



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NUMBER 126 OF 2002

MRS MARY WAMBUI CHEGE.....PLAINTIFF

VERSUS

PETER KIMOTHO CHEGE.....DEFENDANT

RULING

This court delivered a judgment on 15th July, 2015 which triggered the present applications. There are two applications dated 4th December, 2017 by the defendant and the other dated 6th September, 2018 by the plaintiff respectively. The two applications are inter-related and therefore were argued together after both parties filed their respective submissions.

The application dated 4th December, 2017 by the defendant sought orders that time be extended within which to request for copies of proceedings, judgment, rulings, orders and any exhibits that may be required for the preparation of the record of appeal. There was also an order sought that the request for the said proceedings be deemed to have been simultaneously made, filed and served along the notice of appeal which was made on 27th July, and served on 29th July, 2015.

The other prayers are related to computation of time which are inter-related to the above orders sought by the defendant/applicant. The grounds relied upon are set out on the face of the application alongside a lengthy affidavit sworn by the then advocate for the defendant. The application is opposed and there is a replying affidavit sworn by the plaintiff in that regard.

The application dated 6th September, 2018 but filed on 6th November, 2018 by the plaintiff sought an order for attachment of Ksh.6 million held at the Kenya Commercial Bank in the name of Chehe Holdings Limited in execution of the decree dated 15th July, 2015 and the funds be released to the plaintiff's firm of advocates. The plaintiff set out the grounds on the face of the application and there is the supporting affidavit sworn by the then advocate for the plaintiff.

The defendant filed a replying affidavit in opposing the said application. Thereafter, two other affidavits were sworn by the advocates for the parties herein. Counsel appearing for the parties have made their respective submissions which I have on record.

I have perused the record in this protracted litigation with a view to resolving the two applications. It is now clear from the record that, after the judgment of this court on 15th July, 2015, the defendant filed the notice of appeal and applied for proceedings with a view to lodging an appeal in the Court of Appeal. It matters not that the two documents may not have been in the court file when the application by the defendant was lodged. The defendant has demonstrated satisfactorily that, this step was taken and the plaintiff has in the respective submissions by her counsel conceded, that this is the position.

I accept the submission by the counsel for the defendant that the application seeking the order to extend time to file a notice of appeal and request for proceedings, was made out of abundant caution otherwise, it does not add value to repeat the same. In any case, even if that were the case, Rule 75 of the Court of Appeal Rules, 2010 provides that: -

“75 1) Any person who desires to appeal to the court shall give notice in writing, which shall be lodged in duplicate with the Registrar of the Superior Court.

2) Every such notice shall, subject to Rules 84 and 97, be so lodged within 14 days of the date of the decision against which it is desired to appeal.”

The plaintiff has submitted that even if the defendant filed such a notice then he shall be deemed to have withdrawn the appeal in line with the provisions of Rule 83 of the above rules. It is provided under the said rule as follows: -

“83. If a party who has lodged a notice of appeal fails to institute an appeal within an appointed time he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order. The party in default shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.”

I have considered whether or not this court has jurisdiction, either on its own motion or by an application by any of the parties, to address this particular subject. Of interest is what is provided under Rule 76 of the said rules. The Notice of Appeal is filed in the registry of the High Court. However, this rule provides that, on receipt of the notice of appeal the Registrar of the court shall forthwith send one copy thereof to the appropriate registry.

My understanding of this rule is that, whereas the High Court is the recipient of the said notice, the appropriate registry is the Court of Appeal. The High Court, therefore, may not have the jurisdiction to make an order on its own motion, or entertain an application by any party to make an order for the withdrawal of the appeal. That notwithstanding, Section 7 of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya gives the High Court power to extend time within which to lodge the record of appeal.

The defendant having filed a notice of appeal and asked for the proceedings to enable him file a record of appeal has the right to urge the court to extend time to file the said record, if it is established the non-availability of proceedings may not be blamed on him. That is the position that presents itself in this case. Many a times parties are victims of the systematic challenges of the court.

As at the time of preparing this ruling, the proceedings leading to the judgment of 15th July, 2015 had not been prepared. In the interest of justice therefore, time is extended to enable the defendant obtain the proceedings to facilitate the filing of the record of appeal.

The Deputy Registrar shall ensure that these proceedings are ready and availed to the defendant within 30 days from the date of this ruling. Thereafter, the defendant shall file and serve the plaintiff with the record of appeal within 15 days from the date of receipt of the proceedings. To that extent the defendant’s application dated 4th December, 2017 hereby succeeds.

The application by the plaintiff flows directly from the judgment of 15th July, 2015. The plaintiff has already been given an order to be restored as a Director of Chehe Holdings Limited, and also had her shares restored. The court was specific that accounts should be taken from the date of the transfer deed to the date of the judgment and access the sum due and owing to the plaintiff.

There were timelines that were set but from the material disclosed, there has not been any satisfactory compliance with the said order. What has been presented is a bank statement which by any standard cannot be said to be the accounts of the said company. To make an order of attachment before full compliance with that court order may lead to more litigation in the circumstances.

I have read the submissions that the plaintiff is likely to suffer prejudice if the order is not given. I note that the restoration of her capacity as a director of the company, and also ownership of her shares has given her the ability to enjoy the fruits of that position.. It cannot be said that any prejudice shall be visited upon her if the order is not granted. I am not satisfied that she is entitled to the orders sought at this stage. Her application is therefore dismissed.

Each party shall bear their own costs.

Dated, signed and delivered at Nairobi this 13th day of June, 2019.

A. MBOGHOLI MSAGHA

JUDGE