Civil Practice and Procedure

- · Is citation of the wrong order fatal to an application

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI
Civil Case 559 of 1995

RYCE MOTORS LIMITED……...……...….PLAINTIFF/APPLICANT

VERSUS

JONATHAN KIPRONO RUTO ……..1ST DEFENDANT/RESPONDENT

MIDWAY ASSURANCE INTERNATIONAL LTD……...……..2ND DEFENDANT

R U L I N G

The plaintiff by a Notice of Motion seeks stay pending appeal. The plaintiff has brought the application under Order XLV Rule 4 (2) and also under section 3A of the Civil Procedure Act.

The plaintiff intends to appeal against the judgment of the Hon Justice Osiemo, which entered judgment against the plaintiff in favour of the 1st defendant on a counter claim.

Prior to that judgment at a prior hearing the Hon Justice Bosire (as he then was) heard the case between the parties, but not the counter claim. In his judgment the Hon Justice Bosire found in favour of the plaintiff as against the 2nd defendant.

What therefore has aggrieved the plaintiff, and hence the intended appeal is the two seemingly, contradictory judgments on record.

The first hearing was in regard to the plaintiffs claim for repairs undertaken to the 1st defendants vehicle. The plaintiff in this suit claimed for payment of those repair costs, against both defendant. The judge found that the 2nd defendant was liable.

In the second hearing Hon Justice Osiemo heard the 1st defendant's counter claim. The judge found in favour of the 1st defendant as against the plaintiff.

I have read both judgments and I am in agreement with the plaintiff that this is a matter that ought to be tested at the court of appeal. In the judgment of Hon Justice Osiemo I found on page 3 thereof, that it stated that, a consent was entered on 22.1.2001, where it was ordered that the 1st defendant should proceed with his counter claim, against the plaintiff. The record of the proceedings does not bear this out. On 22.1.2001 what was coming up for hearing was the application-dated 10.2.2000 seeking a prayer for the 2nd defendant's counsel to withdraw from acting for the 2nd defendant. The order recorded on that

day states.

"**Orders as prayed. Copies of the order to be served on 2nd defendant by registered post**."

Therefore that discrepancy and the fact the high court has indeed reached two dissimilar decisions on the same matter does convince me that the matter should go to the court of appeal.

The plaintiff's counsel in support of the application stated that the plaintiff had filed a Notice of appeal. That judgment was entered in favour of the 1st defendant, as against the plaintiff, for kshs 7.5 million in general damages, which amount is now about kshs 10 million. That the plaintiff applied for proceedings but the court file was reported as missing, at the court registry and when the proceedings were supplied some pages were missing, and this has hampered the filing of the appeal. Plaintiff counsel also admitted that the counsel acting for the plaintiff has not acted with haste in following this matter, and all this has exposed the plaintiff, to execution. The` plaintiff, it was submitted is willing to supply security for the stay.

In opposition, 1st defendant's counsel began, by submitting that the plaintiff's application is incurably defective, for having been brought under Order 41 Rule 4 (2), and yet it ought to have been under O 41 Rule 4 (1). That the stay orders can only be obtained under Rule (1). That on O 41 R. 4 (2) the applicant is required to show substantial loss and this the plaintiff had failed to do. Secondly, the plaintiff was supposed to satisfy the court, that the application for stay was made without delay, yet the plaintiff had failed, to file the application for stay, in December 2002, and December 2003, and again in December 2004. That on 23rd May 2005 the 1st defendant's bill of costs was taxed by consent. That the plaintiff had failed to file an appeal, within 60 day as required by the court of appeal rules, and therefore stay ought not to be granted.

I have considered the opposing arguments. The defendant's submission that the plaintiff cannot obtain stay by citing O 41 R. 4 (2) although merited, will not sway the court to dismiss the application. That finding is fortified by the ruling of the court of appeal in CIVIL APPEAL NO. 189 OF 2001 (Unreported) POSTAL CORPORATION OF KENYA – AND – I.T. INAMDAR AND OTHERS where the judges of appeal stated: -

"**In our view, the notice of motion that was before the superior court could have been better drafted and the appellants sentiments are not altogether baseless, particularly when one considers that the applicant was seeking orders that were to see finality of the entire suit……..we do not find that the appellant was prejudiced by the bad drafting of the notice of motion and thus, nothings turns out on the first and tenth grounds of appeal. Citation of a wrong order or rule is not necessarily fatal to an application**."

Indeed the test is; was the respondent prejudice by the faulty drafting of the present application. I would answer that in the negative, the respondent knew quite clearly the application that he was facing. I therefore reject that objection.

On the ground that the plaintiff's application, is defeated by delay; I find that the plaintiff cited the loss of the court file as one of the reasons for delay. The defendant respondent did not respond to that submission. Indeed it cannot escape my attention that this file has been categorized a strong room file. I therefore find that the plaintiff's delay is not inordinate in the circumstances particularly when one considers that there was even confusion, on the date the second judgment was delivered, and it necessitated inquiring from the court registry.

The 1st defendant submitted that the application for stay was the plaintiff's attempt to deny him the enjoyment of the fruits of his judgment. In this regard he relied on the case of KENYA SHELL LIMITED V BENJAMIN KARUGA KIBIRU AND RUTH WAIRIMU KARUGA [1982 – 88] 1 KAR 1018. The plaintiff in response submitted that it is willing to abide by the order of court for security as condition for stay.

As stated earlier on, I am of the view that the plaintiff ought to appeal if for nothing but to clear the two judgments that are not consistent. The plaintiff argued that if payment of the judgment amount is made there is no guarantee, that if it succeeded, that it would be able to recover, the same from the 1st defendant. Therefore it was submitted that it would suffer substantial loss. I am however alive to the fact that plaintiff counsel has, by their failure to closely follow this mater, contributed to the delay. Balancing the different issues, brought before me, and in exercise of my undoubted discretion, I am of the view that the plaintiff should provide the amount passed in judgment by the Hon Justice Osiemo and that amount to be held in joint account of the advocates for the plaintiff and the defendant pending appeal.

The orders of the court are as follows: -

(1) That the plaintiff is herby ordered to provide kshs 7.5 million to the 1st defendants counsel within 30 days from this date hereof.

(2) That on the said amount being provided as in (1) above the 1st defendant's advocate is to open an interest earning account with that money which account shall be in the names of the advocates representing the plaintiff and the advocates representing the 1st defendant.

(3) That the costs of the application dated 5th July 2005 shall abide with the appeal

Dated and delivered this 15th day of August 2005.

MARY KASANGO

JUDGE