REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (MILIMANI LAW COURTS

CIVIL CASE 689 OF 2001

AZIM SAMEJA T/A BUSINESS 2000...PLAINTIFF/RESPONDENT

VERSUS

1. **LAKHAMSHI VIRPAL SHAH**
2. **KAMLABEN LAKHAMSHI SHAH**
3. **SURESHCHANDRA LAKHAMSHI SHAH**
4. **ASHOKKURMAR LAKHAMSHI SHAH**
5. **HARSHA LAKHAMSHI SHAH**
6. **PRITMALAKHA SHAH Trading as HIGHPARK INVESTMENTS....DEFENDANT/APPLICANTS**

RULING NO.3

The background information to this ruling is that in this courts', ruling delivered on the 21st day of September 2007, this court, allowed the plaintiffs application to bar the firm of Mutua Mboya and Nzisi from appearing in this matter on behalf of the defendant for the reasons given. At page 6 of the said ruling this court, made the following observations:-

> "*........allowing advocate Francis Mutua and his firm of advocates continue acting in the matter in view of the fact that the plaintiff disagreed with the counsel on a previous bill, which has not been paid up to now, and in view of the fact that, there is no denial of receipt of instructions initially in this matter for the plaintiff, a situation of revenge and persecution as opposed to fair prosecution of the case will arise. It is a cheriscribed principle of judicial process that both sides to litigation should at all times hold the process that they had subjected themselves to, to be fair. Where a situation of disadvantage arises as against one party, fairness demands that the situation be put right before parties can proceed further. In the premises it is the findings of this court, that fairness, and justice demands that the application dated 17th February 2006 has merit. The same is allowed"*

There is a second ruling delivered by this court, on the 11th day of March 2009. This ruling was in respect of an application which had been presented by the same counsel who had been disqualified by this court, from acting in this matter. In this courts', ruling of 21 September 2007, the application was dated 17th day of October 2007 and filed on the 24th day of October 2007.

It is on record from the said ruling of 11/3/2009 at page 4, line 5 from the bottom, that the plaintiff had filed a preliminary objection to that application in a summary form on the grounds, the application presented was in competent because the firm presenting it namely M/S Mutua Mboya and Nzisi Advocates lack locus standi in this matter to file further proceedings. Reasoning on the merits runs from page 9-12 of the said second ruling. In a summary form the following are the findings of the court:-

> ***(i).*** At page 10, 2nd paragraph, "*that the points raised by the plaintiff against the defendants application were pure points of law and as such they could be considered on their merits."*
>
> ***(ii).*** At page 10, line 2 from the bottom, it was observed by this court, "*that as observed earlier the orders made by this court, on 21/9/2007 still stood. It was not disputed that those orders were valid. There was no dispute that they had not been stayed or set a side and were still in place and as long as they stood the said counsel stood disqualified and lacked standi to act in the matter."*
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> ***(iii).*** At page 11, 2nd paragraph, it was observed "*that arguments had been advanced by the defence lawyer that upholding the preliminary objection would have amounted to placing unnecessary barriers in the path of the defendant to pursue its right of appeal. The court, went on to hold that due consideration had been made by the court of that argument and the court, had arrived at*

the conclusion that no barriers had been placed in the path of the counsel then on record. That no where in the said ruling did the court, say that the defendant could not pursue its right of appeal. That it was at liberty to do at the time of the pronouncement of the said order by seeking to stay the same either formally or informally. Further that neither had the said defendant been prevented from engaging another counsel to pursue their right of appeal."

(iv). At page 12 that "*had the application servived the preliminary objection axe, the court, would have gone a head to fault the same on a point of technicality in that it the application as well as the replying affidavit opposing it had been improperly described in its heading in that the heading do not indicate which of the parties is applying and which of them is responding.*

The same defendants counsel has come back to this court, vide an application by way of notice of motion dated 3rd day of April 2009 and filed on 6th day of April 2009. It is brought under section 3A, order L rule 1 and order XLI rule 4 of the CPR. It seeks two prayers namely:-

1. *That there be a stay of this courts' order of 21st day of September 2007 pending the hearing and determination of an application, for review of the courts orders.*

2. *That cost of this application be provided for.*

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

-That there is in place a ruling of this court of 21/9/2007.

-The defendant/applicant is dissatisfied with the entire ruling.

-That they intend to put in place an application for review to review this courts', orders of 21/9/07 because they were granted in favour of an incompetent application which should have been dismissed instead of being allowed.

-As at the time of argument the application for review had already been filed.

-It is their stand that if stay sought is not granted, the defendant/applicant would have been denied their right to seek review and the said review application would have been rendered nugatory.

-The respondents replying affidavit to their application stands faulted because:-

(i). It is misdescribed in its heading.

(ii). Paragraph 7, 8, 9 is not in the approved court's, language.

(iii). The delay in presenting the objection of six years do not matter and should not be used to deny the applicant a remedy,

(iv). Reliance on technicality should be applied uniformly.

(v). Applicants have never sought an adjournment in this matter.

(vi). They are within their right to seek review.

(vii). In this courts', ruling, this court agreed with the plaintiff/respondent objections that the defendant/applicant should have sought stay of those orders if they had wanted to agitate everything in these proceedings.

(viii). All that they are asking this court, to do is simply to stay those orders, so that it can rule on the issues raised by them in the application for review, as the same raises a serious issue of there being an error on the face of the record.

The plaintiff/respondent has moved to oppose the application on the basis of a replying affidavit sworn by one Azim Sameja on the 23rd day of April 2009 and filed the same date and oral highlights in court. The major ones are as follows:-

-That the applicant is guilty of laches as the order sought to be stayed were granted on 21/9/07 and no explanation has been given for the delay of 19 months before presenting the application for stay.

-The applicant has come to Equity with unclean hands as they have not explained that they sought an extention of time which application was faulted by a ruling of this court, delivered on the 11th day of March 2009.

-Contend that the prayers sought herein are made in bad faith and the same should be declined.

-Contend that if the applicant had intended to seek review of this courts', orders of 21/9/07 they would have done so long time ago instead of engaging in frivolous applications for extention of time to appeal which was disallowed.

-The presentation of the application in the manner done was an after thought and an abuse of the due process of this court, and nothing in the application warrants or justifies the delay.

-No prejudices will be suffered by the applicant as no loss would be suffered by them and non has been demonstrated herein.

-The court, is urged to disallow the reasons for seeking stay for purposes of review as no oral application was made for the same.

-Deny application of double standards.

No case law was referred to this court, the court has given due consideration of the rival arguments above, and find that this court, has been invited to rule on both the technical and merit aspects of the application. The technical aspects arises because of the objection raised to the plaintiff/respondents replying affidavit on the grounds that the same stands faulted by reason of the misdecriptiion, In its heading for not specifying which of the parties is applying and which one of them is responding to the application. The authority for this are this courts', observations in its ruling in this matter delivered on the 11/3/2009.

Whereas the merits aspects deal with the jurisdiction to grant stay and whether there is sufficient ground for the granting of that order herein.

On the courts', assessment, on the issues presented on the point of technicality, that the plaintiff/respondents replying affidavit is faulty,the court, upholds the same as the heading is misdescribed and has to be struck out and this court, said so as much in its ruling of 11/3/2009. Having struck out the replying affidavit, the question is whether the applicant now has a walkover in their application subject of this ruling. The answer is in the negative because order 5o rule 16 (3) allows this court, to hear a party who has not filed a replying affidavit or grounds of oppositions to be heard on points of law. This being the case the respondent is not left remediless. The points of law raised by them in their oral high lights will be picked and used in opposition of this application. The centrol theme in them was that there has been delay in presenting the application for stay.

(ii) There is material non disclosure of material facts.

Due consideration has been made of those two points and applied them to the arguments herein, and the court, finds that indeed the application has been presented 19 months after the orders complained of were made. The court, also finds that the applicant failed to disclose that they presented an application soon after the making of the orders on 21/9/07, which application was presented on 17th October 2007 and it is the one which took up the space till 11/3/2009 when a ruling on the same was delivered. Indeed this should have been disclosed in a further affidavit but they did not. The question is whether the applicant is to suffer penal consequences for doing so or not.

In this court's, opinion, it is clear that had the said application of 17/10/07 not been put in place there would have been no delay. However it is not clear as to whether the non disclosure was deliberate or not. The court, has therefore to decide whether that non disclosure operates to disentitle the applicant to the relief sought. This has to be looked at in the light of the overall ends of justice to both sides and decide whether there were benefits to be gained by the party failing to disclose. In this courts', view, there is benefits in that this non disclosure would overshadow the applicants failed earlier move of having an intention to appeal. The question now is whether this should operate to shut the applicant out of his relief. The court, rules in the negative because the applicant did not benefit from that intention to appeal. There is therefore room for them to seek review instead.

Having ruled that the applicant is entitled to a ruling on the merits, it proceeds to make one that on the material presented herein, in view of the allegation that the application which gave rise to the orders of 21/9/07 was a nullity, it is proper to have that issue interrogated and ruled upon on its own merits because should there be good reason for alleging that the said application was incompetent have any substance in it, and this court, fails to revisit that issue, this leaving the orders made herein intact, then the court, would have used the shield of justice to shield an illegality which a court, of law should avoid doing.

For the reasons given in the assessment the court, proceeds to make the following orders.

1. The plaintiff/respondents replying affidavit sworn by one Azim Sameja on 23/4/2009 and filed the same date has been faulted and struck out in that it is misdescribed as it does not indicate which party is applying and which party is responding.

2. The striking out of the said replying affidavit does not leave respondent remediless as order 50 rule 16 (3) allows the court to allow such a party to oppose the application on points of law.

3. Indeed the respondent's points of law of un explained un reasonable delay, and non disclosure of material particulars have been taken into account in the final determination of this ruling.

4. The assessment reveals that the applicant failed to disclose that they had presented an application on 17/10/2007, soon after delivery of the ruling on 21/9/07, which application remained in place till disposed off by the ruling of 11/3/2009.

5. However the said non disclosure will not be construed against the defendant/applicant because of the following reasons:-

    (i). No material benefit was gained by them as the application was bound to fail due to misdescription of the parties in its heading.

    (ii). The intended benefit of the exercise of the right of appeal was not realized.

(iii). They have raised a substantive issue for arguments in the application for review that the application which gave rise to the orders of 21/9/07 was incompetent.

(iv). If this court, were to refuse to interrogate that issue and it turns out that the complaint has some substance in it, then it would have allowed an illegality to stand a matter which a court of law should not do

6. For the reasons given in number 1-5 above the application dated 3/4/09 and filed on 6/4/09 is allowed in terms of prayer 1 on condition that the applicant proceeds to fix the application for review dated 27/4/09 and filed on 28/4/09 for hearing and disposal within 30 days from the date of this ruling.

7. The plaintiff/respondent will have costs of this application paid to them by the defendant/applicant in any event.

DATED, READ AND DELIVERED AT NAIROBI THIS 18TH DAY OF SEPTEMBER 2009.

R.N. NAMBUYE

JUDGE