



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO 218 OF 2004

MANUFACTURES LTD APPELLANT

VERSUS

JOHN KITAMBO MWANGANGI RESPONDENT

RULING

This is an application under Orders XXI Rule 22, XLI Rule 4 and XLIX Rule 5 of the Civil Procedure Rules (hereinafter referred to as “the Rules”), Section 3A of the Civil Procedure Act (Cap 21) and all other enabling provisions of the law. In it, the Appellant/Applicant seeks the following orders:

“2. THAT execution of the Judgment delivered by the Learned Resident Magistrate sitting at Milimani Commercial Courts at Nairobi on 18 th day of December, 2003 be stayed and the parties be ordered to maintain the status quo until the determination of the Appellant’s application filed in Resident Magistrate Court in RMCC No 4711of 2003 is heard and determined.

3. THAT the time to file Appeal be enlarged and the Memorandum of Appeal filed herein be deemed to have been filed in time.

4. THAT such further, other or consequential orders as the court deems just.”

I have perused the affidavit sworn by Anil Joshi Advocate on 25th March, 2004 in support of the application and the Replying Affidavit of John Kitambo Mwangangi sworn on 6th April, 2004 and a Supplementary Affidavit of the same Mwangangi sworn on 14th April, 2004 and it is obvious that the matters leading to the application are not in dispute. I will set them out briefly as follows.

The Respondent sued the Appellant in the lower court. Judgment on liability was entered in his favour by consent in the ratio of 90:10. What was left in the suit was assessment of damages. For this purpose, the contending parties filed written submissions. In the submissions filed on behalf of the Appellant, its Counsel suggested that an award of Kshs.750,000/= would be fair compensation for the Respondent. In her Judgment dated and delivered on 18th December, 2003, the Learned Trial Magistrate (Mrs. Omondi) awarded the Respondent Kshs.900.000/=.

In his affidavit in support of the application, Mr Joshi who is the Appellant’s Advocate stated that Judgment was initially scheduled to be delivered on 10th December, 2003. It was not ready on that date

and the lower court directed that the Judgment would be delivered on notice. No notice had been given to Mr Joshi nor his client when the Judgment was delivered on 18th December, 2004. Mr Joshi only became aware of the Judgment after his client's goods were proclaimed on 22nd March, 2004. He immediately filed an application in the lower court on 24th March, 2004 seeking the following orders.

“1. That this application be heard ex -parte in the first instance

2. That this court be pleased to stay execution of Judgment passed in this suit pending hearing and final determination of an appeal in the High Court

3. That the Defendant's (Appellant's) time to lodge Appeal be enlarged by further Thirty (30) days from the date of court order

4. (Costs)

5. (Other relief)”.

When the application was placed before another magistrate of the lower court (Miss Maina) it was certified urgent. That Magistrate, however, refused to grant an ex parte order for stay. That being the situation, the Appellant moved to this court with the application presently before me.

A careful perusal of the application under consideration and the affidavit of Mr Joshi shows that the primary remedy sought by the Appellant is for stay of execution of the Judgment of the lower court until its application in the lower court is heard (See prayer 2 of the application and paragraph 12 of the affidavit). However, it would appear from the written submissions filed by the contending parties that they intended a conclusive decision on both questions for stay and enlargement of time.

As was seen earlier, there is no dispute between the parties on liability. That was settled. The Appellant's only grievance and which is the primary ground of appeal concerns the quantum of damages assessed by the lower court. In its submissions before that court, its Advocate submitted that an award of Kshs.750,000/= was reasonable. Having conceded to that extent, it is presumed that the Appellant is willing to pay that sum and that it was not appealing against an award to that extent. That being the case, I grant the Appellant's application for stay on condition that it pays the Respondent the sum of Kshs.675,000/= which is 90% of the award accepted by the Appellant to be reasonable compensation for the Respondent. Such payment to be made within 30 (thirty) days of this Ruling failing which execution to issue forthwith.

On the question of enlargement of time for filing the appeal out of time, I will say as follows.

It is now accepted beyond peradventure that the jurisdiction of this court in enlarging time is unfettered and is exercised only on terms that are just. See generally ***Dolphin Palms Ltd vs Al -Nasibh Trading Co. Ltd & Others Civil Application No Nairobi 30 of 2001 (17/2001 UR)*** and ***Mistry Jadva Parbat & Co Ltd vs APV Hall Equitorial Ltd Civil Application No Nairobi 96 of 2001 (UR 57 of 2001)*** . The Respondent did not contest Mr Joshi's statement that no notice had been given to Mr Joshi or his client of the date of Judgment. I was taken aback by the Respondent's Counsel's submission that there is no provision in law that judgment should be delivered on notice. If that were correct, many litigants may lose their rights in cases like this where a court unprocedurally declares their rights in their absence. This is sufficient reason and I think that this is a deserving case in which I should exercise my discretion and which I hereby do by enlarging the time within which the Appellant ought to file his appeal to the time when the Memorandum of Appeal herein was filed with the consequence that this appeal is now deemed properly filed.

Those shall be the orders of the court. For the avoidance of doubt the stay granted shall apply until the appeal is heard and determined if the Appellant shall abide by the conditions upon which it is granted. Each party to bear its own costs of the application as both parties have had partial victory.

Dated and delivered at Nairobi this 6th day of July, 2004.

ALNASHIR VISRAM

JUDGE