



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. E163 OF 2021

KAYSER INVESTMENT LIMITED.....APPELLANT/APPLICANT

-VERSUS-

ABSOLUTE SECURITY LIMITED.....RESPONDENT

RULING

1. The appellant/applicant in the present instance brought the Notice of Motion dated 25th March, 2021 supported by the grounds set on its face and the facts deponed to in the affidavit of **Dorothy Mbaye**. The applicant sought a stay of all proceedings in MILIMANI CMCC NO. E3160 OF 2020 pending the hearing and determination of the intended appeal and a further order for leave to appeal out of time against the ruling delivered on 15th February, 2021 in the said MILIMANI CMCC NO. E3160 OF 2020.

2. In opposing the Motion, the respondent put in Grounds of Opposition dated 27th April, 2021.

3. The Motion was canvassed by way of written submissions.

4. I have considered the grounds on the face of the Motion and its supporting affidavit; the Grounds of Opposition; and the rival written submissions placed before me.

5. The record shows that the order seeking leave to appeal out of time was allowed by consent of the parties on 28th April, 2021, with the applicant being granted 30 days within which to file its memorandum of appeal. Consequently, the sole issue pending for determination is that of the order seeking a stay of proceedings in the suit.

6. It is noteworthy that the granting of a stay of proceedings is purely a matter of judicial discretion. That being said, the principles that guide the courts in determining an application for a stay of proceedings have been discussed in various cases, some of which the parties have quoted in their respective submissions. Both parties herein relied on the case of **Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi [2014] eKLR** where the court listed the following as the three (3) main principles for consideration in determining an application seeking a stay of proceedings:

“a) Whether the applicant has established that he/she has a prima facie arguable case.

b) Whether the application was filed expeditiously and

c) Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.”

7. The first principle relates to the expeditious filing of an application. The applicant states that the instant Motion has been filed without unreasonable delay and that any delay was precipitated by the time taken in obtaining a copy of the impugned ruling.

8. I have perused the copy of the impugned ruling which is annexed to the supporting affidavit of Dorothy Mbaye and note that the same was delivered on 15th February, 2021 whereas the Motion was brought on 1st April, 2021. Upon considering the passage of time in between and the explanation given by the applicant, I am satisfied that there has not been inordinate delay in bringing the Motion.

9. The second principle concerns itself with whether the applicant has an arguable appeal with reasonable chances of success. The applicant states and contends that it has an arguable appeal as discerned from the memorandum of appeal, since the trial court arrived at an erroneous determination on the issue of its integrity resulting from the libelous publications made against it by the respondent and upon reasoning so,

declined to grant the interlocutory injunctive orders sought.

10. On the other hand the respondent by argues that the applicant has failed to demonstrate that the appeal raises any arguable issues to enable this court exercise its discretion in its favour.

11. From the perusal of the record, it is clear the claim which was filed by the applicant before the trial court arises out of the tort of defamation. It is also clear from the impugned ruling that the application dated 7th July, 2020 which gave rise to the aforementioned ruling sought temporary injunctive orders to restrain the respondent from making any further publications of allegedly defamatory and false nature. Upon hearing the parties on the application, the trial court found it to be unmeritorious and consequently dismissed it with costs.

12. A reading of the memorandum of appeal filed on 26th March, 2021 shows that the applicant is challenging not only the finding of the trial court but its reasoning as well, both on points of fact and law. Upon considering the circumstances of the present matter, as well as the legal position that an arguable case or appeal is one that raises arguable points which may be give rise to a possible infringement of a right, notwithstanding whether it succeeds or no; I am convinced that even without going into the merits thereof, the applicant has reasonably demonstrated the existence of an arguable appeal.

13. Turning to the third principle on the interest of justice vis-à-vis the subject of prejudice, the applicant on the one hand is of the view that unless stay of proceedings is granted, it stands to be greatly prejudiced since it will be unable to effectively prosecute its claim. The applicant also submits that if the parties proceed with the suit and the appeal eventually succeeds, then substantial loss and prejudice will be visited upon it, while submitting that the respondent does not stand to be prejudiced in any way should an order for stay of proceedings be granted.

14. On the other hand, it is the argument of the respondent that the applicant has not specifically shown the hardship that will be visited upon it should an order for stay of proceedings be denied, and cites *inter alia*, the case of **Christopher Orina Kenyariri v Toyotsu Auto Mart Kenya Limited [2021] eKLR** in which the court held that an applicant ought to demonstrate with exactitude the hardship to be suffered if stay of proceedings is denied.

15. Upon weighing the rival positions above and the circumstances of the dispute, I note that the suit pending before the lower court was lodged by the applicant. Similarly, and as earlier indicated, the claim is in the nature of defamation and it is evident that the injunctive orders earlier sought by the applicant were not granted by the trial court. In my view therefore, the applicant has reasonably shown that unless there is a stay of proceedings during the pendency of the appeal, there is a likelihood that prejudice and hardship will be visited upon it, which may adversely impact on its right to a fair trial.

16. I will also consider a fourth principle touching on the expeditious disposal of cases vis-à-vis proper use of judicial time. I borrow from the case of **Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others [2009] eKLR** quoted in the respondent's submissions and where the Court of Appeal acknowledged that judicial time is a resource to the courts. I equally borrow from the case of **Ezekiel Mule Musembi v H. Young & Company (E.A) Limited [2019] eKLR** relied upon by the applicant, whereby the court held that the expeditious disposal of cases ought to be a factor for consideration in determining applications seeking an order for stay of proceedings.

17. In the present instance, the suit was instituted in the year 2020 and is still in its early stages, since there is nothing to indicate any further progress made since the delivery of the impugned ruling. It is also apparent that the outcome of the appeal will have a direct bearing on the conduct of the parties in the course of the trial. It is therefore prudent and proper use of judicial time to have the parties pursue the appeal first before undertaking any further proceedings before the lower court.

18. The upshot therefore is that the Motion dated 25th March, 2021 succeeds in terms of prayer c). Consequently, there shall be a stay of all further proceedings in MILIMANI CMCC NO. E3160 OF 2020 until the appeal is heard and determined. Costs of the Motion shall abide the outcome of the appeal.

Dated and signed at **NAIROBI** this day of2021.

A. MBOGHOLI MSAGHA

JUDGE

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 7th day of July 2021.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent