



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
HCCC NO. 624 OF 2007

KANYOTTA HOLDINGS LIMITED PLAINTIFF

VERSUS

KENYA SHELL LIMITED..... DEFENDANT

RULING

1. Before me is a motion on notice by the Defendant dated 13th August, 2012 brought, inter alia, under Section 7 of the Appellate Jurisdiction Act and Order 42 Rule 6 of the Civil Procedure Rules. It seeks the extension of time for the filing and serving of the Notice of Appeal from the 28th June, 2012 to 4th July, 2012, leave to appeal against the decision made on 14th June, 2012 and for stay of execution of the order made on 14th June, 2012 requiring the Defendant to give a guarantee from a reputable bank or an insurance bond from a reputable insurance in the sum of Kshs.22,122,835/60 as security.
2. The grounds for the application were set out in the body of the motion as well as in the Supporting Affidavit of Catherine Musakali sworn on 13th August, 2012. These were briefly that the sum of Kshs.22,122,835/60 ordered to be given as security is substantial and the operations of the Defendant may be affected, that due to inadvertent error the Defendant did not file a Notice of Appeal within 14 days as required by law, that the intended appeal will be rendered nugatory unless the proceedings herein are stayed, that the basis for the requirement to give security is outrightly incorrect and that it is just that the proceedings herein be stayed.
3. The Defendant contended that it has a bonafide defence against the Plaintiff's claim, that due to an error on part of the Advocates for the Defendant, a Notice of appeal was filed in another suit **HCCC No.496 of 2008 Chanzu Enterprises –vs- Kenya Shell Ltd on 19th June, 2012** but this suit was overlooked, that when the error was discovered, the Defendant immediately filed the Notice of Appeal and applied for proceedings. Mr. Kiragu, learned counsel for the Defendant submitted that the application for extention of time was caused by an oversight on his part, that there are salient fundamental points to be agitated on appeal and the court should allow them to be so agitated in that court, that the orders sought will advance the cause of justice, that the court should consider that although the application for security was made in March, 2011 on the basis of the Defendant disposing off assets, two (2) years later the Defendant is still here in Kenya doing business and finally that the Defendant has offered security for the grant of the orders. Counsel referred the court to various authorities and consequently urged that the

application be allowed.

4. The Plaintiff opposed the application through the Replying Affidavit of Wachira Muritu sworn on 19th September, 2012 and the written submissions dated 13th December, 2012. The Plaintiff contended that the present application was an afterthought having been filed more than a month after the Plaintiff had filed an application in the Court of Appeal to strike out the Notice of Appeal under the relevant rules of that court, that there being no valid Notice of Appeal the court lacks jurisdiction to entertain an application for stay of execution, that there was in-ordinate delay in making the present application, and that entertaining this application after an application had already been filed in the Court of Appeal on 9th July, 2012 was clearly an abuse of the process of this court.

5. Mr. K'opere, learned Counsel for the Plaintiff submitted that the court's jurisdiction to grant leave had not been properly invoked and that prayer should be rejected, that leave to appeal against the order of 14th June, 2012 is not required under Order 43 Rule 1(t), that under the Court of Appeal Rules there was no valid Notice of Appeal, that therefore there is no jurisdiction to grant a stay under Order 42 Rule 6 of the Civil Procedure Rules, that the Plaintiff had exercised its rights under Rule 84 of the Court of Appeal Rules by filing an application to strike out the Notice of Appeal filed on 4th July, 2012. On the extension of time, Mr. K'opere submitted that no adequate explanation had been given by the Defendant for the delay between 14th June, 2012 and 4th July, 2012. That further, there was no explanation for the delay between the 4th July, 2012 and 13th August, 2012 when the present application was filed. Counsel submitted that the discretion of the court under Section 7 of the Court of Appeal Rules should be exercised on firm, logical and legitimate grounds and not whimsically, the length and reasons for the delay should be considered, that the first five (5) and subsequent forty (40) days have not been satisfactorily explained. On prejudice, Counsel submitted that the Plaintiff's rights for provision of security will be taken away, its application in the Court of Appeal will be defeated and the Plaintiff's diligence will be unrewarded. Counsel concluded that there were no chances of the intended appeal being rendered nugatory as the funds will not have been put beyond the reach of the Defendant. Counsel urged that the application be dismissed.

6. I have carefully considered the Affidavits on record, written submissions and oral hi-lights of learned counsel as well as the authorities relied on. I have looked at Order 43 Rule 1(t) of the Civil Procedure Rules and I am in agreement with Mr. K'opere that leave is not required to appeal against the order of 14th June, 2012. If however, such leave was required then, none would have been available to the Defendant as the time for applying for such leave had long expired and no extension had been sought. The entire application before me, would have completely collapsed and there would have been no reason to consider the other prayers. However, in view of the provisions of Order 43 1 (t) aforesaid, that prayer is struck out with costs to the Plaintiff.

7. Mr. K'opere urged the court to first consider Prayer No. 4 for stay. But I think to do so would not be in order. Since prayer No.3 precedes prayer 5, it is proper to deal with that prayer first. Prayer No. 3 seeks the extension of time for the filing and serving of the Notice of Appeal dated 3rd July, 2012. Mr. Kiragu for the Defendant cited the case of **Leo Sila Mutiso –vs- Rose Helen Mwangi Wangari CA No. Nai 251 of 1997** quoted in the decision of Visram JA in the case of **John Kiplang'at Barbaret & others –vs- Isaiah Kiplang'at Arap Chelugat CA No. NAI 338 of 2009**. In that case, the Court of Appeal set out the principles to be considered in an application for extension of time as being the length of the delay, the reasons for the delay, the chances of the appeal succeeding and the prejudice to be suffered by the Respondent if the application is allowed. Mr. K'opere was agreeable that those are the principles applicable save for the one on the chances of the appeal succeeding.

8. I am in agreement by Counsels that although those are the principles which the Court of Appeal applies in considering an application for extension of time under Rule 4 of the Rules of that Court, those principles would likewise be applicable in an application before this court under Section 7 of the Appellate Jurisdiction Act with the modification suggested by Mr. K'opere. How do those principles then apply in this case? The delay in this case was of five (5) days i.e. between 29th June, 2012 and 3rd July, 2012. In the **John Kiplang'at Barbaret** case, Visram J.A found that four (4) days were not inordinate.

In this regard, I will also hold that five (5) days cannot be considered to be inordinate. The reason given for the delay is that Mr. Kiragu was busy with other cases and through oversight, the filing of the Notice of Appeal in this matter escaped him. Mr. Kiragu readily admitted that it was his error that had led to the delay in the filing and service of the Notice of Appeal in time. Can the court allow a genuine mistake of a counsel to be visited upon a litigant? I think not. Where a mistake of advocate is genuine and not overreaching, I think it should not be visited upon a litigant. This does not however mean that outright negligence by or dilatory conduct on the part of a counsel should be excused. In the case before me, as was in the aforesaid case before Visram J.A, a genuine error has been readily admitted by Counsel. My view is that the delay in the filing and service of the Notice of Appeal has been adequately explained. What has not been explained, as Mr. K'opere complained is the delay in the filing of the present application as it took the Defendant (forty) 40 days to bring this application. I will have something to say on this later on in this ruling.

9. As regards prejudice, the Plaintiff has contended that due to the delay its right for provision of security will be delayed, that it will defeat its application in the Court of Appeal and that it will continue to suffer despite its diligence. Whilst the Plaintiff's contestations may be true, I have already indicated that the delay was only for five (5) days. The Defendant filed the Notice of Appeal and also came to Court within the sixty (60) days ordered by the court within which to provide security. My view is, the prejudice to be suffered by the Plaintiff can be adequately compensated by an award of costs. In this regard, I am not convinced that by allowing the application the prejudice to be suffered by the Plaintiff outweighs that to be suffered by the Defendant if the application was declined. A right to be heard is so fundamental that there should be compelling reasons before a Court of Law can disentitle or bar a party from exercising the same.

10. Accordingly, I am of the view that the Defendant has succeeded in explaining the delay and that the delay has not greatly prejudiced the Plaintiff. I will therefore allow the prayer for extension of time as sought by the Defendant.

11. This leaves us with the prayer for stay of proceedings pending the hearing and determination of the intended appeal. This is a prayer under Order 42 Rule 6 of the Civil Procedure Rules. Having allowed the prayer for extension of time, the arguments advanced by Mr. K'opere as to the jurisdiction of this court to entertain this prayer does not arise.

12. In an application for stay under Order 42 Rule 6, an applicant has to show three things. That the application has been made timeously, that the applicant will suffer substantial loss and must give security for the performance of the decree or order. On the issue of the time for bringing the present application, the same was made two (2) months after the order sought to be appealed against was made. This application was filed on 13th August, 2012 yet the order appealed against was made on 14th June, 2012. That order of 14th June, 2012 was expiring on the very same day the Defendant came to court. Can it be said that in the circumstances of this court the application was timeously made? I do not think so because for two reasons. Firstly, whilst the order for security was for sixty (60) days, the Defendant filed the application on the sixtieth (60) day. Secondly, the application was filed forty (40) days after the Plaintiff had applied to strike out the Defendant's Notice of Appeal in the Court of Appeal. To my mind therefore there was inordinate delay in making the application.

13. On the issue of substantial loss, it has not been demonstrated to the satisfaction of this court that if the order for the giving of security is complied with the appeal will be rendered nugatory. To my mind, the amount sought to be given as security will still be available to the Defendant if its intended appeal is successful. To the contrary, granting a stay of proceedings will not only lead to the delay in determining the dispute between the parties but will fry in the face of Sections 1A and 1B of the Civil Procedure Act and Article 159 2 (c) of the Constitution which enjoin courts to pursue expeditious resolution of disputes and deliver justice without delay. In any event, the Court of Appeal has held that it is unlikely for substantial loss to be suffered if proceedings are continued in the High Court and the Court of Appeal later finds that they should not have been proceeded with. See the Court of Appeal case of **Silverstein – vs- Chesoni, Nairobi Civil Application No. 189 of 2001.**

14. On the offer for security by the Defendant, Rule 6(2) of Order 42 requires that the security to be granted be adequate for the performance of the decree or order. In this regard, ordering security will be the same as ordering compliance with the order of 14th June, 2012!

15. All in all, I am not convinced that the Defendant has made a case for the grant of a stay order in terms of prayer 5 of the motion.

16. Accordingly, the Motion dated 13th August, 2012 succeeds in terms of prayer 3 thereof but prayer No. 5 for stay is declined. The order of stay in force is hereby discharged and the Plaintiff will have half the costs of the application.

DATED and DELIVERED at Nairobi this 19th day of April, 2013

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A. MABEYA

JUDGE