



IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 28 of 2007

WYCLIFFE A. SWANYA.....PLAINTIFF

VERSUS

TOYOTA E.A. LTD.1ST DEFENDANT

FRANCIS MASSAI.....2ND DEFENDANT

RULING

1. The application before me is the Notice of Motion dated 9/06/2008 which is filed pursuant to Order 41 Rule 4 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya by which the Applicant seeks ORDERS:-

(i) *Now spent.*

(ii) *THAT this Honourable Court be pleased to stay the proceedings hereto and specifically the bill of costs filed on the 2nd April 2005 pending the hearing and determination of this Application inter partes.*

(iii) *THAT this Honourable Court be pleased to stay the proceedings hereto and specifically the bill of costs filed on the 2nd April 2008 pending the hearing and determination of the appeal, NBI COURT OF APPEAL CIVIL APPEAL NO. 70 OF 2008.*

(iv) *THAT costs of this application be provided for;*

2. The application is premised on four brief grounds on the face thereof:-

(1) *THAT there is sufficient cause for allowing the application.*

(2) *THAT the subject bill of costs stands to prejudice the appeal afore-mentioned.*

(3) *THAT the Applicant stands to suffer substantial loss unless the application is allowed.*

(4) *THAT it would serve the interests of justice if the application is allowed.*

3. The application is also premised on the sworn affidavit of **WYCLIFFE A. SWANYA** dated 9/06/2008 in which he says that he has lodged an appeal against the ruling of this Honourable Court made on 19/02/2008 which dismissed his claim with costs. He says the Record of Appeal was lodged on 25/04/2008 subsequent to the lodging of the Notice of Appeal on the 26/02/2008. He also says that the appeal is due for hearing on 8/12/2008, but that the Respondents has in the meantime filed their party-party bill of costs on the 2/04/2008. The deponent says that the bill of costs was prematurely filed and that if allowed to proceed it will prejudice the hearing and determination of the appeal; that the pending appeal has high chances of success and will, if determined in the deponent's favour, set aside the orders made. The deponent says that no prejudice will accrue to the Respondent if the application is allowed as prayed. The deponent says that he is likely to suffer substantial loss if the application is not allowed as the Respondents are of little financial means and especially the 2nd Respondent who was an employee of the 1st Respondent and therefore that the two Respondents are incapable of making restitution if the appeal succeeds. The Applicant says he is ready to offer security as ordered by the court but in the same breath he asks the court to waive the requirement for security.

4. The application is opposed. The Grounds of Opposition dated 18/09/2008 were filed in court on 19/09/2008. In brief, the Respondent says that:-

- (a) *The Plaintiff's application is fatally defective, mischievous and cannot stand.*
- (b) *The pending appeal does not operate as a stay and that in any event, the instant application is frivolous and a mere afterthought intended only to deny the Defendants the fruits of their judgment.*
- (c) *The application seeks to make this court sit on appeal on the orders issued on 19/02/2008;*
- (d) *The Supporting Affidavit by the Applicant sworn on 9/06/2008 raises no reasonable grounds to warrant the grant of a stay*
- (e) *A taxation of the Defendant's Bill of Costs by the Registrar does not preclude the Plaintiff from making the application for stay of execution;*
- (f) *The Plaintiff served a defective hearing notice dated 14/08/2008, mainly to mislead the court;*
- (g) *The present application has been brought in bad faith seeking to obstruct the course of justice for the Plaintiff.*

5. The application was canvassed before me on 24/09/2008. Counsel for the Applicant reiterates the averments on the face of the application and the sworn affidavit of the Applicant. Counsel cited two authorities to the court, namely

- (i) *Machira t/a Machira & Co. Advocates –vs- East African Standard (No. 2) [2002]2 KLR 63.*
- (ii) *Prime Bank Limited –vs- Josephat Ogova Esige [2005] e KLR.*

6. The **Prime Bank** case set out the requirements to be fulfilled by an Applicant seeking an order of stay under Order 41 Rule 4 of the Civil Procedure Rules. As stated by Visram, J in the said case, the primary provisions of this rule deal with stay of execution pending appeal. Rule 4(2) is relevant to this application and it provides:-

“4(2). No order of stay of execution shall be made under subrule (1) unless

- (a) *the court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and*
- (b) *such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by him.*

7. The applicable rule applicable by the Court of Appeal in dealing with applications of this nature is Rule 5(2) (b) of the Court of Appeal Rules. The Court of Appeal has also said that in any application for stay of execution,

- (i) *The Appellant must show that he has an arguable appeal that is to say that the appeal is not frivolous*
- (ii) *The Appellant must also show that if the application for stay is not granted, the appeal will be rendered nugatory if it succeeds.*

Counsel for the Applicant urged the court to find and to hold that this is a fit case for the court to exercise its discretion in favour of the Applicants. The Applicants have annexed to their application as annexure marked “WASA” the Memorandum of Appeal which sets out four grounds of Appeal as follows:-

1. *THAT the Judge of the Superior Court failed to exercise his discretion or exercised it unjudicially by failing to appreciate that the tort of defamation is not actionable perse and that the appellant had otherwise justified that the limitation period within which to file the suit had not expired.*
2. *THAT the Judge of the Superior Court erred in law and fact by failing to appreciate the appellant was entitled to apply for leave to file the suit out of time either before or after the commencement of the suit and that it was therefore premature to strike out the appellant's suit.*
3. *THAT the Judge of the superior court erred in law and fact by failing to take into consideration all the appellant's pleadings and submissions which, had he done so, would have led to a different finding in favour of the appellant.*
4. *THAT the Judge of the superior court erred by failing to appreciate that the appellant had a reasonable cause of action against the respondents, jointly and or severally, and that the respondents had failed to that the suit was scandalous and vexatious. (sic)*

Counsel for the Applicant thus says that the Applicant's pending appeal is not frivolous, that it is arguable and has high chances of success.

8. The Plaintiffs suit was struck out on grounds that the Plaintiff did not obtain leave of the court before filing the suit out of time. The Plaintiff says in ground 4 of the Memorandum of Appeal that the court failed to appreciate that the Plaintiff could apply for leave to file this suit either before or after filing of the suit.

9. The Defendant's counsel also reiterated the Grounds of Opposition and relied on the **Prime Bank Ltd. case** (above) and also cited HCCC No. 399 of 2005 – **Deposit Protection Fund –vs- Rosaline Njeri Macharia [2006]e KLR**. What is clear from these authorities is that if the Applicant is to succeed in this case, he must furnish security. The Plaintiff herein says in one breath that he is ready to furnish whatever security the court may require of him, but at the same time says that the court should waive the same.

10. After carefully considering the facts that have been placed before me by both sides in this case. I am not persuaded that the Plaintiff has made out a case for the orders of stay. The Plaintiff has not demonstrated to me what substantial loss he is likely to suffer if the orders sought are not granted. Nor has the Plaintiff demonstrated that the Defendants are persons of straw and therefore that they will be unable to refund the decretal sum should the pending appeal succeed. It is instructive to note that the 1st Defendant is a body corporate and in his plaint the Plaintiff prays for judgment against the two Defendants jointly and severally for:-

(a) **General**

(b) **Costs**

(c) **Interest on (a) and (b) at court rates.**

11. It is therefore clear to me that if the Plaintiff's appeal succeeds, the suit will be heard on its merits and once the Defendants are jointly and severally charged the Plaintiff should certainly recover whatever amounts he may have paid out to the Defendants in terms of costs.

12. In summary I find that the Plaintiff has not satisfied the conditions for the granting of a stay as set out under Order 41 Rule 4(2) of the Civil Procedure Rules. I also find that by his own averments, the Plaintiff has not offered any security for the order of stay that he seeks from this court. It is also interesting that the order sought by the Applicant is one seeking to stay the proceedings herein until the appeal is heard and determined. I do not think that there is any justification to stay the bill of costs filed by the Defendants on 2/04/2008; for as I have said should the appeal succeed, the Plaintiff should be able to get a refund of such costs from the Defendants.

13. In the result, I find not merit in the Plaintiff's application. I accordingly dismiss the same with costs to the Defendants.

It is so ordered.

Dated and delivered at Nairobi this 17th day of November, 2008.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Mr. Opiyo (present) for the Plaintiff/Applicant

Miss Mbithe for the Defendant/Respondent