



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENY AT NAIROBI
CIVIL SUIT NUMBER 16 OF 2009

KEREN BAURON. APPLICANT/PLAINTIFF

VERSUS

SONY HOLDINGS LIMITED. 1ST DEFENDANT

NAKUMATT HOLDINGS. 2ND DEFENDANT

KNIGHT FRANK KENYA LIMITED. 3RD DEFENDANT

RULING

The application before the court is a Notice of Motion dated 5th November, 2013 and filed the same day. It was brought by the Plaintiff against the Defendant. It sought mainly the following orders: -

- a. *That the orders of this court made on the 29th October, 2013, ordering plaintiff/applicant to deposit in court the sum of Ksh.2.4 million as security for costs within 7 days together with other consequential orders, be reviewed/varied.*
- b. *That the court do enlarge time for the deposit of the said security by 10 more days from expiry date.*
- c. *That there be a stay of execution of the ruling and orders of 29th October, 2013.*

There were other prayers in the application which however were already spent. The Respondents had filed their Replying Affidavit and grounds of opposition and the application was heard inter partes on the 7th November, 2013.

The facts behind this application were as follows: -

The Applicant filed this main suit against the Respondents seeking damages amounting to just over Ksh.84,000,000/-. She mainly resides outside Kenya and is not a citizen of the Republic. Feeling apprehensive to the expenses required to defend the suit, the Respondent formally sought orders from the court against the Applicant who is the Plaintiff, to deposit security for costs as a condition to prosecute the claim for damages. The application was placed before the Deputy Registrar under Order 49 of Civil Procedure Rules and having considered the application after hearing all the parties concerned, the Deputy Registrar made an order to the effect that the Plaintiff shall furnish security for costs in the sum of Ksh.800,000/- in respect of each of the three defendants, thus making the total sum of the security to be Ksh.2,400,000/-. The said security was to be deposited in a joint interest-earning bank account in the joint names of the advocates representing the parties, within a period of 45 days of the 26th June, 2013.

The record shows that the applicant/plaintiff did not raise and/or deposit the security for costs as ordered by the Deputy Registrar until the relevant period expired. She did not either appeal to the Judge in Chambers seeking reversal or setting aside of the Deputy Registrar's order within seven days prescribed by law. Things would have ended there but they did not. This is because over a month later, the applicant filed a Notice of Motion seeking leave of this court to file an appeal out of time to the Judge in Chambers.

By a Ruling dated the 29th October, 2013, this court found that the applicant had filed the application to appeal out of time, 38 days after the Deputy Registrar's orders were made, a delay which it found was long and inordinate in the circumstances of the case. The court hinted that the applicant's conduct which culminated in the delay could have been deliberate and unreasonable. The court also noted that the applicant's conduct towards the filing of the application which went before the Deputy Registrar, was unnecessary, unjustified, inequitable and not diligent.

Notwithstanding the applicant's undeserving conduct above, the court bent backwards in the name of justice and gave the applicant leave to appeal out of time on condition only, that she complied with the Deputy Registrar's meritorious orders to the effect that she deposits the sum of Ksh.2.4 million within a period of seven (7) days within which the intended appeal was also to be filed. For the purpose of clarity, the order made by this court and which is the order now the subject of this present application was as follows: -

"1. The Applicant shall file her appeal within 7 days.

2. The Applicant shall together with her memorandum of Appeal, deposit in this court the sum of Ksh.2.4 million being the security of costs for the lower court (Deputy registrar's) suit as ordered by that court.

3. In default of such deposit the leave to appeal within 7 days aforesaid, shall automatically lapse and the Defendants/Respondents shall be at liberty to move the lower (Deputy Registrar's) court under Order 26 Rule 5(1) as earlier ordered by said court.

4. Costs"

This application before the court presently is dated 5th November, 2013. It sought the orders at the start of this Ruling.

A careful examination of the prayers in this application would in this court's, view, amount to one main order i.e. the alteration of the courts orders of 29th October, 2013 in such a way that time is enlarged to allow or enable the Applicant to have more time to deposit the security for costs aforesaid.

When Mr. Morara for the applicant finally argued the application, he clearly appeared to have abandoned all the other prayers sought above except for extension of time by 10 or 14 days, as the case may be, to enable his client to deposit the security.

This application was vehemently opposed by the Defendants/Respondents who indicated that the hands of the court were really not free to alter the orders it made on the 29th October, 2013. That the orders effectively took effect the moment the Applicant/Plaintiff failed to file the Memorandum of Appeal together with the deposit of the security for costs of Ksh.2.4 million.

I have carefully considered the application before me after perusing the supporting documents and the submissions from both sides. In my view and finding the orders of this court were made deliberately to assist the Applicant/Plaintiff who from the circumstances of the case, did not deserve them. May be that is why the court constructed them in a manner which would not give the applicant a further chance to abuse the court's favourable discretion after failing to deposit the security of costs ordered by the Deputy Registrar and thus delaying unduly from filing her appeal in time. The court saw an applicant who was playing with court's process which it felt she was abusing.

The court orders granting further time to file an appeal were clearly and strictly conditional upon her complying with the court's discretion in her favour. She would by those orders obey them and secure herself a further chance to conduct her suit to the ultimate end. If she failed to comply, (and she knew so), she would lose the said rights. The orders were clear, that the leave to appeal would lapse if the Memorandum of Appeal was not filed within 7 days. The Memorandum of Appeal on the other hand, would not be filed without a demonstration that the security for costs of Ksh.2.4 million had already been deposited in court. There was clearly, no room for any other maneuver.

In the court's view and finding accordingly, the moment the applicant failed to deposit the said security for costs, she automatically lost the chance to file the appeal and on the other hand, to get any further opportunity to expand the time to deposit the same.

Having said the above, I must however, add for whatever it is worth, that the applicant's arguments that the money had been deposited in her advocate's bank account by 5th November, 2013, could not stand reasonable scrutiny. She failed to show any legal or factual documents to that end. She just wanted the court to believe her statement from the bar when such statement was based on nothing credible. No bank transaction nowadays can be transacted without a supporting documents being produced in support. Furthermore, the court had ordered the security for costs be deposited in the court, not in the Advocate's account.

In these circumstances and having taken into account all that has been raised above, this court has no other reasonable conclusion to reach except to find that this application has no merit whatsoever. It must and is hereby dismissed with costs to the Respondents. Orders are made accordingly.

Dated and delivered at Nairobi this 13th day of November, 2013.

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D A ONYANCHA

JUDGE