



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 154 OF 2019

SBM BANK KENYA LIMITED.....APPELLANT

VERSUS

SASAH CONTRACTORS LIMITED.....1ST RESPONDENT

INVESTEQ CAPITAL LIMITED.....2ND RESPONDENT

RULING

The Notice of Motion dated 13th May 2020 was lodged by the Appellant, **SBM BANK KENYA LIMITED**, seeking the following orders, in relation to the Ruling delivered by the trial court on 13th December 2019;

(i) Extension of time to pray for leave to appeal;

(ii) Leave to appeal;

(iii) Leave to appeal out of time;

(iv) That the Memorandum of Appeal filed on 31st December 2019 be deemed as filed with leave of court;

(v) Stay of execution pending hearing and determination of the Appeal; and

(vi) Costs of and incidental to the application do abide the result of the Appeal.

1. It is common ground that on 15th April 2020, this Court delivered its Ruling on an application dated 27th December 2019, through which the Appellant herein had sought stay of execution pending the hearing and determination.

2. The court gave a conditional order for stay of execution, on condition that the Appellant pays Kshs 6,108,138/= to the Respondent within 7 days; and further that the Appellant deposits Kshs 2,186,916/= into a joint Interest-Earning Account.

3. Therefore, as the 1st Respondent, **SASAH CONTRACTORS LIMITED**, has pointed out in its submissions, the issue of stay of execution pending appeal has already been dealt with.

Leave to appeal out of time

4. As far as the 1st Respondent was concerned, the Appellant did not require leave to appeal out of time, because the Memorandum of Appeal had been filed within time.

5. By its calculation, the Respondent reckoned that the Appellant had until 5th February 2020 to file an appeal, if any, arising from the Ruling dated 13th December 2019.

6. If, as the 1st Respondent has submitted, the Memorandum of Appeal was filed within the 30 days' period, as provided for under **Section 79G**, that would imply that the Appellant did not require leave to appeal out of time.

Order 43 Rule 1 (3) of the Civil Procedure Rules

7. The said rule reads as follows;

“An application for leave to appeal under Section 75 of the Act shall in the instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.”

8. In the light of that rule, the Respondent submitted that this court, being the appellate court, lacked jurisdiction to hear and determine the application for leave to appeal, as the jurisdiction to do had been expressly vested upon the court whose decision was to be challenged through the intended appeal.

9. As the Applicant has not demonstrated to this court that its first application, for leave to appeal, had been filed before the trial court, I find that the Applicant erred by moving straight to the appellate court.

10. Secondly, I find that the person seeking leave to appeal has 2 options;

(a) he can either make the application orally, when the order is made; or

(b) he can make the application within 14 days from the date when the order was made.

11. However, whichever option he chooses, must be first exercised before the court which made the order that he intended to appeal from.

12. In this case, the Appellant was not in court when the ruling was delivered. Therefore, it did not make any oral application.

13. Secondly, the Appellant did not seek leave before it lodged the Memorandum of Appeal, on 31st December 2019.

14. Therefore, that means that the Appellant had failed to utilize either of the only 2 options available to it, pursuant to **Order 43 Rule 1 (3)** of the **Civil Procedure Rules**.

15. Furthermore, as the said Rule confers jurisdiction, in the first instance, to the court which the intended appeal arose from, this court cannot usurp the said jurisdiction.

Mistake of Counsel

16. The Appellant has blamed its advocates, who were representing it earlier, for the failure to seek leave to appeal before lodging the Memorandum of Appeal on 31st December 2019.

17. In its considered opinion, such a mistake by counsel was not fatal, as the court had power to admit the Memorandum of Appeal, after granting extension of time.

18. As noted by the Appellant, in the case of **CHARLES KARANJA KIIRU Vs CHARLES GITHINJI MUIGWA, CIVIL APPEAL NO. 71 OF 2016**, the;

“..... Appellate Judges, faced with a similar case, upheld the decision of the High Court Judge to hear and determine an Application to extend time within which to file an appeal that was already filed without leave of the court, and also to admit the Appeal to hearing.”

19. When responding to that submission, the Respondent made the following concession;

“The Court was right when it said that such an application can still be entertained even after the time limited for doing the act in respect of which extension of time is sought has lapsed.”

20. I find that both parties are right to have stated that a party may seek the extension of time for the lodging of an appeal, even if such an extension is sought after the lapse of the time within which the appeal ought to have been lodged.

21. However, the extension of time within which to lodge an appeal is distinct from leave to lodge an appeal. Whether or not leave is required to file an appeal, there could be need to seek an extension of time to lodge the appeal, if the time provided had lapsed.

22. But if leave to appeal was required, by law, it would render a nullity such an appeal as had been filed without the requisite leave.

23. In this case, I had delivered a Ruling on 15th April 2020, in which I had expressed myself thus;

“17. Bearing in mind that the Applicant’s appeal arises from an order made under Order 23 Rule 4 of the Civil Procedure Rules, the test for ascertaining whether or not the Applicant required leave to appeal is determined by looking through Order 43 Rule 1.

18. Having carefully perused Order 43 Rule 1, I found that appeals do not lie as of right from Order 23 Rule 4 of the Civil Procedure Rules.”

24. In the circumstances, I find that the advocate who lodged the Memorandum of Appeal on 31st December 2019 erred, as he did so without first having sought leave of the Court of Appeal.

Should the Advocate’s Mistake be visited upon the Client?

25. The Appellant urged the Court to hold that the mistake of their former advocate ought not to be visited upon them.

26. The Respondent submitted that the Appellant cannot be heard to heap all the blame upon their advocate. In particular, it was pointed out that even after the Court had expressly held that leave to appeal was required, the Appellant waited for over one month before filing an application seeking the said leave.

27. According to the Respondent, there has been an inordinate delay on the part of the Applicant, and that the said delay was unexplained.

28. Indeed, the Respondent even suggested thus;

“The record will probably show that the Appellant’s Counsel did concede that leave was necessary but had not been obtained.”

29. A perusal of the relevant portion of the record of the proceedings on 6th February 2020 reveals that Mr. Oundo Advocate submitted thus;

“My interpretation of Section 67 (1) of CPA is that there is no need for leave.”

30. In the circumstances, until the Court delivered its Ruling on 15th April 2020, the Appellant was under the impression that it did not require leave to lodge an appeal at the Court of Appeal.

31. In effect, I find that the said mistaken understanding by the Appellant was sufficient explanation for their failure to seek leave to appeal prior to 15th April 2020.

32. Having been told that there was need for it to seek leave of the court, before they could appeal, the Applicant filed the application dated 13th May 2020.

33. It is common ground that during the period between 15th April 2020, (when the Court delivered its Ruling) and 13th May 2020 (when the Applicant lodged the present application), the said Applicant paid Kshs 6,108,138/= to the 1st Respondent; and the Applicant also remitted Kshs 2,186,916/= into a joint Interest-earning account. The said joint account is in the names of the advocates representing the respective parties herein.

34. I find that the Applicant did not simply sit back, doing nothing, after the court had granted conditional stay of execution of the Garnishee Order.

35. Secondly, I find that there is already in place, a security which would enable the 1st Respondent to swiftly access the balance of the money, if the appeal was ultimately unsuccessful.

36. In a nutshell, I find that the 1st Respondent would not be prejudiced if the Applicant was granted leave to appeal.

37. I share the following view of the Court of Appeal, as expressed in **WASIKE Vs SWALA [1984] KLR 591**;

“..... the respondent had sufficient notice that the applicant was resolutely intending to prosecute his appeal.”

38. I would paraphrase the said holding, so that it reflects the resolute intention of the Applicant to lodge an appeal, as was clearly manifested through the Memorandum of Appeal which was lodged on 21st December 2019.

39. Accordingly, I now grant to the Applicant, leave to appeal against the Ruling delivered on 13th December 2019.

40. I further order that the Memorandum of Appeal which was filed on 31st December 2019 be deemed as duly filed within time, as extended, following the grant of leave today.

41. Following the compliance with the conditions imposed by the court on 15th April 2020, I order that there shall be a stay of execution until the appeal is heard and determined.

42. As regards the costs of the application, I hold the considered opinion that the Applicants, although successful, have to bear the costs thereof. I so hold because the Respondents cannot be held accountable for the matters which led to initial failure by the Applicant, to seek leave to appeal.

DATED, SIGNED and DELIVERED at KISUMU This 15th day of October 2020

FRED A. OCHIENG

JUDGE