



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
[CORAM: F. AZANGALALA J.]
CIVIL APPEAL NO. 95 OF 2011

BETWEEN

TURBO HIGH WAY ELDORET LIMITED:.....APPELLANT

AND

NICHOLAS KARIRA T/A KARIRA & CO. ADV.:.....RESPONDENT

R U L I N G

Before me is an application for stay of proceedings in Eldoret CMCC NO. 670 of 2009 pending appeal from that Court's decision delivered on 13th May, 2011, dismissing the applicant's application to strike out the respondent's plaint on grounds that the same did not disclose any reasonable cause of action and/or was otherwise an abuse of the Court process. The substance of the application is that unless the said proceedings are stayed, the applicant's appeal against the said decision will be rendered nugatory as the proceedings in the said case will proceed to conclusion which event will be detrimental to the applicant. It is also contended that the lower court totally misunderstood the law when it dismissed the applicant's application.

The application is opposed and in this regard, a replying affidavit has been filed by the respondent who is an advocate of the High Court of Kenya. He has deponed, inter alia,:

- § **That the court has no jurisdiction to stay the proceedings of the subordinate court;**
- § **That the supporting affidavit is defective because it was sworn by counsel; and**
- § **That in any event, the ruling being challenged has not been annexed to the application.**

In their oral submissions before me, counsel reiterated the stand-points taken in their respective affidavits. Having considered the application, the affidavits and the said submissions I take the following view of the matter.

The applicant has moved this court under sections 1A, 3, 3A and 63 (e) of the Civil Procedure Act, Order 34 Rule 3 of the Civil Procedure Rules and all enabling provisions of the Law. The substantial provision under which the application should have been brought however is Order 42 rule 6 (1) of the Civil Procedure Rules. The application is not however incompetent for failure to invoke the said rule given that the applicant has expressly invoked all enabling provisions of the Law. Further, in my view, to allow the objection based on failure to invoke the correct rule could offend the objective of the Civil Procedure Act and Rules as codified in sections 1 A and B.

Objection has also been raised against the supporting affidavit of **Alfred King'oina Nyairo**, on the basis that, as an advocate instructed by the applicant, he ought not to have sworn the affidavit. I agree with counsel for the respondent that ordinarily, counsel is not expected to enter the arena of dispute by filing an affidavit. The Logic is simple. An affidavit is evidence in documentary form. A deponent may be called upon to testify and be cross-examined on the same, which would be awkward where counsel is also acting in the matter. There is however, nothing objectionable to counsel swearing an affidavit on uncontested matters and matters upon which only he can depone to. For instance, where matters deponed to are from counsel's records or court records which he has perused, it would be cumbersome for such matters to be deponed to by the parties who would not themselves have made the perusals. I have perused the impugned affidavit, it contains matters about which counsel has knowledge of and are not in contention. In the premises, I do not find the supporting affidavit incompetent merely because it was sworn by counsel acting in the matter.

With regard to jurisdiction, I have no hesitation in holding that the court has a discretion to order stay of proceedings pending appeal. Such a discretion is, in my view, unfettered. An applicant is not required to satisfy the conditions set out in Order 42 Rule 6 (2) of the Civil Procedure Rules. The Court's concern is whether it is in the interests of justice to order a stay of proceedings and if it does so, on what terms. In considering such stay, factors which will be of concern to the court will include the overriding objectives set out in section 1A and 1 B of the Civil Procedure Act.

I have seriously given consideration to the challenge that this application is incompetent because the ruling under challenge is not exhibited. The applicant has however, sworn that the lower court dismissed its application to strike out the suit for failure to disclose a reasonable cause of action. That deposition is not denied by the respondent. The applicant has in any event exhibited its application which was dismissed. I have perused that application and the grounds of appeal and have come to the conclusion that it was not fatal to omit to annex the ruling dismissing the application. It is plain to me that the applicant's appeal is arguable given the applicant's complaint that the lower court suit is for recovery of unpaid rates due to the Municipal Council of Eldoret which council is not a party in the suit.

If a stay is not granted, the respondent will prosecute his suit which event will render the applicant's appeal nugatory. If the intended appeal is prosecuted and determined in favour of the applicant, the objectives of the Civil Procedure Act will thereby have been served. If the appeal is prosecuted and is dismissed, the respondent will still prosecute his suit and may be compensated by an award of costs.

In the premises, I have come to the conclusion that it is in the interests of justice to stay further proceedings before the lower court pending hearing and determination of this appeal. The only condition I attach to the order of stay is that the applicant prosecutes its appeal with dispatch.

In the result, I order that there be a stay of further proceedings in Eldoret CMCC No. 670 of 2009 pending hearing and determination of this appeal. The costs of this application shall be in the cause.

I grant to the respondent liberty to apply.

Orders accordingly.

**DATED AND DELIVERED AT ELDORET THIS
22ND DAY OF NOVEMBER, 2011.**

**F. AZANGALALA
JUDGE**

Read in the presence of:-

M/s Orina holding brief for **Kigamwa** for the respondent.

**F. AZANGALALA
JUDGE**

22ND NOVEMBER, 2011.