Company Advocates and J.N. Njuguna & Company Advocates. J.N. Njuguna & Company are the former advocates of the plaintiff. Their relationship floundered; and, the plaintiffs appointed new counsel. The firm of J. N. Njuguna filed client-advocate bills of costs against the plaintiff. The plaintiff is thus apprehensive that since the suit has been dismissed, the monies in the account may be released to the respondents to the detriment of the plaintiff. It is contended that the action would render the appeal nugatory. The plaintiff avers that it will abide by any terms ordered by the court.
4. The motion is contested. There is filed grounds of opposition by the 1st defendant dated 19th January 2015. The respondents' case is that there has been laches; that there is no order capable of being stayed; that application lacks merit; and, that it is only fair and just that the 1st defendant have access to the funds in the account. The 2nd and 3rd respondents did not file a reply or attend

court.

5. On 28th October 2015, learned counsels for the plaintiff and 1st defendant made brief oral submissions. The 1st defendant relied on a list of authorities filed on 20th January 2015. As I have stated the 2nd and 3rd respondents did not file a reply or attend court. I have considered the notice of motion, the grounds of opposition and rival submissions.
6. I am satisfied that the plaintiff lodged a notice of appeal on 25th November 2014. For purposes of Order 42 Rule 6 (4), the filing of the notice constitutes an appeal. The court has discretion to grant a stay pending appeal. The rationale is *to see that the appeal, if successful, is not rendered nugatory*. See Wilson v Church (No. 2) 12 Ch D [1879] 454 at 458, Butt v Rent Restriction Tribunal [1982] KLR 417 at 419, Attorney General v Emerson and others 24 QBD [1889] 56 at 59, Madhupaper International Limited v Kerr [1985] KLR 840 at 846.
7. I note that the applicant abandoned prayers 1, 2 and 3 of the motion. One of the *abandoned* prayers was for *stay* of the dismissal order made on 18th November 2014 pending the hearing of the appeal. I think the plaintiff was well advised to withdraw that prayer. The order of dismissal was a negative order; it was not amenable to stay. See Samross Investments Limited v KCF Company Limited, Eldoret High Court Civil Case 95 of 2001 (unreported). There is thus no application for stay before the court as contemplated by order 42 of the Civil Procedure Rules 2010.
8. The present motion falls more within the genre of *preserving* the subject matter of the appeal. It can thus only be anchored upon the inherent jurisdiction of the court to do justice under sections 3A and 63 of the Civil Procedure Act; or, the overriding objective to do justice under article 159 of the Constitution as read with sections 1A and 1B of the Civil Procedure Act.
9. For starters, there is *no* suit before the High Court: the suit was dismissed. Order 52 Rule 4 of the Rules cited by the plaintiff empowers the court, where an advocate-client relationship has been terminated to order the advocate to render an account. That cannot be done in this suit. The disputes over fees or contract between the plaintiff and its former lawyers, J. N. Njuguna and Company, belong to another forum under the Advocates Act as read with Order 52 of the Civil Procedure Rules. I do not also see how section 95 of the Civil Procedure Act cited by the plaintiff would come to his aid in this matter. That section deals with power of the court to extend the time for doing certain acts prescribed by the Act. There is no such prayer before the court.
10. The present motion was brought to court on 15th January 2015. The notice of appeal was filed within time on 25th November 2014. The impugned ruling was delivered on 18th November 2014. There was thus a delay of nearly *two months* before presenting the motion. The delay has *not* been explained. Order 42 Rule 6 (2)(a) requires the motion to be filed *without unreasonable delay*. When delay is established, unless it is well explained, it is deemed to be inexcusable. See Allen v Mc Alpine & Sons Ltd [1968] 1 All ER 543, Ivita v Kyumbu [1984] KLR 441.
11. The deposit made into court of Kshs 5,300, 000 in the names of the two firms of advocates was by the 2nd defendant. The plaintiff admits it was not *its* money. True, the plaintiff had sued the 2nd defendant to pay it the said sum and to restrain it from disbursing it to the 1st defendant. The suit having been dismissed, I am unable to hold that the plaintiff has shown it would suffer *substantial* loss if there are dealings over monies belonging to third parties. To succeed under order 42, the applicant must demonstrate substantial loss. There is no allegation that the 2nd defendant or the two firms of advocates named would not be able to restore the deposit if the appeal is successful.
12. Granted those circumstances, I cannot say that the plaintiff will suffer *substantial* loss as *defined* by the courts in applications of this nature. See Kenya Shell v Benjamin Karuga [1982-88] 1 KLR 1018, Jaribu Credit Traders Ltd v Mumias Sugar Company Ltd High Court, Nairobi, Commercial Case 465 of 2009 [2014] eKLR.
13. For the same reasons, I cannot also say that the appeal will be rendered *nugatory*. See Sirgoi Holdings Limited v Martha Kamunu Eldoret, High Court Civil Appeal 26 of 2014 [2014] eKLR.
14. The upshot is that the plaintiff's notice of motion dated 15th January 2015 is devoid of merit. It is dismissed with costs to the 1st respondent.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 21st day of January 2016

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

No appearance for the plaintiff.

Mr. Mwinamo for the 1st defendant instructed by Mwinamo Lugonzo & Company Advocates & Company Advocates.

No appearance for the 2nd defendant.

No appearance for J. N. Njuguna & Company Advocates (3rd Respondent).

Mr. Lesinge, Court clerk.