



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 722 of 2008

JOHN MUREITHI KIARIE.....PLAINITFF

VERSUS

KARANGI COFTEA LIMITED.....1ST DEFENDANT

JORDU INVESTMENTS LIMITED.....2ND DEFENDANT

RULING

1.0 Introduction

1.0.1 The Defendants' application is the Notice of Motion dated 28th November 2012. It has been brought under the provisions of Order 42 Rule 6 (1) & (4), Order 51 Rule 1 of the Civil Procedure Rules 2010 seeking orders:-

- 1. THAT the application be certified urgent**
- 2. THAT further proceedings in this suit be stayed pending the hearing and determination of the application dated 10th October 2012 lodged in the Court of Appeal**
- 3. THAT costs be in the cause.**

1.0.2 The grounds on which the Defendants have relied on in support of their application are as follows:-

- 1. THAT on 12th September, this Honourable Court dismissed the application dated 3rd February 2011 by the Defendants seeking leave to amend the Defence.**
- 2. THAT upon the said dismissal, the Defendants filed a Notice of Appeal against the ruling on 4th October 2012.**
- 3. THAT however the said Notice of Appeal was filed out of time and the Defendants filed an application seeking extension of time to file the said Notice of Appeal on 10th October 2012.**
- 4. THAT the said application was certified urgent and is pending inter partes hearing and determination of the application lodged in the Court of Appeal.**

5. THAT the Defendants/Applicants will suffer irreparable loss and damage if the orders sought are not granted.

1.0.3 The Defendants' application was supported by the Supporting Affidavit of Thomas Kiarie Karanja sworn on 28th November 2012.

1.0.4 In opposing the said application, the Plaintiff filed the following Grounds of Opposition dated 4th December 2012:-

1. THAT the application has been deliberately filed late with the specific intention of derailing the hearing of the suit scheduled for 10th December 2012. The Applicant is therefore acting in bad faith.

2. THAT the application pending at the Court of Appeal (Civil Application No. NAI 255 of 2012) is not an appeal by itself as it merely seeks leave to extend the time for the Applicant to file a Notice of Appeal against the Ruling delivered on 12th September 2012.

3. THAT to the extent that no Appeal has been filed by the Applicant, the provisions of Order 42 Rule 6 (1) and (4) are not applicable as purported. The Application is therefore defective and incompetent and should be dismissed with costs.

4. THAT this honourable court lacks the jurisdiction to grant the order for stay of proceedings in the absence of an Appeal.

5. THAT no valid grounds have been advanced by the Defendant/Applicants to persuade this honourable court to grant an order for stay of proceedings.

6. THAT the Defendants/Applicants have not explained what prejudice they stand to suffer if an order for stay of proceedings is not granted.

7. THAT the Plaintiff will suffer substantial prejudice if the suit is stayed since the Appeal process will be lengthy.

2.0 Arguments

2.0.1 During the hearing of the application, Mr Karuga orally submitted that he had been under the impression that the appeal to the Court of Appeal should have been filed within 30 days.

2.0.2 He stated that the application lodged in the Court of Appeal had been certified urgent and parties were awaiting the invitation from its Registry to fix a date for its inter partes hearing.

2.0.3 Mr Karuga further averred that if the hearing of the suit proceeded on 10th December 2012, then it would render the entire proceedings in the Court of Appeal nugatory. He added that greater harm would be occasioned to the Defendants if the hearing proceeded than the inconvenience that the parties would suffer by having the matter delayed until the said application in the Court of Appeal was heard.

2.0.4 It was his contention that there was an existing appeal under Order 42 Rule 6 (4) of the Civil Procedure Rules 2010 and consequently a notice of the intended appeal had been given to the Plaintiff. Mr Karuga further submitted that the Plaintiff had not moved to strike out the Notice of Appeal.

2.0.5 Mr Karuga also argued that there had been no inordinate delay as the application for amendment was made before the commencement of the hearing. He was emphatic that the Defendants were keen to

participate in the matter and the application was not intended to stifle the hearing scheduled for 10th December 2012.

2.0.6 He asked that this honourable court invokes Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 (of the laws of Kenya) and order a stay of the proceedings scheduled for 10th December 2012 pending the hearing and determination of the Defendants' application filed in the Court of Appeal.

2.0.7 On his part, Mr Kang'ethe for the Plaintiff was categorical that the Defendants had exhibited indolence in this matter.

2.0.8 He submitted that the application was not merited for the reasons that the Defendants had not given any explanation why they had delayed in filing the application herein or any sufficient grounds to warrant this honourable court granting the orders sought in the application herein.

2.0.9 Mr Kang'ethe also stated that there was no existing appeal as envisaged by Order 42 Rule 6 (4) of the Civil Procedure Rules and consequently this honourable court did not have jurisdiction to grant the orders sought.

2.1.10 He argued that the Defendants' application was premature and since it was intended to stifle the hearing on 10th December 2012, he prayed that the same be dismissed.

3.0 **Ruling**

3.0.1 I have carefully considered the Defendants' application, their Supporting Affidavit and annexures in support thereof, the Plaintiff's Grounds of Opposition and the oral submissions by both Mr Karuga and Mr Kang'ethe regarding whether or not there I should order a stay of the proceedings herein as the Defendants pursue their application seeking extension to file their Notice of Appeal out of time.

3.0.2 Exhibit Marked "TKK 2" shows that the Defendants instructed their advocates to file the Notice of Appeal on 4th October 2012 which I note was outside the period stipulated under the Court of Appeal Rules 2010. Leave of the Court of Appeal was not sought before the said Notice was filed in court out of time.

3.0.3 I have come to this conclusion because there is in the Court of Appeal an application pending before it seeking extension of time to file the said Notice of Appeal out of time.

3.0.4 Accordingly, I agree with the views expressed by Mr Kang'ethe that there is no Appeal in existence as there is no valid Notice of Appeal filed in the Court of Appeal at this material time. I therefore reject the Defendants' assertion that the Notice of Appeal is in existence and that the Plaintiff had not moved to strike it out. The Plaintiff could not have moved to strike out what does not exist.

3.0.5 Order 42 Rule 6 (1) under which the Defendants have brought their application stipulates that no appeal or second appeal shall operate as a stay of proceedings. Rule 6(4) further provides that for the purposes of that rule, an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court, notice of appeal has been given.

3.0.6 Having found in 3.0.4 above that there was no valid Notice of Appeal filed by the Defendants in accordance with the Court of Appeal Rules, I do not therefore agree with the Defendants' averments that there is an appeal in existence in accordance with Order 42 Rule 6 (4). It is clear that the appeal will be deemed to have been filed when under the Rules of that court; notice of appeal has been given.

3.0.7 The Notice of Appeal filed by the Defendants was filed out of time. It was without leave of the court and it cannot therefore be said to have been given in accordance with the rules of the Court of Appeal. For an appeal to be deemed to have been filed in the Court of Appeal, the notice to be given under Order 42 Rule 6(4) must be valid. An Appeal in the Court of Appeal cannot be deemed to be in

existence by any other way. I therefore reject Mr Karuga's arguments that there is an appeal in the Court of Appeal by virtue of the Notice of Appeal that was filed on 4th October 2012.

3.0.8 In the absence of an appeal in existence, I would agree with Mr Kange's submissions that the application herein is premature and that this honourable court cannot stay the proceedings herein as there is no appeal in place currently.

3.0.9 The Defendants have further not demonstrated sufficient grounds of what loss, prejudice or damage they will suffer if the orders sought in the application herein are not granted.

3.0.10 The delay in awaiting the outcome of the application seeking an extension to file the Notice of Appeal appears very likely. Though the Defendants submitted that the said application had been certified as urgent, there is nothing on record to show this fact.

3.0.11 For this reason, I find that the staying of the proceedings of the suit herein as sought by the Defendants will be grossly unjust to the Plaintiff as it will cause delay in the just determination of the proceedings and efficient disposal of the dispute between the parties. This negates the very principles encapsulated in Sections 1A, 1B and 3A of the Civil Procedure Rules 2010 that the Defendants have they themselves requested me to invoke.

3.0.12 The upshot of my ruling is that the Defendants' application is not merited and for that reason it is hereby dismissed with costs to the Plaintiff.

3.0.13 Orders accordingly.

J. KAMAU

JUDGE

DATED and DELIVERED at NAIROBI this 7th day of December 2012.