



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 285 OF 2009

PAUL IMISON..... PLAINTIFF

- VERSUS -

JODAD INVESTMENTS..... DEFENDANT

RULING

The Defendant brought the application under order XLI Rule 4 of the Civil Procedure Rules seeking orders as follows:-

1) (Spent)

2) (Spent)

3) That this Honourable be pleased to grant a stay of proceedings herein pending hearing and determination of the application *inter partes*.

4) That this Honourable Court be pleased to grant a stay of proceedings herein pending the hearing and determination of Defendant's intended appeal against the whole of the decision herein made by the Honourable Mr Justice Kimaru on 18th November 2009.

5) That such orders be made as the court deems fit and just.

6) That costs of this application be provided for.

The application is supported by affidavit of Calvin Harold Cottar dated 17th February 2010 together with the annexures.

The brief facts of the application are that on 28th July, 2009 the Defendant company filed the application dated 24th July 2009 seeking to have the Plaintiffs suit herein struck out on the grounds, *inter alia* that the same is *res judicata*. That the aforesaid application was based on the ground that in a previous suit between the same parties, namely High Court Civil Case Number 693 of 2000, this Honourable Court had ordered that an inquiry as to damages be carried out in that suit by a Judge of this division. That the Defendant herein intends to appeal against this court's aforesaid decision and has filed the relevant Notice of Appeal.

The application is opposed by the Plaintiff vide his undated Replying Affidavit filed on 21 June 2010, on the grounds that Order XLI Rule 4 (1) of the Civil Procedure Rule for granting stay, namely, that a substantial loss may occur to the Defendant if proceedings herein are not stayed have not been met and further that there is no appeal filed. It is submitted that what the Defendant annexed in the supporting affidavit is a Notice of Appeal which was filed on 4th December 2009 but there is no appeal itself and that the Defendant, since the filing of the Notice of Appeal, has not taken any steps to file an appeal. It is also submitted that the Defendant's delay in filing this application is unreasonable and its intention is not genuine but its only keen and delaying the matter and deprive the Plaintiff of the just fruit of his case.

I have considered the application and the opposing submission of the parties: For me, I will limit the issues in this matter to the following:-

1) Whether the application is defective.

2) Whether there is a tenable appeal.

3) End of justice in this matter.

On the first issue the Respondent submitted that Order L Rule 3 of the Civil Procedure Rules state that:-

“Every Notice of Motion shall state in general terms the grounds of the application”.

It is submitted that the Applicant has not complied with this mandatory requirement and that on this ground alone the application must fail. The Applicant however, relying on the authority of **CASTELINO –VS– RODRIGUES (CIVIL APPEAL NO. 4 OF 1972 -KAMPALA)**, has submitted that the omission is curable by the decision in that case where the court observed that:-

“as a general rule, a reference in a document to an annexure has the effect of incorporating the contents of the annexure in the documents... In these matters of procedural irregularities it is the question of prejudice that is an important. If there is no possible prejudice the non-compliance can be treated as a minor departure”.

In the current application, the Notice of Motion merely states that the application is supported by the annexed affidavit and other grounds to be adduced at the hearing. In the above case, however, the motion stated that it was made on the grounds set out in the affidavit annexed to it, and it is submitted that the principal laid down in the CASTELINO CASE is distinguishable.

In my view Order L Rule 3 is clear and it is in mandatory terms. It has to be complied with. Any party which fails to incorporate it in the Notice of Motion suffers the possibility that the Notice is groundless, and without ground it must fail. The CASTELINO CASE provides a cure for the same. The present Applicant however has not brought itself within the ambit and parameters of the CASTELINO CASE. The affidavit in support is bare. It simply states that:

“This application is supported by the annexed affidavit of Calvin Cottar”.
On this ground alone I would strike out the application.

However, this court is not a prisoner to technicalities, and Article 159 of the Constitution and the overriding requirement to render justice imposes an obligation on this court to restrain itself before striking out proceedings.

On the issue number two i.e. whether there is a tenable appeal to warrant the grant of the orders sought, it is not the province of this court to go into the merits of the intended appeal. From the pleadings it is clear that the Plaintiff/Respondent's claim is firmly based on the undertaking as to damages given by the Defendant in the initial suit. There is no record to show that the Defendant/Applicant has ever denied that the Plaintiff/Respondent is entitled to those damages. All the Defendant seems to be disputing is the forum in which the damages should be assessed. By seeking to stay these proceedings, the Defendant may simply be intentionally delaying the matter. In any event it is my view that the issue of the correct form is merely a technical issue, and where the best forum has not been achieved, the next best forum will apply. The same Article 159 of the Constitution serves both parties. From a superficial consideration of the issues at hand, I am not persuaded that the intended appeal is tenable.

On the last issue, regarding the ends of justice, I have considered the entire application and the history of the matter which are well captured in the proceedings. It is clear to me that the intended appeal is not brought in good faith. It was meant to slow the progress of the suit and to disable the Plaintiff. In the initial suit, the Defendant filed a Notice of Appeal on 8th April 2006. The appeal itself has never been filed more than 5 years down the line. This is most likely to be the fate of the current intended appeal as parties are the same, and issues are the same. The intention is also the same - to delay the realization by the Plaintiffs of the fruits of his suit. A party that files a Notice of Appeal must be seen to be doing something to have it prosecuted. There is no evidence that the intending Appellant has made any effort to ensure that the proceedings are ready to enable the intended appeal proceed. The court's discretion relation to granting orders of stay of proceedings is unfettered. However, I am not satisfied that I should in this matter exercise the same in favour of the Applicant.

Finally there is the issue of prejudice to be suffered if the order of stay is not given. The Applicant will suffer none. There is currently no order, no decree or rule which needs to be stayed and about which the Applicant may suffer the consequences of their execution. Stopping the proceedings is like grounding the wheels of justice of the suit. As the Applicant will not suffer any prejudice with the confirmation of the proceedings, I will not stay those proceedings. In any event, a time may come in the cause of these proceedings when a clear prejudice to the Defendant may emerge. However, that is purely speculative at this stage.

In the upshot I dismiss the entire application and discharge and set aside any interim orders which may have been in place prior to this Ruling.

The costs of this application is given to the Plaintiff/Respondent.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 13TH DAY OF DECEMBER 2011.

E. K. OGOLA
JUDGE

PRESENT:-

Nyaberi for the Plaintiff/Respondent

Orina for the Defendant/Applicant

Irene -Court clerk