

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

HIGH COURT MISC. CIVIL APPLICATION NO. 37 OF 2015

EDMOND SHIUNDU ALELE..... APPLICANT

VERSUS

PETER NJOROGE NG'ANG'A..... 1ST DEFENDANT/RESPONDENT

AUTO SELECTION (K) LIMITED..... 2ND DEFENDANT/APPLICANT

RULING

1. Before the Court is an application under Certificate of urgency brought pursuant to sections 1A, 1B, 3A & 75 of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules seeking to have leave granted to the 2nd defendant / Applicant to lodge an appeal against the ruling and order made on 29th April, 2015 in Bungoma CMCC No.58 of 2012, dismissing its application dated 8th April, 2014, secondly pending hearing and determination of the intended appeal there be a stay of the proceedings in the Lower court's matter.
2. The application is supported by the following grounds; that the applicant's case was closed on 1st April 2015 due to absence of a witness; on the 14th of April, 2015 the applicant sought to re-open its case, which application was dismissed; upon refusal the applicant sought leave to appeal, which leave was equally denied, this application has high chance of succeeding and the applicant has a right to a fair hearing as enshrined in the Constitution.
3. The application was supported by the affidavit of L.G. Menezes (now deceased) where he inter alia deponed to facts within his record and acknowledge, there was an admission that his law firm inadvertently failed to inform the applicant of the need to avail a witness at the hearing of the case.
4. The respondent vehemently opposed the application by filing grounds of opposition and several authorities in support. The grounds were that; the application was fatally defective; an afterthought and in breach of Order 19 Rule 3 of the Civil Procedure Rules; litigation must come to an end application is res judicata; no security has been offered; nor demonstration of loss; the application is meant to frustrate the respondent in having his case closed.
5. I have considered the application, and the supporting affidavit, the grounds of Opposition, authorities cited and submissions by the parties. The issue for consideration is whether or not to grant leave for an appeal to be lodged and secondly, whether or not to grant stay pending hearing and determination of the appeal.
6. This Court was not furnished with the proceedings of the lower Court to appreciate the facts of the matter and the reasons given for the denial of the adjournment or indeed the application whose refusal is being appealed from, neither have the parties alluded to reasons if any given by the Lower Court. This court is therefore disadvantaged in this respect.
7. It has been held over time that the right to appeal is a Constitutional right and therefore to deny a party that right would in essence be a denial of ones right of a fair hearing, which right it otherwise guaranteed by the Constitution. It has not been shown that the intended appeal is a sham or is frivolous and all that the applicant is seeking at this point is leave to appeal and a stay pending hearing and determination. I am therefore of the view that the application before court at this point is merited. Let the applicant be accorded an opportunity to ventilate its grievances.

For the above reasons the application is allowed. Costs in the cause.

Dated at Bungoma this 22nd day of September 2015.

ALI-ARONI

JUDGE.