



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

MISC. APPLICATION NO. 61 OF 2020

KWALE INTERNATIONAL SUGAR COMPANY LTD.....APPELLANT

-VERSUS-

JOSHUA MANTHI MANI.....RESPONDENT

RULING

1. The ruling is in respect of the Notice to Motion dated 14th August, 2020 brought under Section 3A and 79G of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules and all enabling provisions of law. The Appellant seeks the following orders:

1. Spent

2. That this Honourable court be pleased to order stay of proceedings in Kwale CMCC No. 207 of 2016 pending inter-partes hearing.

3. That this Honourable Court be pleased to order stay of proceedings in Kwale CMCC No.207 2016 pending hearing and final determination of the intended appeal herein.

4. The court be pleased to grant leave to the Appellant to appeal out of time against the orders and ruling of Honourable Omido J. M. Principal Magistrate issued on 4th March, 2020.

5. The costs of this application be provided for.

2. The application is grounded on the grounds in the body of the application and the contents of a supporting affidavit of Amos Kipkemboi Suge, the legal officer of the Appellant company sworn on 14th August 2020. It is deponed that on or about 20th April 2016, the Respondent filed a suit at Kwale Magistrate Court seeking general and exemplary damages for trespass and costs of the suit. A copy of the plaint, defence, witness statement, list and bundle of documents filed in the matter have been annexed. It is stated that on or about 23rd October, 2019, the Appellant filed an application seeking to vary consent recorded on 10th April 2019 and further seeking orders that the statement of defence dated 19th April 2019 and filed on 22nd May 2019 be deemed as duly filed. Copies of the application, replying affidavit and written submissions are annexed. The Appellant's case is that on or about 4th March 2020, a ruling was delivered in Kwale Civil Suit No. 207 of 2016 wherein the court dismissed the Appellant's said application. That the effect of the ruling is that the matter will proceed as undefended. A copy of the said ruling and order are annexed. That on or about 10th March 2020, the Appellant applied for a copy of the ruling and order for purposes of preparing a memorandum of appeal but due to the scaling down of court operations wherein the Kwale Court registry was operating at limited capacity, the Appellant could not immediately access a copy of the ruling. That the Respondent's advocates on 14th July 2020 did a letter inviting the Appellant's advocates to the Kwale Court registry on 21st July 2020 for purposes of fixing a hearing date where they fixed the matter for hearing on 4th November, 2020.

3. The Appellant avers that unless a stay of proceedings is ordered, the matter is likely to proceed for hearing without the participation of the Appellant, which will deny the Appellant the right to be heard in his defence, and the intended appeal shall be rendered nugatory. The Appellant states that it is in the interest of justice that the orders sought be granted in order to give the Appellant a chance to ventilate their defence, adding that the intended appeal is arguable with high probability of success. That the time for filing an appeal has run out and it is necessary for leave to appeal out of time to be sought firsthand and obtained. The Appellant contends that the application herein has been brought timeously and without unreasonable delay. That the Respondent will not be prejudiced if leave is granted as the matter will be heard and determined on its substantive merits.

4. In opposing the application, the Respondent filed a replying affidavit sworn by Joshua Manthi Mani, the Respondent on 29th January,

2020. The Respondent has deponed that the Appellant first appeared in suit before the subordinate after two (2) years where they filed a memorandum of appearance, a copy of which has been annexed. That the applicant filed an application dated 17th April 2018 (which is annexed) seeking for stay of proceedings among other prayers including leave to file defence out of time since interlocutory judgment in the matter had already been endorsed and the matter was ready for formal proof. The Respondent avers that the Appellant slept on its rights and not prosecuting the said application dated 17th April 2018 until when the Respondent's advocates fixed the matter for mention for directions in order to proceed with the hearing. That the applicant wrote a letter dated 1st April 2019 stating their intention to proceed with the application after they had seen the Respondents move the court. That the parties compromised the application by recording a consent on 10th April 2019 which was recorded as an order of the court which details the applicant did not comply with on time. That as a result, the application dated 17th April 2018 stood dismissed with costs to the Respondent after non-compliance on time and the monies received was received on a without prejudice basis as costs of the application. That in an attempt to delay the matter further, the applicant filed another application dated 23rd October, 2019 seeking to review the consent order recorded on 10th April 2019 and further requested for an order to have the statement of defence filed on 22nd May, 2019 deemed as duly filed. That application was again dismissed with costs by the trial court.

5. The Respondent states that the applicant has now come up with another delaying tactic intended to stop the Respondent from proceeding with the matter by filing this miscellaneous application on the pretext that they wish to pursue an intended appeal. That this has been a trend where the applicant files applications to stall the Respondent from ever proceeding with the matter. The Respondent states that the allegation that the intended appeal was not filed on time because of scaling down of operation of the court should not be an excuse as the digital filing system was up and running as directed by the Chief Justice. That the intended appeal is frivolous and the same is just meant to frustrate the hearing and delay the expeditious disposal of the matter before the subordinate court.

6. The application was canvassed by way of written submissions which were duly filed by both parties. I have considered the application and the submissions made. I have also taken into account the authorities cited. The application seeks to stay the proceedings in Kwale CMCC No.207 of 2016 pending the hearing and determination of the intended appeal and for leave to file appeal out of time against the ruling of the learned Magistrate, Honourable Omido, JM Principal Magistrate delivered on 4th March 2020 in Kwale CMCC No.207 of 2016. The ruling delivered on 4th March 2020 by the learned Magistrate was in respect of the applicant's Notice of Motion dated 23rd October 2019 which sought to review, vary and/or modify a consent order recorded by the parties on 10th April 2019 and for the statement of defence dated 19th April 2018 and filed on 22nd May, 2019 by the applicant to be deemed as duly filed. The record shows that the applicant through an application dated 17th April 2018 and filed on 18th April 2018 moved the court seeking for orders, inter alia, that the interlocutory judgment entered against the applicant be set aside and for the applicant to be granted leave to file its statement of defence out of time. The said applicant was compromised by a consent reached by the parties and recorded in court in the following terms:

“By consent the Notice of Motion dated 17th April, 2018 be allowed on condition of the defendant paying throw away costs of kshs.3,000/= within the next seven (7) days. In default, the application to stand dismissed.”

7. Following that consent, the trial court ordered that upon compliance with the terms of the consent, the applicant would have 21 days within which to file and serve its statement of defence. It transpired that the applicant did not pay the throw away costs of Kshs.3,000/= within the seven (7) days as per the consent recorded and made payment well outside the period that was agreed upon by the parties. Upon hearing the application for review, the learned Magistrate found that the application was devoid of merit and proceeded to dismiss the same with costs to the Respondent. Being dissatisfied with the said ruling, the applicant on 10th March 2020 requested for a copy of the ruling and order and took no further action until it was jolted by the Respondent's letter dated 14th July, 2020 requesting the Applicant's Advocates to send their representative to attend the court registry on 21st July 2020 for purposes of fixing a hearing date in the matter. This prompted the applicant to file the present application on 18th August, 2020, which was a period of about one month later.

8. Appeals from the subordinate court have to be filed within 30 days from the date of the decision of the lower court and such appeal is filed when a memorandum of appeal has been filed. Section 79G of the Civil Procedure Act provides as follows:

“Every appeal from a subordinate court to the High Court shall be filed within thirty days from the date the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the Appellant of a copy of the decree or order.”

9. In this case, the decision of the lower court was made on 4th March 2020. As already stated, the present application was filed on 18th August, 2020 which is a period of over five (5) months from the date the impugned ruling was delivered. There is no doubt there was delay in bringing the current application. The applicant has submitted that due to the scaling down of court operations occasioned by the covid-19 pandemic, the applicant could not access a typed copy of the ruling and order for the purposes of preparation of the memorandum of appeal until 9th August 2020 when the applicant collected the ruling and order dated 7th August 2020. I note however that the ruling is dated 4th March 2020. The explanation given by the applicant for failure to file the intended appeal on time is not very convincing. Even after allegedly collecting the ruling and order on 9th August, 2020, the applicant took no action for the next nine (9) days. This inordinate delay has certainly caused serious prejudice to the Respondent who was magnanimous enough to have the interlocutory judgment earlier entered in the matter to be set aside and for the applicant to file a statement of defence out of time. Even then, the material on record shows that the applicant still went ahead and slept on his rights by failing to comply with the consent recorded by the parties. In this case, I am far from satisfied that the applicant has shown proper diligence that this court has come to expect of those who seriously pursue their right. Even as the court seeks to do justice, it cannot be lost to it that despite having a conscience, it is a court of law and not of mercy. It is also bound by the law. Having looked at the history of the case, the court is in agreement with the Respondent's submission that the applicant is merely attempting to further delay the proceedings pending before the subordinate court. There is no reason for me to grant leave to file appeal out of time. In addition, stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his/her litigation. It impinges on the right of access to justice, right to be heard without undue delay and overall, right to fair trial. Stay of proceedings can only be granted sparingly, can only in exceptional cases. Moreover, having declined to grant leave to appeal out time, the order for stay in this case will serve no purpose as there no appeal pending determination.

10. I find that no valid reason has been offered for the delay in filing an appeal because the explanation given is not plausible. I am also of the considered view that the applicant has not met the test for grant of stay of proceedings in this matter.

11. In the circumstance, and for the reasons I have given above, I find that the application is without merit. The notice of motion dated 14 August, 2020 is hereby dismissed. Costs to the Respondent.

12. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25TH DAY OF MAY, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE