



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 82 OF 2012

ABRAHAM MWANGIAPPELLANT

VERSUS

AHMED IBRAHIMRESPONDENT

RULING

The Notice of Motion application dated 29th October, 2012 and expressed to be brought under order 42 rules 6, order 50 rule 6 order 51 rules 1 and 3 of the Civil Procedure Rules 2010 and Sections 3 and 3A of the Civil Procedure Act seeks the following orders

1. Spent
2. That the Applicant be granted leave to appeal out of time against the ruling of Honourable Gesora – Senior Resident Magistrate in Resident magistrate Civil Case Number 2162 of 2008 delivered in Mombasa on 16th November, 2011.
3. An order for stay of proceedings in RMCC No. 2162 of 2008 pending hearing and determination of the appeal.
4. That the memorandum of appeal annexed to the application be deemed as duly filed upon payment of requisite fees.

The grounds are that the Applicant had through a preliminary objection dated the 8th day of May, 2009 sought to have the Respondents plaint struck out as it did not comply with the provisions of order XXXI rules (1) (1) and 2 now order 32 rule 1(1) and 2 of the Civil Procedure Rules.

A ruling was delivered on 16th November, 2011 dismissing the applicants preliminary objection with no orders as to costs. Being dissatisfied with the ruling the Defendant now wishes to appeal.

That on 17th August, 2011, 7th December, 2011, 18th February, 2012, 20th March, 2012 by way of letters the executive officer Mombasa Law Courts was requested for copies of the ruling but the Court file could not be traced.

Further that during the time the Court file was missing the time within which the appeal was to be filed lapsed.

That unless there is a stay of proceedings and leave to file appeal out of time is granted the applicant will be prejudiced as the plaintiffs case would proceed on the premise of defective pleadings that ought to have been struck out and filed afresh.

That the applicant has a good arguable appeal which has high chances of success.

The application is opposed vide grounds of opposition filed and dated 6th November, 2012.

That the application offends order 42 rule 6 of the Civil Procedure Rules.

Further that there is unreasonable delay in bringing the application and no sufficient cause has been shown in bringing the application.

Order 42 rule provides,

***“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.*”**

2. No order for stay of execution shall be made under sub rule (1) unless

(a) The Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant”.

The Appellants in the present appeal had sought by way of a preliminary objection dated 8th May, 2009 to have the Respondents' plaint struck out for reasons of non-compliance with the provisions of order XXXI rule 1 & 2 now order 32 rule 1(1) & (2) of the Civil Procedure Rules 2010.

It is the applicants' contention that the ruling was to be delivered on notice but no notice was served on them. The ruling was later delivered on 16th November, 2011 without notice.

The applicants did make efforts in a bid to find out the outcome of their notice of preliminary objection as evidenced by annexures marked “MKI A” “MKIB & C” and “MKI D”.

These facts are not denied in the grounds of opposition filed by the Respondents in this application.

The applicants rely on **Civil Application No. 336 of 1999 Cut Tobacco Kenya Ltd. -Vs- British American Tobacco (K) Ltd.** where the Court of appeal cited with approval the unreported case of **Leo Sila Mutiso -Vs- Rose Hellen Wangari Mwangi Civil Application No. NAI 255 of 1997** where Court of Appeal held,

“It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are first the length of the delay, secondly, the reason for the delay, thirdly, possibly, the chances of the appeal succeeding if the application is granted, and fourthly the degree of prejudice to the Respondent if the application is granted”.

In the present case a reasonable explanation for the delay has been made. I am further satisfied that substantial loss may be occasioned to the applicant unless the order for stay is granted.

This application has merit and leave to file appeal out of time is granted. Same to be filed and served within twenty one (21) days from today.

There will be a stay order for proceedings in RMCC 2162 of 2008 pending hearing and determination of the appeal.

Costs in the cause.

Ruling delivered dated and signed this **8th** day of **April, 2014**.

.....

M. MUYA

JUDGE

8TH APRIL, 2014

In the presence:-

Learned Counsel for the applicant

Learned Counsel for the respondent Mohamed

Court clerk Musundi

M. MUYA

JUDGE

Court: Photocopies of the ruling to be furnished to the parties.

.....

M. MUYA

JUDGE

8TH APRIL, 2014