



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 197 OF 2015

FRANCIS KAKUI MUINDI.....APPLICANT

VERSUS

URBANUS MUTUNGA MUTUA.....RESPONDENT

RULING

The Application

The application before the court is a Notice of Motion dated 1st December 2015, filed by the Applicant under the provisions of Order 51 Rule 1 of the Civil Procedure Rules, and sections 3 and 3A of the Civil Procedure Act. The Applicant is seeking orders that there be a stay of execution of the proceedings in **Makueni Civil Case No 123 of 2014**. The said application was heard by way of oral submissions made by the parties at a hearing on 23rd December 2015.

The grounds for the application are stated in the said Notice of Motion and the Supporting Affidavit sworn on 1st December 2015 by Faith Mutio Mutuku, the Applicant's Advocate. These are that the parties herein closed their respective cases in the trial court in Makueni Civil Case No 123 of 2014, and proceeded to file submissions, when the Applicant discovered that he had not specifically pleaded special damages. The Applicant thereupon made an application in the trial court dated 2nd November 2015 seeking to amend his Plaint.

The Applicant alleges that the trial magistrate refused him the chance to hear the application, dismissed the same with costs and gave a judgment date of 19th January 2016 for the case in the trial court. The Applicant further claims that he has filed an appeal against the said ruling by the trial magistrate, and that if the proceedings in Makueni Civil Case No. 123 of 2014 are not stayed, his appeal will be rendered nugatory.

Ms. Mutuku, the learned counsel for the Applicant, gave a summary of the proceedings in the trial Court, and submitted that the Applicant had met the requirements for stay; namely that the application was brought expeditiously, that the Applicant has an arguable appeal, and that it is in the interests of justice that the stay is granted. It was urged in this regard that the ruling in the trial Court was given on 24th November 2015 and the Applicant filed his application on 1st December 2015.

Further, that Order 8 of the Civil Procedure Rules allows for amendments of pleadings so long as it is not prejudicial to the other party. It was argued that the reason given by the trial Court was that the case had closed, yet judgment had not been delivered. In addition, that parties had agreed to the production of

documents on the special damages, and had been examined on the same during trial. Lastly, it was urged that the Applicant had incurred the special expenses and had produced supporting receipts during trial, and unless allowed to specifically plead the same stands to lose Kshs 698,630/= special damages if the judgment of the trial Court is delivered on 19th January 2016 as is scheduled.

The Response

The Respondent opposed the Applicant's application in a replying affidavit sworn on 18th December 2015 by his Advocate, Caroline Wanjiru Githae. It is stated therein that the parties in the trial court only agreed to dispense with calling of makers of documents, and that the Applicant did not seek to amend its Pleint to include a claim for special damages in the said Court. Further, that the Applicant had not complied with the trial Court's directions to file submissions by 3rd November 2015, and only sought to extend time for filing submissions. The Respondent also averred that the Applicant discovered the error in his pleadings upon being served with the Respondent's submissions in the trial Court, and that the application herein is intended to defeat its defence in the trial Court.

Mr. Ngechu, learned Counsel for the Respondent submitted during the hearing that there is no arguable appeal presented by the Applicant, as the prayers sought in the trial Court and the provisions of law relied therein were not in tandem. It was argued in this respect that the application in the trial Court was not brought under Order 8 of the Civil Procedure Rules but under the provisions of sections 3A and 63 of the Civil Procedure Act and Order 50 of the Civil Procedure Rules. Therefore, that the trial Court was correct to dismiss the said application to ensure efficient disposal of the court's business. Reliance was placed by the counsel on the Court of Appeal decision in **John Gitonga Njeru vs Tabitha Kamwangi & Another (2006) eKLR.**

It was further submitted that the Applicant's appeal will not be rendered nugatory as the said appeal was filed without leave of the trial Court contrary to the provisions of Order 43 Rules 1, 2 and 3 of the Civil Procedure Rules, and the Applicant will not be prejudiced as he has not filed submissions in the trial Court. Further, that the appeal has no chance of success as the application before the trial Court was to amend the Pleint and not to re-open a case that was already closed.

The Issues and Determination

I have read and carefully considered the pleadings filed. The issue to be determined is whether the proceedings in **Makueni Principal Magistrate's Court Civil Case No. 123 of 2014** should be stayed pending the hearing of this appeal. I note that the applicable law on stay of proceedings is not as clear cut as that on stay of execution that is provided in Order 42 Rule 6 of the Civil Procedure Rules. However, 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.*

In the present application it is not contested that the ruling appealed from was given by the trial Court on 24th November 2015, and that the Memorandum of Appeal and the application herein were lodged on 1st December 2015. The application was accordingly filed expeditiously. What is in contention is whether the Applicant has an arguable appeal and whether it would be in the interest of expeditious and efficient disposal of the case in the trial Court to order stay of proceedings of the same.

The Respondent urged that there is no arguable appeal as the Applicant did not seek leave to appeal, and as he never sought to reopen the case in the trial Court which had closed. Further, that seeking to stay proceedings indefinitely would be contrary to the oxygen principles. The Applicant's counsel on her part conceded that no leave to appeal was sought in the trial Court, and that even though their application in the lower Court may have been brought under the wrong provisions of law, the substance of the application was clear.

Order 43 of the Civil Procedure Rules provides for orders against which appeals shall lie as of right and those where appeals lie with leave of the Court. An application for leave to appeal shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order. In the present application the application before the trial Court dated 2nd November 2015 sought leave to further amend the Plaintiff. I have carefully perused the provisions of Order 43 Rule (1) (f) and (y) of the Civil Procedure Act, and undoubtedly, an appeal lies to the High Court from an order on amendment of pleadings and enlargement of time under order 50 Rule 6 of the Civil Procedure Act as a matter of right.

The Applicant in this regard relied on Order 50 Rule 6 in his application, and even though the Applicant did not cite the provisions of Order 8 of the Civil Procedure Rules in his application, the substance of his prayer was for amendment of his Plaintiff, from which he has a right of appeal. The Applicant's Appeal is therefore competently before this Court.

This Court is also alive to the requirements of the "Oxygen principles" laid out in sections 1A and 1B of the Civil Procedure Act which were relied upon by the Respondent, and which provide that the overriding objective of the Act and the Rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of cases. However, the oxygen **principle** is not a panacea for all ills and applicable in every situation, and a foundation for its application must be properly laid as held in **MSK v SNK [2010] e KLR. The Court of Appeal in the said decision stated as follows:**

"In this regard we believe that one of the principal purposes of the "double 'O' principle" is to enable the Court to take case management principles to the centre of the Court process in each case coming before it, so as to conduct the proceedings in a manner which makes the attainment of justice fair, quick and cheap. On our part, we have no doubt that a process which would result in the exclusion of the directly affected parties, would fly against this timely intervention in the management of the civil justice system in our country. Expressed differently the purpose of the "double O principle" in its application to the civil proceedings is to facilitate the just quick and cheap resolution of the real issues in the proceedings and the court cannot claim to have before it real issues where affected parties have been excluded."

In addition, in **Nairobi Civil Application No. 173 of 2010., Abdirahman Abdi alias Abdirahman Muhumed Abdi v. Safi Petroleum Products Ltd. & 6 others,** the Court of Appeal stated as follows on the effect of Article 159 of the Constitution on the oxygen principle:-

"The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice...In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Sections 3A and 3B of the

Appellate Jurisdiction Act, Cap 9 Laws of Kenya, and later, Article 159 (2) (d) of the Constitution of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion.”

The Applicant has conceded that there were some procedural irregularities in its application in the trial Court but argued that the same did not affect the substance therein. Indeed this Court finds that the spirit of the law is not to dismiss applications merely on the basis of want of form as provided for in Article 159 (2)(d) of the Constitution, and more specifically in Order 51 Rule 10 of the Civil Procedure rules which states as follows:

“(1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application”

In addition the Applicant has shown the prejudice he is likely to suffer in terms of loss of special damages, while the Respondent, other than claiming that the application is for an indefinite stay, has not shown what prejudice he is likely to suffer. This Court in this regard notes that the present application for stay of proceedings of the trial Court is brought in the context of the hearing of an appeal that the Applicant has filed in this Court, and the Applicant in its pleadings stated as much. The application for stay of proceedings is therefore not for an indefinite period as alleged by the Respondent.

This finding notwithstanding, the Court also notes that the proceedings in the trial Court were in the final stages, and it is in the interests of justice that no undue delay is caused in the finalization of the said case.

The orders that commend themselves to me therefore are that the Applicant’s Notice of Motion dated 15th May 2015 is allowed on the terms that there shall be a stay of proceedings in Makeuni Principal Magistrate’s Court Civil Case No. 123 of 2014 pending the hearing and determination of the Applicant’s appeal, and on the condition that Applicant 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 Applicant’s Notice of Motion shall follow the appeal.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 14th day of January, 2016.

P. NYAMWEYA

JUDGE