



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS CIVIL APPLICATION NO 507 OF 2018

WIPER DEMOCRATIC MOVEMENT- KENYA.....APPELLANT

VERSUS

ULTIMATE AFRICA ENTERPRISES LIMITED.....RESPONDENT

RULING

INTRODUCTION

1. The Appellant's Notice of Motion application dated and filed on 4th October 2018 was filed pursuant to the provisions of Article 159 (2) (d) of the Constitution, Sections 1A, 1B, 3A, 65(1) and 79G of the Civil Procedure Act, Order 42 Rule 6, Order 43 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules 2010 and all enabling provisions of the law. Prayer Nos (1) and (2) were spent. It sought the following remaining orders:-

1. Spent.

2. Spent.

3. THAT this honourable court be pleased to grant leave to the Applicant to file its Memorandum of Appeal out of time.

4. THAT Respondent be restrained by itself, its officers, employees, agent, servants and or any other person whosoever from in anyway disposing off, concealing, repossessing, selling, commencing the suit of or otherwise proceeding with the intended auction or interfering with the Appellant/Applicant's ownership and possession of any property pending the hearing and determination of the Appellant/Applicant' appeal.

5. THAT the Annexed Draft Memorandum of Appeal be deemed duly filed and served upon payment of the requisite fee.

6. THAT the costs of this application be provided for.

2. The Appellant did not file any Written Submissions and relied on its affidavits in support of its case. The Respondent's Written Submissions were dated and filed on 3rd December 2018.

THE APPLICANT'S CASE

3. The Applicant's present application was supported by Affidavits of its Executive Director, Dr Jared Maaka Siso, that were sworn on 4th October 2018 and 2nd November 2018.

4. It stated that judgment was entered against it on 6th July 2018 without its knowledge and that judgment was to be delivered on notice. It said that it only became aware of entry of the said judgment when it was served with a letter by the Respondent's advocates.

5. Being aggrieved by the decision of the Trial Court, its party leadership resolved that it appeals against the same and also appoint M/S Ngigi Njuguna & Co Advocates to represent it in the Appeal herein.

6. It blamed the delays in filing the present application on administrative lapses between its previous and current advocates and lack of knowledge of when judgment was to be delivered. All in all, it contended that the delay in filing of the Appeal herein was not inordinate.

7. It averred that it had filed a Memorandum of Appeal which had raised serious issues that were not addressed by the Trial Court and that if the application was not allowed as sought, it would suffer grave injustice, irremediable loss and exploitation.

8. It therefore urged this court to allow its application as prayed.

THE RESPONDENT'S CASE

9. In response to the said application, the Respondent's Assistant Managing Director, Harriet Kavaya, swore a Replying Affidavit on its behalf on 13th November 2018. It was filed on 14th November 2018.

10. The Respondent stated that the Applicant had not advanced any reason to justify why it did not file its Memorandum of Appeal on time as its former and current advocates shared the same physical address. It added that the Appeal was not arguable because the Applicant did not attend court when the matter proceeded for trial in the Trial Court or file any Written Submissions as had been directed by the Learned Trial Magistrate, Hon A.N. Makau (Ms), the Learned Trial Magistrate.

11. It also averred that the Applicant had not demonstrated that it had met the conditions for granting of a stay of execution set out in Order 42 Rule 6 of the Civil Procedure Rules. It pointed out that when considering whether or not to grant an order for stay of execution pending appeal, a court should balance the right of an appellant to ensure that his appeal is not rendered nugatory and the right of a respondent, to ensure that he is not denied his fruits of judgment.

12. It therefore urged this court not to allow the Applicant's application as it had not even commenced the process of procuring typed proceedings from the Trial Court.

LEGAL ANALYSIS

13. As was pointed herein, the Applicant did not file any Written Submissions herein. It, however, relied on the cases of **Charterhouse Bank Ltd vs Frank N Kamau [2016] eKLR** and **James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR**. On its part, the Respondent relied on the cases of **Machira t/a Machira & Co Advocates vs East African Standard [No 2] [2002] KLR 63**, **James Wangalwa & Another vs Agnes Naliaka** (Supra) amongst other cases to buttress its argument that an applicant should not be granted an order for stay of execution pending appeal until he had satisfied the three (3) conditions that have been set out in Order 42 Rule 6 of the Civil Procedure Rules.

14. Order 42 Rule 6 (2) of the Civil Procedure Rules provides as follows:-

“No order for stay of execution shall be made under subrule (1) unless-

a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

15. An applicant seeking a stay of execution must demonstrate:-

a. That he will suffer substantive loss if the order for stay is not granted;

b. That he had filing his application for a stay of execution timeously; and

c. That he was willing to provide security.

16. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “and”. It connotes that all three (3) conditions must be met simultaneously.

17. The Decree that was attached to the Applicant's present application was issued on 27th August 2018. It showed that judgment was entered in favour of the Respondent against the Applicant on 6th July 2017.

18. The present application was filed on 4th October 2018. The reason the Applicant had given for not having filed its Memorandum of Appeal was not plausible considering that its previous and current advocates shared the same physical address. This was a fact that was raised by the Respondent that was not rebutted by the Applicant. Be that as it may, considering that the Decree was issued on 27th August 2018, a delay of slightly more than one (1) month could not have been said to have been inordinate. This court was therefore satisfied that the Applicant had met one of the conditions of being granted an order for stay of execution.

19. The Respondent did not demonstrate that it had financial means to refund the Applicant the decretal sum in the event the Applicant was successful in its appeal. It was the considered opinion of this court that difficulties in recovering the decretal sum upon the appeal being successful could also be equated to an applicant suffering substantial loss. In this regard, this court was satisfied that the Applicant had met another limb of Order 42 Rule 6 (2) of the Civil Procedure Rules.

20. In respect of the third condition under Order 42 Rule 6 (2) of the Civil Procedure Rules, it was clear that the Applicant had not offered any security for the due performance of the Decree as would be ultimately be binding on it. This was, however, not fatal to the Applicant's case as it is the court that exercises its discretion and imposes the security to be paid. In this regard, this court was not persuaded that it should deny the Applicant an order for stay of execution pending appeal merely because it had not offered any security.

21. As was pointed out hereinabove, the Applicant had not preferred a good reason why it did not file the Memorandum of Appeal within the stipulated period. Having said so, every person is entitled as envisaged under Article 50 of the Constitution of Kenya to have a fair trial. The said Article 50 of Constitution of Kenya provides as follows:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

22. It therefore follows that every person ought not to be shut out from accessing court or having his day in court. Indeed, the right of a party to enjoy the fruits of his judgment must be weighed against the right of a party to access court to have his dispute heard and determined by a court or tribunal of competent jurisdiction.

23. Appreciably, **“equity aids the vigilant and not the indolent.”** However, it was the view of this court that a delay of about two (2) months in bringing the application seeking leave to file an appeal out of time was not inordinate. This court did not see the prejudice the Respondent had suffered or was likely to suffer. If it suffered any prejudice, then it did not demonstrate the same.

24. The Respondent urged this court to consider the special and unique circumstances and that the Applicant deliberately chose not to participate in the proceedings or call any witnesses and that it filed its List of witnesses and Witness Statements twenty six (26) days after close of the hearing.

25. The Respondent's assertion were matters of fact that could only be discerned from the proceedings of the lower court. It was the view of this court that those were issues the appellate court ought to consider during the Appeal and not at this stage. Taking the same into account at this point would be to delve into the merits or otherwise of the Appeal.

26. Accordingly, having considered the parties affidavit evidence, their respective Written Submissions and the case law they each relied upon, this court came to the firm conclusion that there would be more injustice in the Applicant being denied an opportunity to ventilate its case on merit. This is notwithstanding the Appellant's alleged conduct in the Trial Court. This is because the appellate court is required to analyse the evidence that was adduced in the lower court to demonstrate, that even in the absence of one (1) party, a party proved its case on a balance of probability.

DISPOSITION

27. For the foregoing reasons, the upshot of this court's Ruling was that the Appellant's Notice of Motion application dated and filed on 4th October 2018 was merited and is hereby granted in terms of Prayer No (c) therein. The Applicant is hereby directed to file its Memorandum of Appeal within fourteen (14) days from today.

28. Prayer No (d) is also hereby allowed in the following terms:-

1. THAT the Appellant shall deposit into an interest earning account in the joint names of his advocates and those of the Respondents, the sum of Kshs 437,500/= within the sixty (60) days from the date hereof i.e. by 8th July 2019.

2. For the avoidance of doubt, in the event, the Appellant shall default on Paragraph 28 (1) hereinabove, the conditional stay of execution shall automatically lapse.

3. The Appellant is hereby directed to file and serve its Record of Appeal within sixty (60) days from today i.e by 8th July 2019.

4. The Deputy Registrar High Court of Kenya Milimani Law Courts is hereby directed to facilitate the placing of the typed certified proceedings and lower court file to enable the Appellant comply with Para 28 (3) hereinabove.

5. Costs of the application herein shall be in the cause.

6. Either party is at liberty to apply.

29. It is so ordered.

DATED and DELIVERED at NAIROBI this 7th day of May 2019

J. KAMAU

JUDGE