



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC. APPLICATION NO. 53 OF 2016

MURSAL GULEID

MASLLAH BUS CO. LTD.

HASSAN ATHMAN TUMBO.....APPLICANTS

VERSUS

DANIEL KIOKO MUSAU.....RESPONDENT

RULING

[1] This is a ruling on an application by Notice of Motion dated 22nd February 2016 for leave to appeal and stay of proceedings pending appeal from the decision of the Resident Magistrate in Machakos Chief Magistrates Court Civil Case No. 544 of 2013 *Daniel Kioko Musau v. Mursal Guleid, Maslah Bus Co. Ltd and Hassan Athman Tumbo* made on 9th December 2015.

[2] The grounds of the application are, as set out in the application and supporting affidavit of Sandra Nyakweba sworn on 24th February 2016, principally that –

- a. The trial Court's ruling of 9th December 2015 dismissing the applicants' applications for setting aside a consent judgment and for amendment of the defence, respectively dated 11th September 2015 and 1st October 2015 was delivered in absence of Counsel for both applicants and the respondents, and the advocate for the applicant only came to know about its delivery when the time for filing the appeal had already started running.
- b. The applicant would suffer irreparable loss and damage and the appeal would be rendered nugatory.
- c. The applicant was ready to furnish reasonable security.
- d. The application was filed without any unreasonable delay

[3] In his replying affidavit sworn on 7th March 2016, the respondent on the facts pointed out that the date of delivery of the ruling on 9th December 2015 was given by the court in the presence of counsel for the applicants, and they therefore cannot rely on the fact of delivery of the ruling in their absence in seeking extension of time without giving any reasons for their failure to attend court.

[4] The application is also opposed on matters of law set out in the replying affidavit that –

- a. Leave to appeal out of time cannot be granted as leave to appeal has not been granted by the trial

- court and the decision from which it is sought to appeal is not appealable as of right;
- b. The ruling complained of did not order the plaintiff to take any action and stay cannot be granted against negative orders; and
 - c. The appeal court has no jurisdiction to stay proceedings in the trial court when no application for stay of proceedings had been sought in the lower court.

[5]The Counsel for the parties – Messrs Kairu & McCourt Advocates for the applicants and Messrs. B. M. Mung'ata, advocates for the Respondent - filed written submissions in support of their respective contentions, and ruling was reserved.

Issues for determination

[6] In determining the application before the court the following issues will be considered:

- a. Whether there is a right of appeal as of right or with leave of court only;
- b. Whether stay of proceedings may be granted by an appellate court where it had not been sought in the trial court; and
- c. Whether on the facts, circumstances exist for the grant of leave to appeal out of time and stay of proceedings of the lower court.

Determination

Appeal as of right from the decision of 9th December 2015

[7] It is clear that the appeal from a decision made on an applications for review and for amendment of the defence is an appeal that is available as of right by virtue of section 75 (1) (h) and Order 43 1 (1) (f) and (x) Civil Procedure Rules. Order 43 rule 1 (1) (f) and (x) are in the following terms:

“1. (1) An appeal shall lie as of right from the following Orders and rules under the provisions of section 75 (1) (h) of the Act—

(f) Order 8 (amendment of pleadings);

(x) Order 45, rule 3 (application for review);”

[8] Order 45 (3) provides for decision by the Court on applications for review as follows:

“3. (1) Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application.

(2) Where the court is of opinion that the application for review should be granted, it shall grant the same:

Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.”

[9] Order 41 rule 5 of the Civil Procedure Rules is clear that review of an order or judgment amounts to a setting aside as the hearing of the matter will restart upon grant of an order for review:

“5. When an application for review is granted, a note thereof shall be made in the register, and the court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit.”

I do not agree, therefore, with the contention by counsel for the respondent that the order for setting aside

sought by the applicant in the trial court could only be granted under the inherent jurisdiction of the court, appeal from which decision required leave to appeal.

[10] The application of 11th September 2015 which sought the setting aside of the Consent judgment was expressed to be brought under Order 22 Rule 22 (1) Order 45 Rules 1 and 2, Order 51 Rules 1 and 3 , sections 3, 3A 63 (e) and 80 of the Civil Procedure Act and all enabling provisions of law. The application was however, one substantially for review of the consent judgment. When the trial Court dismissed it in exercise of discretion, the Court was acting pursuant to the provisions of Order 45 (3) (1) of the Civil Procedure Rules that -

“3. (1) Where it appears to the court that there is no sufficient ground for a review, it shall dismiss the application.”

[11] Failure to set out Order 43 rule 3 (1) as one of the ‘enabling provisions’ does not defeat the applicant’s substantive right of appeal which is guaranteed under Order 43 rule 1(1) (x) of the Civil Procedures Rules for determinations of the court on application for review. Under Order 51 rule 10 of the Civil Procedure Rules the failure or mis-description of the provision of law under which an application is based is not fatal to the application –

*“10. (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.”

[12] Neither should a right of appeal be defeated for non-reliance in an application on the correct rule of procedure for which appeal as of right is prescribed by the rules.

[13] Clearly, the applicants had leave to appeal as of right, and consequently no leave to appeal was necessary from the trial court or this court.

Jurisdiction of appellate court to order stay of Proceedings

[14] With respect, it is not correct as submitted by Counsel for the applicant that –

“The issue of whether stay of proceedings should be handled by the appellate court or the trial court is an issue that lacks concrete jurisdiction. The law does not provide for stay of proceedings in the Civil Procedure Act and the Civil Procedure Rules. The court will thus be called to apply its inherent jurisdiction which is preserved under s.3A of the Civil Procedure Act in furtherance of the ends of justice.”

[15] Order 42 rule 6(1) of the Civil Procedure Rules provides for stay of proceedings as well as stay of execution, in clear terms, as follows:

*“6.(1) No appeal or second appeal shall operate as a stay of execution or **proceedings** under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, **and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just**, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”*

The appellate court has concurrent jurisdiction to stay execution and or proceedings pending appeal as with the trial court. There is no requirement that the applicant must have made the application for stay of proceedings in the trial court before approaching the appellate court for the order of stay of the proceedings in the trial court.

[16] The effect of Order 42 rule 6 of the Civil Procedure Rules is simply that an appeal from an order or judgment will not provide automatic stay of the execution of that order or of proceedings in that case unless the trial court or appellate court orders. In my view, while a stay of execution may call for an examination whether the order appealed from is executive or not, it is not so with stay of proceedings which halts the proceedings or further steps in the case pending the appeal from the order or judgment, executive or non-executive pending hearing and determination of the intended appeal. In both instances, of course, the primary consideration is that the appeal, if successful, should not be rendered nugatory.

[17] It is not inconceivable that following a dismissal of an application for setting aside of a consent order, which is non-executive in terms, but which leads to the next steps towards judgment in the case, the applicant would be prejudiced and the appeal rendered nugatory if he eventually succeed in having the consent order set aside on appeal. The question therefore becomes whether the appeal has prospects of success, or is it one that is frivolous and unarguable.

On the merits of the application

Leave to file appeal out of time

[18] The applicant had 30 days to lodge an appeal from the decision of the Magistrate's Court made on 9th December 2015. In computing the 30 days the period between 21st December 2015 and 13th January 2016 was to be discounted in accordance with the provision of Order 50 rule 4 of the Civil Procedure Rules which provides as follows:

“4. Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the **twenty-first day of December in any year and the thirteenth day of January in the year next following**, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act:

Provided that this rule shall not apply to any application in respect of a temporary injunction.”

[19] It would appear that time to appeal lapsed on 1st February 2016. The application for extension of time was filed on 26th February 2016 about 25 days after the expiry of time. I do not consider that a delay for a period of 25 days is inordinate, even if the court disregarded the explanation given by Counsel in submissions that the advocate who held their brief did not inform them of the ruling date. However, it is not the respondent's fault that the applicants were on 28th October 2015 before the trial court represented by an advocate who did not report back to them on the matter of the date for which ruling was reserved. The respondent would, therefore, be entitled of costs, if extension of time is granted.

Ex turpi causa principle

[20] The principle of **Scott v. Brown**. The Court should not enforce an illegality is a judicial policy of general application. Whenever the court is made aware of circumstances that may manifest a crime, fraud or other illegality, the Court should give opportunity to have the matter investigated and a determination thereon made as appropriate. I have always agreed with the principle as enunciated by Lindley, L. J. in **Scott v. Brown, Doering, McNab and Co.**, (1892) 2 QB 724, that:

"No Court ought to enforce an illegal contract or allow itself to be made the instrument of

enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the, evidence adduced by the plaintiff proves the illegality, the Court will not assist him."

[21] I consider that the applicant has an arguable case on the appeal from the decision of the trial court on the issue of fraud by the respondent, and this should be canvassed at the intended appeal, for which leave to appeal out of time should, therefore, be granted.

Orders

[22] Accordingly, for the reasons set out above, I grant the Applicant's Notice of Motion dated 22nd February 2016 in terms of prayers 2, 3 and 5 thereof. The Memorandum of Appeal shall be filed and served within the next 7 days. The Applicant will pay the costs of this application to the Respondents.

DATED AND DELIVERED THIS 30TH DAY OF MARCH 2016.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

No appearance for the Appellant/Applicant

Miss Ombega for the Respondents

Ms. Doreen - Court Assistant.