



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL APPEAL NO. 154 OF 2015

PAUL KIBUGI MUIITE 1ST APPELLANT

EDITH NDETI MUIITE 2ND APPELLANT

VERSUS

NATIONAL BANK OF KENYA LIMITEDRESPONDENT

RULING

The multiple applications in the record before me have clouded the approach the court should take in ensuring that both parties are accorded the justice they deserve.

That notwithstanding, it is noted that the genesis of all the matter presented before me is to be found in CMCC No. 572 of 2003, between National Bank of Kenya Limited as the plaintiff and Paul Kibugi Muite and Edith Muite as the defendants.

The hearing of that cause proceeded ex-parte after the counsel for the defendant failed to attend court at the appointed time because, as the material before me shows he was engaged in a five Judge bench of the High Court. An adjournment sought by counsel who was detailed to hold brief was rejected the trial magistrate.

Subsequently, Judgment was delivered in favour of the plaintiff and execution proceedings initiated.

By a Notice of Motion dated 20th March, 2014, the defendants moved the court for the substantive orders that the ex-parte proceedings and judgment in favour of the plaintiff delivered on August 13th, 2013 together with all consequential order be set aside. Alternatively, upon the setting aside of the Ex-parte judgment, the plaintiff's witnesses be re-called for cross-examination by the defendants and that there be a stay of execution of the ex-parte judgment and decree and the Notice to show cause dated 30th October, 2013.

There was also the prayer that the defendants be granted leave to defend the suit on the basis of the defence filed and provision be made for costs.

The lower court in a ruling made on 26th May, 2014 disallowed the application but reserved the issue of the Notice to show cause as the personal attendance of the defendants was required. The foregoing prompted the filing of Civil Appeal No. 154 of 2015, the Memorandum of Appeal of which is on the record.

Having set out the background above, it is the application dated 10th April, 2014 which addresses the

issues that stand out. Prayers 2 to 5 in that application, except the numbering, are exactly the same as those in the Notice of Motion dated 20th March, 2014 which was heard and determined by Hon. Teresia Ngugi, SP.M on 26th May, 2014. The only prayer that is different is number 6 which seeks leave to appeal out of time the decision of T. Wamae dated 27th July, 2013 and Ruling of Hon. T. Ngugi on 26th May, 2014.

It is not clear from the record why the appellants did not challenge the decision made by two magistrates in the lower court within the time allowed by law.

Whatever the case, the court must look at both sides when addressing the application at hand. There is another application dated 17th August, 2015 by the appellants which sought a stay of proceedings in CMCC NO. 572 OF 2003 until the hearing and determination of the appeal herein. But as of now there is no proper appeal before the court as can be seen clearly from the prayer on the application dated 10th April, 2014 which seeks an order to file the appeal out of time.

It is the appellant's case that the delay in filing the appeal in time was occasioned by failure to obtain the proceedings on time. The record before me does not include the proceedings of the lower court except the ruling of Hon. T. Ngugi dated 26th May, 2014. I am prepared to accept this as the sole reason for the delay in filing the appeal.

Having said so, I am persuaded that leave sought to file the appeal out of time should be and is hereby granted. The record of appeal shall be filed within 30 days of today. There is an interim stay of proceedings in the lower court which shall now be extended until the decision on appeal.

The circumstances in this case call for an order that the appellants shall pay to the respondent all the costs occasioned by the applications.

Orders accordingly.

Dated, signed and delivered at Nairobi this 15th day of March, 2016

A. MBOGHOLI MSAGHA

JUDGE