



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI

CIVIL APPEAL NOS. 165, 166 AND 167 OF 2015

SONY HOLDINGS LTD.....1<sup>ST</sup> APPELLANT  
NAKUMATT HOLDINGS LIMITED.....2<sup>ND</sup> APPELLANT  
KNIGHT FRANK KENYA LIMITED.....3<sup>RD</sup> APPELLANT  
VERSUS  
KEREN BUARON.....RESPONDENT

*(An appeal from the ruling and order of Hon. F. R. Wangila Deputy Registrar*

*delivered and signed at Nairobi on 14<sup>th</sup> April 2015 in Nairobi HCCC No. 16 of 2009)*

**RULING**

1. This ruling is the outcome of the motion dated 8<sup>th</sup> April 2016 taken out by Keren Buaron, the Respondent/Applicant, in which the following orders were sought:

- a. This application be certified urgent and heard on priority.*
- b. The honourable court be pleased to grant leave to the Applicant to appeal against the entire judgement of the court (Hon. Justice Sergon) dated 1<sup>st</sup> April, 2016.*
- c. The honourable court be pleased to enlarge time for filing the Notice of Appeal in the event the period fixed for lodging the Notice of Appeal shall have lapsed when this application is determined.*
- d. The honourable court be pleased to order a stay of further proceedings in the matter, pending the hearing and determination of the Applicant's intended appeal.*
- e. Costs*

2. The motion is supported by the affidavit of George Miyare sworn on the same date. When served with the motion, Nakumatt Holdings Ltd, the 2<sup>nd</sup> Appellant, filed the replying affidavit of John Ngugi while Knight Frank Ltd, the 3<sup>rd</sup> Appellant, filed replying affidavit of Ben Woodhams to oppose the application. When the motion came up for interpartes hearing learned counsels appearing in this matter made oral

submissions.

3. Mr. Miyare, learned advocate for the Respondent/Applicant informed this court that he was only pursuing prayers (b) and (d) and that he had instructions to abandon prayer 5.

4. It is the submission of Mr. Miyare that the Respondent/Applicant requires leave to appeal against the judgement of this court delivered on 1<sup>st</sup> April 2016 pursuant to the provisions of rule 75 of the court of Appeal rules. The learned advocate pointed out that the decision of this court unjustly curtails the Applicant's right to access justice and goes against the overriding objectives of Civil Procedure. It is argued that the decision of this court fetters the jurisdiction and or discretion of the Deputy Registrar to set aside its orders and to do justice. The Applicant argued that he has an arguable appeal which raises weighty/substantial issues of law and fact and the Respondent/Applicant should be allowed an opportunity to ventilate it fairly on appeal. It is further argued that the grant of leave will not prejudice the Appellants/Respondents in any way and that any loss can be compensated by way of damages.

5. Mr. Nganga, learned advocate for Sony Holdings Ltd the 1<sup>st</sup> Appellant, opposed the motion arguing that the same was not supported by the affidavit of the intended Appellant but is instead supported by the affidavit of George Miyare. Mr. Nganga urged this court to find that since there is no competent affidavit in support of the application then the motion is fatally defective. The 1<sup>st</sup> Appellant also argued that it will suffer substantial prejudice in that there is a case hanging over its head. The learned further pointed out that there is no order capable of being stayed.

6. Mr. Musyoki, learned advocate for the 3<sup>rd</sup> Appellant opposed the motion too. He pointed out that the intended appeal arises from an order of the Deputy Registrar therefore the intended appeal will be incompetent hence not arguable. The learned advocate further faulted the Respondent/Applicant for failing to annex to the supporting affidavit the draft memorandum of appeal.

7. Mr. Musyoki further argued that there can only be a stay of taxation but not the decision of this court but since taxation has not commenced then there is no risk of execution taking place.

8. Mr. Mege, learned advocate for the 2<sup>nd</sup> Appellant adopted the submissions of Mr. Nganga learned advocate for the 1<sup>st</sup> Appellant to oppose the motion. Mr. Miyare responded to the submissions of learned counsels for the Appellants arguing that there were no contentious issues in his affidavit but instead he has raised points of law. He argued that there is no strict bar to an advocate swearing an affidavit so long as the same does not raise contentious matters. He also contended that the matters he deposed to are within his knowledge and the application is interlocutory in nature. Mr. Miyare further responded by stating that the motion is competently before this court by virtue of Section 75 of the Civil Procedure Act and also that there was no need to avail a draft memorandum of appeal.

9. Having considered the material placed before this court plus the rival submission together with the authorities cited, it is important to give a short history behind the motion. On 13.3.2014, Hon. F. Wangila learned Deputy Registrar of this court dismissed the Respondents' suit for want of security for costs. Being aggrieved, the Respondent took out the motion dated 26.3.2014 to have the dismissal orders reviewed and set aside. The Appellants opposed the motion by filing preliminary points of law. Hon. F. Wangila heard the Appellant's preliminary objection and had the same dismissed on the basis that they were technical objections. The Appellants were aggrieved and were prompted to file an appeal before this court. This court heard the appeal and in the end agreed with the Appellants.

10. The decision of the Deputy registrar to dismiss the Appellant's preliminary objections was set aside and was substituted with an order upholding the preliminary objections and dismissed the Respondent's application dated 26<sup>th</sup> March 2013. The Respondent is aggrieved by that decision and now intends to proceed to the Court of Appeal. I have already outlined the arguments put forward by both sides over the motion dated 8<sup>th</sup> April 2016. The Respondent/Applicant is basically seeking for two main orders; **first** is an order for leave to appeal to the Court of Appeal against this court's entire judgment delivered on 1.4.2016. **Secondly**, the Respondent/Applicant also sought for an order for stay of proceedings in this

matter pending the hearing and determination of the Respondent'/Applicant's intended appeal. As we speak, the Respondent's suit remains dismissed for want of security for costs. With respect, I agree with the submissions of the learned advocate for the Appellants/Respondents that the only remaining step to take in this suit is to have costs of the suit to be taxed. The process of taxation is conducted by a taxing officer and under a different regime of law and rules. That process has not begun therefore it is premature to make an application for stay of proceedings which have not begun. The judgement delivered by this court on 1.4.2016 simply dismissed the Respondent's motion dated 26.03.2013 thus confirming the orders dismissing the entire suit for want of security for costs. There is no evidence that the suit has been reinstated necessitating the need to stay proceedings.

11. On the question as to whether or not leave to appeal should be granted, it is apparent from the provisions of Section 75 of the Civil Procedure Act that a party must seek for leave to appeal. However under Section 72 of the Civil Procedure Act, the law prescribes the grounds which a second appeal can lie to the Court of Appeal from the decision of the High Court on appeal. Those grounds are enumerated as follows:

**“72 (1) Except where otherwise expressly provided for in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely;**

- a. the decision being contrary to law or to some usage having the force of law;**
- b. the decision having failed to determine some material issue of law or usage having the force of law;**
- c. a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.”**

12. It is clear in my mind that leave to appeal from an order in such proceedings will normally be granted where prima facie it appears that there are grounds of appeal which merit serious judicial consideration. The Respondent/Applicant has stated on the face of the motion that this court's decision is disproportionate and inimical to the overriding objective of Civil Procedure. It is also stated that the decision curtails the Respondent/Applicant's access to justice and contravenes Article 159 of the Constitution of Kenya, in that it is based on technicalities. The Respondent further pointed out that this court's decision restricted the discretion of the Deputy Registrar. Though the Respondent/Applicant did not file a draft memorandum of Appeal as envisaged under Section 72 of the Civil Procedure Act, I am convinced that the Applicant has specifically articulated the intended grounds of appeal proposed to be argued before the court of appeal. I find those grounds arguable.

13. Mr. Nganga has however argued a preliminary point of law which is to the effect that the motion is supported by an affidavit sworn by the Respondent's learned advocate instead of the Respondent in person. Mr. Miyare has stated that the law allows that if the issues deponed are not facts which are in contention. Mr. Miyare pointed out that he has basically raised points of law. With respect, I agree with the submissions of Mr. Miyare that what he has deponed are purely points of law and not facts. However, it is always desirable to let litigants swear in their affidavits information whether they are facts or pure points of law.

14. In the end the motion partially succeeds. The Respondent/Applicant is granted leave to appeal against the decision of this court delivered on 1<sup>st</sup> April 2016. The order for stay of further proceedings in this matter pending appeal is found to be premature, consequently the same is dismissed.

15. In the circumstances of this case I direct that each party meets its own costs.

Dated, Signed and delivered in open court this 20<sup>th</sup> day of May, 2016.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

.....for the Respondent