



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCA NO. 21 OF 2019

NAFTALI AROKO OPIYO.....APPELLANT/APPLICANT

VERSUS

LYDIA MBURUGU.....RESPONDENT

RULING

The Appellant by a Notice of Motion application brought under the provision of **Article 48, 50(1) 159(2) (a)(d) and (e) of the Constitution of Kenya 2010, Order 42 Rule 6 (1); Order 51 of the Civil Procedure Rules, Sections 1A, 1B, 3, 3A, 63(e) of the Civil Procedure Act** sought orders;

- a. That the Court orders that there be a stay of proceedings in Nairobi Milimani Chief Magistrate Commercial Court; **Civil Suit Number 186 of 2016** pending the hearing and determination of the Appeal as filed by the Appellant pursuant to Memorandum of Appeal dated 17th July 2019 and filed in court on an even date.
- b. That this Court orders any other and further orders as it deems appropriate in the circumstances of the case.
- c. That the costs of this application be provided for.

The application is based on the following grounds; the Appellant/Applicant contends;

On 31st October 2018, the Trial Court granted orders that Plaintiff had 30 days to file written submissions and the Defendant had 30 days after service of Plaintiff's submissions to file their written submissions. The matter, ***Milimani Commercial Civil Cause 186 of 2016*** was to be mentioned on 25th January 2019 to confirm filing of these submissions.

On 7th December 2018, the Plaintiff filed written submissions and served the Defendant. On 18th January 2019, the Defendant served the Appellant/Plaintiff with an Application dated 14th January 2019.

The gist of the application, the Defendant/Applicant sought the Court orders of 31st October 2018, to be varied to accord the Defendant opportunity to reopen the case, recall the Defendant to produce documents/exhibits inadvertently left out during proceedings. The documents were not produced as exhibits, during the Trial.

The Trial Court granted the application vide Ruling of 18th June 2019 and allowed the application.

The Appellant found it inconceivable that the application of 14th January 2019 was granted in an omnibus manner as it led to the conclusion that reopening the Respondent's case was for the sole purpose of filing gaps in their case; namely failure by the star witness **DW1** to produce documents as exhibits in Court. This would be prejudicial considering the Applicant filed written submissions on 7th December 2018 and raised the same issue. If stay of proceedings was not granted it would render the appeal nugatory.

The Appellant's submissions of 7th December 2018 remain legally on record and if again no stay of proceedings is granted pending appeal, then it would indeed be the epitome of prejudice to the Appellant's submissions as it would have the effect of striking out Issue 3 of

submissions.

In the interest of justice, the application for stay of proceedings pending appeal should be granted.

The Respondent being fully aware of the filed appeal and application for stay of proceedings against the orders of the Trial Court of 18th June 2019 moved the Trial Court to set down the matter for hearing on 10th September 2019. It was in bad faith, with ill will and malice with the sole agenda of rendering the appeal nugatory.

APPELLANT'S SUBMISSIONS

The Appellant relied on Order **42 Rule 1 CPR** on grounds for seeking stay of execution and/or stay of proceedings.

In Kenya Wildlife Service vs James Mutembei CMCC 46 of 2017 where the Court relied on ***Global Tours & Travels Ltd NBI Winding Up Cause 43 of 2000 Ringera J. observed;***

“The sole question is whether it is in the interest of justice to order stay of proceedings and if it is, on what terms it should be granted..... the court should essentially weigh the pros and cons of granting or not granting the order..... it should bear in mind such factors as the need for expeditious disposal of cases, prima facie merits of intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one..... the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”

See Also **Halsbury Law of England 4th Ed Vol 37 Pg 330-332**

on the grounds for stay of proceedings.

REPLYING AFFIDAVIT

The Application was opposed by an Affidavit dated 1st August 2019 and filed in court on 8th August 2019 sworn by Lydia Mburugu the Respondent herein. She stated that the Appellant's application was frivolous, vexatious and an outright abuse of the court process and that it was an afterthought all along meant to derail quick and early determination of the main suit which is pending in the Milimani Chief Magistrate Commercial Court and which the Applicant do not intend to proceed.

That the matter at the Milimani Chief Magistrates Commercial Court has already been fixed for defense hearing on 10th September 2019.

That, the purpose of the hearing is for the Respondent to be recalled by her Counsel to produce her documents in court as evidence. The evidence was omitted due to in-advertence and human error of her Counsel's Junior Assistant, she failed to produce documents as exhibits during the defense hearing. The Appellant is adamantly objecting to the production of documents even after the Court allowed the Respondent to produce her evidence in court.

That the Court admitted the documents during the Pre-trial and the Appellant's advocate extensively used the same documents in cross-examination which evidence is on record and therefore there will be no prejudice that stands to be suffered by the Appellant.

That the reasons, grounds and arguments being raised hereto by the Appellant are all fictitious, baseless and unfounded and which could have been verified at the hearing set for 10th September 2019.

That the court was right and justified in allowing the Respondent's application for reopening of her case and the reasons being advanced by the Appellant are not convincing to warrant this Court to allow his application.

RESPONDENT'S SUBMISSIONS

In response to the application the Respondent filed her Replying Affidavit and grounds of opposition both dated 1st August and filed in Court on 8th August 2019.

The Respondent submitted that the purpose and intent of the Appellant's application is to stop the Respondent from producing as exhibits documents which have already been filed in court; and the court having already given a go ahead for the Respondents to fix a hearing date to cause the Defendant/Respondent to be recalled to produce her bundles of documents already before court.

It was the Respondents submissions that this matter came up for hearing of the defence case on 20th March 2018, since Mr. Gitonga Muriuki the Counsel on the record for the Defendant/Respondent was away attending to a mention at ***Kajiado High Court in ELC No. 837 of 2017***. He had requested his Junior Associate Mr. Mugambi to hold his brief for the matter to be set aside up to noon but the Court insisted on proceeding at 11.00 am. As a result, Mr. Mugambi was compelled to proceed and he took the Defendant through examination in-chief which entailed introduction of the witness and production of witness statement but failed to lead the Defendant in the production of her evidence as exhibits; which necessitated the Defendant/Respondent herein filing an application dated 14th January 2019 seeking to recall the Defendant who had closed her case on 31st October 2018, to produce documents already;

i. Filed before the court on 11th March 2016 and served on the Plaintiff/Appellant.

ii. These documents were subject to the Pre-trial directions of the court on 4th July 2016 and 20th July 2016.

iii. These documents were subject to cross-examination by Plaintiff's Counsel and re-examination by the defense Counsel on 20th March 2018 and 31st October 2018.

iv. The issue of re-calling a witness to produce documents which have been extensively and intensely referred to in the proceedings before the lower courts. The Defendant Counsel only came to know of the omission to produce the defense exhibit filed in court on 10th March 2016 and subjected to pre-trial on 4th July 2016 and 20th July 2016 and which made the Plaintiff to file a supplementary bundle of documents and supplementary witness statements.

It was her submission that on 18th June 2019 the Chief Magistrate L.L. Gicheha made her determination and seriously considered all submissions of the parties allowing the Counsel for the Defendant to recall the Defendant to produce her bundle of documents as exhibits.

The Respondent in her submissions relied on the case of Samuel Kiti Lewa -vs- Housing Finance Co. of Kenya Ltd & another [2015] eKLR Kasango J. observed;

“The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion, the court should ensure that such re-opening does not embarrass or prejudice the opposite party”

In St. Patrick's Hill School Limited -vs- Bank of Africa Kenya Limited [2018] eKLR Nyakundi J. stated;

“In exercising judicial authority the courts and tribunals shall be guided by the following principles....(d) justice shall be administered without undue regard to procedural technicalities.”

In the case of Republic -vs- District Land Registrar, Uasin Gishu & Another (2014) eKLR where Ochieng J held that;

“...to my mind, justice is not dependent on Rules of Technical procedures. Justice is about doing the right thing. Pursuant to article 159 (2)(d) ...in exercising judicial authority, the courts and tribunals shall be guided by the following principles....(d) justice shall be administered without undue regard to procedural technicalities.”

Court of Appeal case of Philip Chemwolo & Another -vs Augustine Kubende [1986]eKLR, Apaloo J. A. recognized;

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.”

She submitted that by this Court allowing the Appellant's application the very essence of **Article 159 of the Kenyan Constitution** will be defeated. Further, there will be no prejudice suffered by the Appellant if the Court allows the Defendant to proceed and produce the exhibits in the Lower Court as directed by the Chief Magistrate Court.

DETERMINATION

The issue for determination is whether stay of proceedings of Milimani Commercial Chief Magistrate Court Civil Case 186 of 2016 pending hearing and determination of the appeal is granted.

The Appellant filed Memorandum of Appeal and Certificate of Urgency on 17th July 2019. The Court granted orders to serve the Defendant and come back for further directions on 30th July 2019. The defendant through Counsel filed Notice of Appointment on 29th July 2019. On 28th August 2019, the Duty Court M.Odero LJ granted temporary stay of proceedings pending hearing of the instant application. On 9th September 2019, it was brought to this Court's attention that the matter was scheduled for hearing on 10th September 2019. This Court granted stay of proceedings pending hearing of the instant application. Parties/Counsel were to file and exchange written submissions and proceed on 23rd October 2019.

The issue to be considered is whether, there is an arguable appeal. In the instant case, the question is if after close of the Defendant's case and directions are issued on filing written submissions, the Appellant filed submissions and served the Defendant. Instead of filing submissions, the Defendant filed an application to reopen the case and have the Defendant produce documents as exhibits. The Court is of the view that there are legal issues for interrogation on if the Trial Court's discretion was judicially exercised and was in tandem with the law? This is an arguable appeal and at this stage; it is not whether the appeal succeeds or not but rather if there are issues that are not rather groundless for determination. In Stanley Kangethe Kinyanjui vs Tony Ketter & 5 Others [2013] eKLR held;

“On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised....An arguable appeal is not one which must necessarily succeed, but one which ought to be fully argued before Court; one which is not frivolous.....”

Secondly, there is the issue of whether the Ruling of 18th June 2019 prejudiced the Appellant's rights and case. In the case of **Pkiech Chesimaya vs Limakorwai Achipa 2020 Eklr**; the Court of Appeal found;

“On the question of whether either party is likely to be prejudiced by the delay, it is upon the party making the application to show the Court the prejudice they would suffer as a result of the delay.”

In weighing the interests of both parties and determine the question of prejudice to each party, the Appellant submitted that by virtue of filing written submissions as per the Court Order of 31st October 2018 and filed on 7th December 2018, which raised issues on production of exhibits by Defendant thereby, Defendant filed the application of 14th January 2019, seeking to regularize the issue raised in written submissions filed. The Applicant contended that Ruling of 18th June 2019, prejudiced their case as the grant of reopening the case amounts to filling gaps and if the trial is reopened the submissions on record shall be rendered obsolete.

The Respondent alluded to the fact that the failure to have the Defendant produce documents was inadvertent and Counsel was away in Kajiado Law Courts. According to him, Junior associate proceeded with the matter and omitted to produce the documents hence filed application to reopen the case.

Considering both attempts to establish prejudice by parties without the opportunity to peruse the Trial Court's proceedings/Court file, I find it in the interest of justice to stay proceedings so as to allow hearing and determination of the appeal. This is because, there is a question of law as to how the matter ought to proceed and if so, when and how a matter should be reopened to admit evidence without prejudice to any party's right.

DISPOSITION

- 1. The Application filed on 17th August 2019 for stay of proceedings of Civil case 186 of 2016 pending hearing and determination of the pending appeal is granted with costs.**
- 2. Parties/Counsel to file and close pleadings on the appeal.**
- 3. During the ongoing Corona virus pandemic lockdown no party should undertake precipitate action/execution until official announcement on resumption of normalcy.**
- 4. Each party to bear own costs.**

DELIVERED SIGNED DATED IN OPEN COURT ON 5TH JUNE 2020

(VIDEO CONFERENCE)

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

F.A. FADIA & CO. ADVOCATES- APPELLANT

GITONGA MURIUKI & CO ADVOCATES- REPENDENT