REPUBLIC OF KENYA

High Court at Nakuru

Miscellaneous Application 388 of 2011

KENYA COMMERCIAL BANK LIMITED ..... APPLICANT

VERSUS

DAVID KAROBIA KIIRU …..... RESPONDENT

RULING

By the application dated 30th November 2011, the applicant, Kenya Commercial Bank seeks the following orders:

1. leave be granted to the Applicant to lodge an Appeal against the ruling of Hon. D.K. Mikoyan (SRM) out of time.

2. stay of proceeding in Chief Magistrates Court Civil Suit Number 1645 of 2001 pending the hearing and determination of the appeal

3. costs

The applicant fears that **Civil Suit Number 1645 of 2001, David Karobia Kiiru vs Kenya Commercial Bank** will proceed to formal proof which will restrain the Applicant from realizing its security on the loan advanced to the Respondent. The applicant has annexed a draft memorandum of appeal. The application is premised on the supporting affidavit sworn by Veresta Kiende, the credit manager of the applicant dated on 30.04.2011. The applicant is dissatisfied with the ruling of Mr. Mikoyan, Senior Resident Magistrate Nakuru, dated 7/2/2011, in which he granted an order of injunction restraining the Applicant by itself, its agents and or servants from selling, advertising, disposing and or interfering or dealing with Njoro/Njoro Block 2/94, Njoro/Njoro Block 2/95, Njoro/Njoro Block 2/96, Njoro/Njoro Block 2/97, Njoro/Njoro Block 2/140 and Njoro/Njoro Block 2/141. The deponent deponed that the ruling was reserved for 3/05/2010 but unfortunately, in that date the lower court was not sitting; around the month of February 2011 when the ruling was delivered, the applicant's firm of Advocates, Kipkenda, Lilan & Koech Advocates, disengaged to form Kipkenda & Company Advocates and Lilan & Koech Associates; the newly formed firm of Kipkenda & Company Advocates was allocated the applicant's file which it misplaced when moving offices; the file was finally traced by the advocates in the month of November 2011; she avers that the delay in lodging the appeal was not intentional and if the orders sought are not granted, the appeal shall be rendered nugatory and useless.

The Respondent opposed the application. He swore an affidavit dated 8.12.2011 in which he deponed that the application is an abuse of the court process and its aim is to delay the conclusion of this case; That he filed the suit in 2001, the Applicant did not file its defence and an interlocutory judgment was entered against it. After 3 years, the Applicant filed an application to set aside the said judgment but the

application was rejected. The matter proceeded to hearing of an application for injunction which was ruled in favour of the Respondent. After six years, the Applicant sought to auction the land which resulted in an application before the trial magistrate and a decision by the Learned Magistrate Mikoyan S.R.M. The Respondent further deponed that it had taken the Applicant over a year to decide whether or not to appeal the decision of the Learned Magistrate; That the matter had been scheduled for hearing of formal proof when the Applicant again brought this Application with a view to securing an adjournment and further delay the hearing of this suit.

I have read the submissions of both parties. The Applicant contends that the delay was not intentional and prays that this court exercise its discretion in its favour. The matters which this court should take into account as provided under the **Civil Procedure Rules, Order 42 (6) (2)** are:

a) Whether substantial loss may result;

b) Whether the application has been made without unreasonable delay; and

b) Whether security for the due performance has been offered.

Whether substantial loss may result;

As the parties have not exhibited previous proceedings in the lower court, I considered the Notice of motion, affidavits and Submissions filed by the parties in question. It is not in dispute that the applicant advanced a loan to the respondent and as security for the loan facility, a first legal charge was registered against several properties in favour of the applicant. This was also the observation of Mr. Mikoyan in his ruling when he stated:

“the bank advertised the sale of the charged properties....while putting Plaintiff on 14 days notice indicated the outstanding loan to be Kshs.5,240,021.99 which is indicated to be outstanding as of 19th February 2009”.

The point of departure between the two parties is the amount outstanding (if any) and owed to the applicant by the respondent. The applicant contends that the respondent owes Kshs.5,240,021 which it ought to realize through the sale of the respondent's properties by public auction. The respondent in his replying affidavit avers that he cleared the loan advanced to him by the applicant. This issue can only be settled at a hearing and in mind is the holding by the magistrate that:

“it is clear that (sic) Plaintiff is indeed indebted to the Bank. The bank has employed both legal channels to enforce security as well as attempted table (sic) negotiations to settle accounts to no avail”.

The trial court having appreciated that the applicant is owed money, if the order of stay is not granted, the applicant stands to suffer substantial loss.

Whether the application has been made without unreasonable delay;

Section 79G of the **Civil Procedure Act** provides that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time. The question is whether the delay has been adequately explained? Ms. Kiende in her affidavit (para. 3) deponed that the ruling had been reserved for 3/05/2010 but was not delivered as the trial court was not sitting. She did not state whether the applicant's counsel became aware of the new date and whether he was present in court? The respondent in the replying affidavit (para 13) deponed that on 7/02/2011 the applicant's counsel was present in court when the ruling was delivered. It is uncertain from the two affidavits when and how the applicant became aware of the ruling. As there are no proceedings of the lower court in the file, it remains the word of the applicant against that of the respondent.

In an attempt to explain the circumstances leading to the delay in lodging the appeal, the applicant

annexed a letter (Exh. VK3) showing the firm of Kipkenda, Lilan & Koech Advocates which was representing it in the matter disengaged to form Kipkenda & Company Advocates and Lilan & Koech Associates. This was around the time the ruling was delivered. During distribution of files between the resultant firms and moving offices the file containing proceedings of the lower court was misplaced by Kipkenda & Company Advocates. The applicant stated that the delay was not intentional and the circumstances were beyond the applicant and counsel on record. They relied on the case of **Egerton University v Republic ex parte Ruga [2004] 2 KLR 132** in which the court of appeal held that:-

"Despite that delay the Court has still discretion to allow the application if the interest of justice so requires. It is my view that considering all the circumstances of the dispute; the nature of the dispute and the previous proceedings it is in the interest of justice that the dispute between the parties should be conclusively and finally settled by allowing the applicant to file a competent appeal".

Although this case is distinguishable from the instant case to the extent that the delay in **Egerton case** was 5 months. I do agree with the applicant's counsel that the circumstances leading to the delay in lodging the appeal were beyond him and this should not be used to drive the applicant out of the seat of justice.

Whether security for the due performance has been offered;

I do take note of conduct of the Applicant since 2001 when the Respondent herein filed this suit. The applicant filed a notice of appointment and failed to file a defence for at least two years. The applicant later applied for leave to file the defence out of time, which was allowed. However, the applicant did not pursue its application seeking to set aside the *exparte* judgment which resulted in dismissal. All these acts over an 11 year period show that the applicant has not been keen to bring this matter to a conclusion. The applicant is a prominent bank and there is no likelihood that it will be unable to pay the appellant in the event that the appeal succeeds. I find it unnecessary to order that the applicant do provide security.

In conclusion, it would be detrimental to the applicant if this court did not allow it an opportunity to present its case. In light of **Article 159 (2) (d)** of the **Constitution** which provides that justice shall be administered without undue regard to procedural technicalities, I am of the opinion that the interests of justice will be best served if this application is allowed. I hereby allow the application and direct that the applicant do lodge its appeal within 14 days hereof and the same be prosecuted within 120 days. I also grant stay of the hearing in CMCC 1645/2011 as prayed. The applicant will bear the costs of the application.

DATED and DELIVERED this 26th day of October, 2012.

R.P.V. WENDOH
JUDGE

PRESENT:

N/A for the applicant

Mr. Gakinya holding brief for Hari Gakinya for the respondent

Kennedy – Court Clerk