



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 567 OF 2014

ELITE CARS LIMITED.....APPELLANT

VERSUS

TASFABAH MEAZA

T/A MAISAWA CARS & SPAREPART DEALERS.....RESPONDENT

RULING

1. Before me is the Appellant's notice of motion dated 19th December, 2014 seeking the stay of proceedings before the Chief Magistrate's court at Nairobi Milimani Commercial Court Civil Suit No. 2246 of 2013 pending hearing and determination of this appeal. The Appellant also sought costs of the application.
2. The application is based on the grounds set out on the body of the motion and the supporting affidavit of Vincent Rerimoi Chemngorem Koech who is the Director of the Appellant. His contention is that the Respondent filed an application dated 27th June, 2014 seeking to amend the name of the Plaintiff in the plaint, while the Appellant filed its application dated 15th August, 2014 seeking to strike out the plaint on the grounds that it disclosed no cause of action against the Defendant. He stated that in its replying affidavit to the Respondent's application, it was stated that the application was res judicata since the court had in its ruling of 26th June, 2014 stated that it could not distinguish whether the two names (TESFABAH MEANZA and TEFAGABER KASETE TEFAMARIAM) referred to one and the same person. That the court heard both applications and on 16th December, 2014 gave orders allowing the application to amend and dismissed the application for striking out. It is the Appellant's contention that the trial magistrate's ruling of 16th December, 2014 is tantamount to reviewing or varying his earlier orders of 26th June, 2014. He then contended that if the Respondent is allowed to amend its pleadings, this appeal shall be rendered nugatory.
3. The application was opposed by the replying affidavit of TEFAGABER KESETE TEFAMARIAM dated 13th February, 2015. It was contended that the Respondent's application dated 26th June, 2014 sought to strike out the Appellants defence and it was so struck out. That on 6th March, 2014, the Appellant filed an application seeking stay of execution and clarification of the ruling which struck out the defence and it was confirmed that the defence was struck out. That the Appellant filed another application on 11th April, 2014 seeking stay of execution and review and setting aside of the orders of 27th June, 2014. That application was allowed. That on 9th July, 2014, the Respondent filed an application seeking to amend the plaint and the Appellant filed another application dated 15th August, 2014 seeking to strike out the plaint. The two applications were heard simultaneously and a ruling delivered on 16th December, 2014 allowing the Respondent's application and dismissing the Appellant's application. In view of the foregoing, it

- was contended that the Appellant is misleading the court since it was merely granted leave to amend the plaint and that the ruling did not vary the orders of 26th June, 2014.
4. The Respondent also filed grounds of opposition to the application contending that; the prayers sought by the Appellant are untenable, devoid of merit and not available to the Appellant as the entire application and appeal have been overtaken by events and that the granting of the orders sought herein would not be efficacious as this court does not grant orders in vain even if it has the requisite jurisdiction to grant the orders sought.
 5. In the Appellant's submissions, it was argued that the trial magistrate acted ultra vires by allowing an amendment essentially reviewing or sitting on appeal of his earlier decision which found that the names Tesfaber Meaza and Tesfagaber Kasete Tesfamariam were different. That the matter before the trial magistrate was res judicata since the trial court had tackled the issue previously. On the issue of res judicata the Appellant cited the case of **Pop-In (Kenya) Ltd & 3 Others v. Habib Bank AG Zurich (1990) KLR 609** wherein it was held that the plea of res judicata applies not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence, might have been brought forward at the time.
 6. The Respondent on the other hand submitted that courts do not issue orders in vain even if the court is clothed with the requisite jurisdiction and that there is no legal requirement that a plaintiff must file an amended verifying affidavit in the event of a minor, purely formal amendment such as rectifying descriptive labels.
 7. This is an application for stay of proceedings. The decision on whether or not to grant the order is a matter of Judicial discretion to be exercised in the interest of justice. The discretion is unlimited save that it should be exercised rationally. In determining the question, the Court exercises its inherent power under Sections 1A, 1B and 3A of the Civil Procedure Act. In **Halsbury's Laws of England 4th Edition Vol. 37 P. 330**, the learned writers observe as follows:-

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the Court’s general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.”

8. In the case of **Global Tours and Travels Ltd Winding Up Cause No. 43 of 2000 (UR)** it was held that:-

“...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 interests of justice. Such discretion is unlimited save that by virtue of this character as a judicial discretion, it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests 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 the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, 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 timeously.” (Underlining provided)

9. Therefore, in determining whether or not to grant the order for stay of proceedings, this Court ought to consider whether or not the motion has been brought timeously and the appeal is arguable. The ruling the Appellant intends to appeal against was delivered on 16th December, 2014 and this motion was filed on 19th December, 2014, a period of three (3) days. In my view the application was brought timeously. The second principle is the merits of the appeal, I have looked at the memorandum of appeal filed in court on 19/12/14. It cannot be said to be frivolous. It is arguable. Be that as it may, what is being sought is to stay the proceedings in the trial court. I do

not see anything so fundamental that may be breached if the lower court proceedings continue parallel to the appeal herein. It is a serious issue to stay proceedings which leads to backlog of cases. Unless proceedings in a lower court are to cause grave prejudice if they are undertaken, I think a court of law should not lightly halt a legal process through a stay order. I do not think that the current appeal will be rendered nugatory if the proceedings in the lower court are left to proceed. The outcome thereof can be stayed at the execution stage to await the outcome of this appeal. An order for costs in my view, would be adequate compensation. In the circumstances I find no merit in the application. The same is dismissed with costs.

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A. MABEYA

JUDGE

Dated, Signed and Delivered at Nairobi this 18th day of September, 2015.

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JUDGE