



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 2389 of 1997

DAVID KARIUKI MAINGI.....PLAINTIFF

VERSUS

ASP COMPANY LTD.....DEFENDANT

RULING

This court has been informed that this case HCC 1539/97 was consolidated with HCC 2389/97 and heard together. Judgment was delivered herein by Ransely J as he then was, way back on the 16th day of January 2004. The court, has been informed further that the judgement in HCC 2389/97 has been settled. The judgement in HCC 1539/97 has not been settled because the defendant/applicant wishes to appeal against the same and in pursuance of that desire, presented to the court of appeal a notice of appeal dated 19th day of January 2004 and lodged in the court of appeal on 17th February 2004. It has been annexed to the supporting affidavit as annexure LM2.

In furtherance of that desire the applicant has filed an application subject of this ruling dated 25th day of April 2008 and filed on the same 25th day of April 2008. It seeks 4 prayers namely:-

- (1) *Spent*
- (2) *That there be a temporary stay of execution of the judgement of this court pending the hearing and determination of this application.*
- (3) *That there be a stay of execution of the degree herein pending the hearing and determination of the appeal in the court of appeal.*
- (4) *That the costs of the application be provided for*

The grounds in support are set out in the body of the application supporting affidavit, and oral submissions in court. The major ones are as follows:

- That the deponement is the administrative manager of the defendant and he is duly authorized to swear the said affidavit.
- That Auctioneer have proclaimed the defendants goods in an attempt to recover the decretal sum.

- That they were under a mistaken belief that their advocates had obtained stay pending appeal.
- That the plaintiffs are people of no means and if the amount of Kshs 2,354,67.00 is released to them and the appeal succeeds, it will be hard to recover the decretal sum from them.
- That they are ready and willing to furnish the security which this court, may order.
- That failure to file the application was due to the mistake of previous counsel on record who never communicated to the client nor the insurance company on the status of the suit and as such they should not be denied a chance to prosecute their appeal because of lapse of their counsel.
- It is their stand that the plaintiffs will not be prejudiced in any way as they applicants pursue the appeal.
- That they are aware that the proceedings and judgement have been typed but not certified hence the delay in proceeding to prosecute the appeal.

In their oral highlights in court, counsel stressed the following points.

- Since notice of Appeal has been filed the court, is invited to take cognizance of the existence of the appeal.
- Maintains that they will suffer substantial loss if the judgement sum is paid over to the Respondents. It will be difficult for the applicant to recover the same.
- They have complied with the requirement of furnishing security as they have already deposited the judgement sum into court.
- The court, to note that since the Respondent has filed a Miscellaneous Application challenging the appeal, then they have recognized the existence of the appeal.
- They contend that since the Respondent has moved to the court, of appeal to challenge the notice of appeal is a recognition that there in an appeal in existence for which stay is granted.

In opposition, the Respondent put in a replying affidavit, oral highlights and case law and the grounds relied upon by them are as follows:-

- The applicant is disentitled to the relief of stay because he is guilty of laches as the application has been presented 4 years after the delivery of the judgement.
- The applicant has no excuse for the inordinate delay as they filed notice of appeal on 20/1/2004, applied for proceedings on 9/2/2004, , which proceedings were ready by 29/9/2004 and the defendant applicant was duly notified of the readiness of the proceedings by that date. The applicant was accordingly asked to pay Kenya shillings 3,720.00 to have the proceeding certified for collection of the proceedings, in order to process the appeal, but to date they have not paid for the same, and they have no doubt that is why the certificate of delay has not been issued and exhibited.
- Since the appeal was not filed in time, it is deemed to have been withdrawn and as such there is no pending appeal in respect of which stay could be obtained.
- The Respondent applied to the court, to have the appeal struck out vide an application dated 21/7/2008 which was duly served on to the applicant, and to date they have not filed any response to the same and for this reason the court, is invited to take note that the applicant is not serious in pursuing the appeal and is only using it to delay the realization of the fruits of judgement in favour of the Respondent.
- The court, is invited to note that the two suits were consolidated and heard together. The Respondent

was held liable 100% and it is misleading to this court, when the applicant conceded. Liability in one suit, settles the claim and then blocks settlement of the claims in another.

- No memorandum of appeal has been exhibited by the applicant to demonstrate the nature of the complaint that they intend to raise on appeal.
- By reason of the applicants conduct, the proper forum an application for stay should be the Court of Appeal and this court should direct them accordingly to that forum.

In reply to that submission it is contended by the applicant that is not necessary to file a memorandum of appeal when one is seeking relief from the Court of Appeal.

- This court, is not in a position to determine whether an appeal is flawed or not. Also content that failure to file a response to the application pending in the court of Appeal has nothing to do with the proceedings herein.
- The reason why they have not filed the appeal is because the proceedings have not been certified for their collection.

On case law the court, was referred to the case of KENINDIA ASSURANCE COMPANY LTD VERSUS PARTICK MARUTI NAIROBI CA 107 OF 1993 (44/93(UR) laying out the principles that:-

- (i) The Court of Appeal was correcting an erroneous position previously held that there can be no stay of execution in a money decree.
- (ii) The consequence of an assertion that the appeal if successful will be rendered nugatory arises because once the money is paid over to the decree holder, it will be out of the reach of the defendant judgement debtor, and within the reach and control for the decree holder.
- (iii) Where appropriate instead of paying over to the decree holder, the same can be deposited in an interest earning account in the joint names of counsel of both parties.

Due consideration has been made by this court, of the rival arguments presented herein and this court, is of the view that in order to succeed the applicant has to demonstrate the ingredients for granting stay pending appeal set out in order 41 rule 4(1) (2) namely:

- (1) *That if stay is not granted, the applicant will suffer substantial loss.*
- (2) *That the appeal will be rendered nugatory if stay is not granted.*
- (3) *That the application has been presented without undue delay.*

Where as in order to oust, the claim, the respondent has to demonstrate to the satisfaction of the court, that the said ingredients have not been satisfied. Herein the applicant asserts that they have satisfied the ingredients where as the respondents say they have not. In order to determine which of the two is correct, one has to scrutinize each of them in line with the arguments presented.

As regards the suffering of substantial loss indeed, the respondent has not presented to court, the means of sustenance of the Respondent in order to demonstrate that they will be able to pay back the decretal sum should the appeal succeed.

The applicant has therefore demonstrated a genuine complaint. However, satisfaction of this ingredient, alone will not be sufficient to earn the applicant stay. It has to be considered in conjunction with the other ingredients.

Turning to the ingredient of existence of an arguable appeal, this court, is of the opinion that this court,

is not in a position to determine that, as it cannot sit on an appeal over its own judgement. The best forum for determining that is the court of appeal.

As for presentation of the application without undue delay, it is common ground that the same was presented four years later. The explanation being that counsel then on record was at fault. It is noted from the record that counsel currently on record came on record on 25/4/2008, since then a part from presenting this application to court, and making an attempt to settle the matter, no other steps have been taken to quicken the processing of the appeal such as obtaining proceedings, and preparation of the record. The applicants counsel concedes that they have not obtained the proceedings for purposes of processing the appeal because the same has not been certified. They applicants however did not counter the respondents assertion that the proceedings were indeed applied for and were ready as early as 29/9/2004 and the applicant was duly informed of this fact but took no action to process the same.

It is on record that the current counsel came on record more than a year ago and yet he has not explained why no positive action has been taken towards obtaining of the said proceedings. The explanation given is that the same have not been certified. No rule of procedure was cited to this court, to show that certification has to precede payment, in view of the assertion by the respondent that payment precedes certification. For this reason the court is of the view that the unreasonable delay has not been explained to the satisfaction of the court.

As for furnishing of security indeed the applicant has already deposited the decretal sum in court. However, that perse is not sufficient. This has to be accompanied by a demonstration, that the withholding of the successful party from the enjoyment of the fruits of judgement is justified in that it is not mischievous, but is accompanied by a serious desire to get a second opinion on the complaint from a higher court. And that it is not intended to be used by the applicant as a shield and a sword against the successful litigant. Herein, on the facts demonstrated, there is lack of demonstration of a serious intention to proceed with the appeal and get a pronouncement on the complaint. There is an apparent demonstration that the stay order sought herein even if it is not intended to be used as a shield and sword against the successful litigant, by the applicant, their conduct of inaction and lack of moving with speed to process the appeal for speedy disposal, if unchecked it is likely to turn the stay orders into a shield and sword by the applicant as against the respondent.

For the reasons given above the court is of the opinion that it will not be appropriate to grant the stay orders sought herein. This is appropriate case where the applicant can be directed to seek stay from the court appealed to. The applicant will therefore be granted only 30 days stay of execution from the date of the reading of this ruling and there after they can seek stay from the court appealed to.

Dated, Read and delivered at Nairobi this 29th day of May 2009.

R.N.NAMBUYE

JUDGE