REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL APPEAL NO. 92 OF 2010

(Being an appeal from the Ruling of Honourable D. K. Mikoyan SRM, Nakuru dated and delivered on the 12th April 2010 in Nakuru CMCC No. 1435 of 2004 dated 13th October, 2009)

DANIEL OTIENO AWUOR……………………………..……APPELLANT/APPLICANT

VERSUS

HARDWARE TRADING STORES LIMITED..........….1ST DEFENDANT/RESPONDENT

DOUGLAS GITONGA MATHENGE…….............……2ND DEFENDANT/RESPONDENT

RULING

This Ruling relates to an application by way of a Notice of Motion dated 8th November 2010 and filed on 11th November 2011 wherein the Applicant sought the orders following -

(1) that the application be certified as urgent,

(2) that pending the hearing and determination of the application, there be a stay of proceedings in Chief Magistrate's Court Civil Suit No. 1435 of 2004,

(3) that there be a stay of proceedings in Chief Magistrate's Court Civil Suit No. 1435 of 2004 pending the hearing and final determination of the Applicant's Appeal in Nakuru High Court Civil appeal No. 92 of 2010.

(4) that costs of this application be provided for.

The application was supported by the Affidavit of Kipkurui Kibellion counsel having the conduct of this matter on behalf of the Plaintiff/Applicant and the grounds on the face of the application.

The application was opposed, and the firm of Jones and Jones filed eleven grounds of opposition to the application.

Mr. Kisilah who urged the application before me on 25th November, 2010 relied upon the said Supporting Affidavit and the grounds on the face of the application, while Mr. Mahida who urged against the application relied on the Respondent's grounds of opposition. I will consider this application from two perspectives, the facts, and the law.

The facts are not in dispute, and appear on the record. The hearing of the CMC Civil Suit No. 1435 of 2004 commenced with the Plaintiff/Applicants evidence being taken on 29th June 2009. After the Plaintiff's evidence was taken the matter was adjourned for hearing on 10th August 2009. On that date the matter was stood over to 5th October 2009 as no representative of the Plaintiff was present in court.

Unfortunately on that date *(5/10/2009)*, the matter was listed as a mention and not a hearing. According to the Affidavit of Mr. Kibellion counsel who had the conduct of the Plaintiff's case on that date, he himself went to the Civil Registry to check why the case was not listed for hearing on that date, only to discover that it was indeed listed, not for hearing, but as a mention.

Mr. Kibellion reached the court only to find that orders had been made closing the Plaintiff's case, and the Defence case had commenced with the Defendant's evidence. Despite Mr. Kibellion's explanation that the error in failing to see the listing of the case as a mention was that of his Court Clerk, and should not be held against the Plaintiff, the trial court declined to stop the proceedings and the evidence of the Defendant was taken, including cross-examination by Mr. Kibellion of the Defendant's witness, wrongly listed in the proceedings as PW1, when he should be DW1.

The Defendant also closed his case after the evidence of DW1.

Thereafter Mr. Kibellion intimated that he would file an application to re-open the Plaintiff's case and stay proceedings. He did so, and his application to that effect dated 13th October, 2009 was dismissed in a Ruling delivered on 12th April 2010. That Ruling is the subject of an appeal No. 92 of 2010 pending admission or otherwise. As no appeal under Order XLI rule 4 operates as a stay of either proceedings or execution, the Plaintiff/Appellant has come to this case for an order to stay the proceedings pending the determination of the Appeal.

In essence those were the submissions of Mr. Kisilah.

On his part Mr. Mahida counsel for the Defendant relied on his extensive grounds of opposition. Counsel confirmed the facts as outlined above. He however submitted that since the Plaintiff's case was closed, and the Defendant's case was also closed the only step remaining was delivery of the judgment and that parties are due for another mention in order to take a date for judgment. Mr. Mahida submitted that the Plaintiff, if he loses the case, has still got an opportunity to appeal, and no order of stay of proceedings should be granted. He asked that the application be dismissed with costs to the Defendant/Respondent.

Those essentially, were the facts. The law is contained in rule 4 of Order XLI of the Civil Procedure Rules. The said rule provides that no appeal or second appeal shall operate as a stay of execution or proceedings, and where the court appealed from declines to give an order of stay proceedings, the court to which an appeal is made, is ***"at liberty … to consider such application (for stay of execution of proceedings) and to make such order thereon as it may just …. and any part aggrieved by an order of stay made by the court from whose decision the appeal is preferred may still apply to the court to have such order set aside.***

Unlike an application for stay of execution where rule 4(2) of the said Order XLI lays specific criteria for grant thereof *(substantial loss by the Applicant, the application is made without unreasonable delay, and provision of security)* the grant of an order for stay of proceedings is entirely at the discretion of the court. All discretion must be exercised judiciously that is to say, on the basis of good reason or sound judgment.

In his characteristic and inimitable style, Hon. Ringera J. as he then was put it thus in the case of **RE-GLOBAL TOURS & TRAVELS LTD [2000]LLR 1061-**

"As I understand the law, whether or not to grant a stay of proceedings or further proceedings in a decree order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion it should be exercised rationally and not capriciously or whimsically. The sole question is whether it is in the interest of justice to order a stay of proceedings and, if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously."

That Ruling anticipated by a decade, the oxygen provisions introduced by Section 1A and 1B of the Civil Procedure Act *(Cap. 21, Laws of Kenya)*, that the overriding objective of the Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes

governed by the Act.

As I said in the case of **JOHN NJUGUNA NDUNGU & GRACE WAMBUI KUNGU VS WARNER LAMBERT LTD** *(Nakuru H.C.C.A. No. 205 of 2010),*

"The court is bound to handle all matters presented before it for the purpose of attaining the timely disposal of proceedings and other proceedings in the court at a cost affordable by the respective parties."

It may be expeditious to ride rough-shod over litigants, but it is neither fair or just, nor proportionate nor affordable to litigants to ***"to and fro"*** from the lower court to this court and back again in search of fair and just resolution of their disputes.

In this case, although the matter before the lower was fixed for hearing on the material date, it was however listed for a mention on that date. It was therefore both proper and reasonable for the Applicant's counsel to seek an explanation from the registry why it was not listed for hearing as it had been ordered by the court earlier. Such shuffling around court corridors is bound to cause delay, and by the time the Applicant's Counsel entered into the trial court he found that the Plaintiff's case had been closed - on the ground of lack of interest. The trial court should have observed that his own cause list showed the case was for ***"mention"*** and not ***"hearing".*** That should have rung warning bells in the court's mind that there was something amiss about the listing of the case. The arrival of the Plaintiff/applicant's counsel and explanation would have confirmed that warning. Despite the Plaintiff/Applicant's counsel's application to be allowed to re-open the Plaintiff's case because he had witnesses, the court declined the Plaintiff's/Applicant's application to re-open the Plaintiff's case.

In my view it is not the hallmark of a party who has lost interest in his case when ***firstly*** he has himself testified, and ***secondly*** on the date fixed for hearing of his case he arrives, for plausible reasons, late, and in the company of his witnesses, namely an expert, that is, a doctor, and a Police Officer ready to testify. ***Thirdly***from the Plaintiff/Applicant's counsel's explanation for his late arrival into court it cannot be said that the Plaintiff had lost interest in his case.

For those reasons, I would allow the Applicant's application dated 8th November, 2010 and direct that the appeal herein be placed before a Judge for perusal and admission or otherwise, once the lower court file is availed.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 3rd day of December 2010

M. J. ANYARA EMUKULE
JUDGE