



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL APPEAL NO. 104 OF 2019**

**KENYA PORTS AUTHORITY.....DEFENDANT/APPELLANT**

**VERSUS**

**FRANCIS T KARANJA & 2 OTHERS.....PLAINTIFF/RESPONDENT**

**(Being and Appeal from the Ruling of the Hon. Kyambia at the Chief Magistrate's court at Mombasa issued on the 24<sup>th</sup> May 2019 in CMCC No 3891 of 2005)**

**RULING**

1. Vide a notice of motion dated 31<sup>st</sup> May, 2019, the Applicant, KENYA PORTS AUTHORITY seeks in the mean an order of stay of proceedings in CMCC No. 3891 of 2005 where Hon. Kyambia's order dated 24<sup>th</sup> May, 2019 that the appellants witnesses statement expunged from the court records, pending the hearing and determination of the appeal.

2. The reasons advanced for the application have been set out on the face of it and in the affidavit in support, that;

**(a) That in response thereto the Appellant herein filed a defence dated 24<sup>th</sup> April 2007. A copy of the said defence was annexed thereto.**

**(b) That at the time of filing the suit, the Civil Procedure Rules 2010 had not come into force and the previous Civil Procedure Rules 1963 did not have the requirement of complying under order 11.**

**(c) That the respondent's case was substantively heard under Civil Procedure rules 1963 and the plaintiff's case was finalized/closed on 13<sup>th</sup> April 2011.**

**(d) That the Appellant's 1<sup>st</sup> witness started testifying on 27<sup>th</sup> March 2014 and was stood down on account of the magistrate having other pressing engagements.**

**(e) That thereafter the defence hearing was adjourned on account of the unavailability of the Respondent's advocate and subsequently the magistrate was transferred in 2015.**

**(f) That proceedings were supposed to be typed and certified, however, directions were given by the court in April 2016 that the magistrate's handwriting was not legible and therefore the defence hearing should start De novo**

**(g) That when the matter was slated for defence hearing in December 2017, the appellant had to apply for adjournment on account of the fact that the defence witness 1 (Dw) who had previously substantively testified had just passed away and the appellant needed to substitute the witness.**

**(h) That the matter was listed on various days in 2017 but did not take off because the court was not sitting. In the mean time the Appellant's 2<sup>nd</sup> witness also retired from the services of the Appellant.**

**(i) That the court gave directions on 18<sup>th</sup> October 2017 that the Appellant should file witness statements due to the fact that both witnesses were being substituted.**

**(j) That this was done in March and May 2018 and therefore we were perplexed by the application by the respondents' advocates to have the same struck out.**

**(k) That this notwithstanding, the trial court proceeded to hear and determine the Respondents' application to have the Appellants witness statement struck out and sitting at Mombasa on the 24<sup>th</sup> day of May 2019, the Hon Kyambia allowed the said application.**

**(l) That we see it as delay tactic on the part of the Respondents as nothing stops the Respondents' advocate from recalling the plaintiffs to seek clarification on any point raised by the Defendants witness. It is not trial by ambush.**

**(m) That the Appellant feels like it is being denied a right to fair trial and are thus dissatisfied and/or aggrieved by the said ruling which the Appellant intends to appeal against on the basis that Appellant stands to suffer a miscarriage of justice if the said witness statement is expunged for the court records.**

**(n) That the applicant has already written to the Chief Executive Officer of the Magistrate's court at Mombasa seeking to be supplied with both handwritten and typed and certified copies of the ruling and court proceedings so as they can file their substantive appeal against the said ruling.**

**(o) That the Appellant has already filed a memorandum of appeal in this court which is pending hearing and determination in this court.**

**(p) That the trial court while delivering its ruling on the 24<sup>th</sup> May 2019 also directed that the matter should be listed for defence hearing on the 8<sup>th</sup> July 2019. Therefore, if this application is not heard and allowed it shall render the appeal nugatory.**

**(q) That Respondents would suffer no prejudice if this application is allowed pending hearing and determination of the appeal.**

**(r) That I swear this affidavit in support of this application seeking for orders of stay of proceedings of the trial court and orders of stay to prevent the trial court from implementing the said ruling of the Hon Kyambia issued on the 24<sup>th</sup> May 2019 pending hearing and determination of this appeal.**

3. In response, the Respondents have opposed the application by filing an affidavit reply dated 21<sup>st</sup> July, 2019 and ground of opposition dated 20<sup>th</sup> July 2019.

4. In the affidavit of reply, the Respondents have deponed that;

**(a) That, they have always attended all hearings whenever this matter come to court.**

**(b) That, it is not true that on 18<sup>th</sup> October 2017 the court allowed the Applicant herein to file witness statements**

**(c) That, the Appellant has been dithering and dragging this matter that is why they now seek to introduce new witness statements long after the Respondents had closed their case**

**(d) That, the lower court matter was filed in 2005 and any further delays by way of stay orders or otherwise only serve to delay matters and prejudice me and my fellow plaintiffs who are retirees.**

**(e) That, I believe that no sufficient grounds for grant of the orders sought have been made.**

5. And in the grounds of opposition, they fault the application for

(a) Not having made sufficient grounds for grant of the orders sought

(b) The notice of motion dated 21<sup>st</sup> May, 2019 being bad in law.

6. The application came up for hearing on 24.6.2019 and parties canvassed the same by submitting orally.

The Applicant's counsel submitted that the decision by the Honorable magistrate on 24.5.2019 to expunge the defendant's witnesses' statement was prejudicial to them since the mater had been listed for being on 8.7.2019 and they may be forced to close their case.

7. The Applicants' counsel submitted that they had filed a memorandum of appeal which is pending before the court so that what remains to be filed is a record of appeal but are waiting for the proceedings which they have applied for to be availed them.

8. According to the Applicant's counsel, their appeal has high chances of success so that if the application is not allowed, they would be prejudiced and yet the Respondent would suffer no prejudice. They submit that their application is anchored on the provisions of Order 42 Rule (1) of the Civil Procedure Rules and "Article 159 (2) (c ) of the Constitution and the principles the principals expounded in sections 1A, 1B and 3A of the Civil Procedure Act.

9. The Respondent's counsel, M/s Mwanzia in opposing the application submitted that the Applicant has not provided sufficient grounds to

warrant the grant of orders sought. She states the Applicant has not provided evidence to prove that one of the witnesses died and another retired. And even, for the one who retired, she wondered why the witness cannot be contacted from the details with the company.

10. M/s Mwanzia also submitted that the Applicant has not provided evidence to confirm that the said witnesses were substituted and that the claim that they were granted such orders on 18.10.2017 is false. She stated that the witness statement were filed without leave of court and therefore improperly on record.

11. As is the submissions by M/s Mwanzia that if the application is allowed, the Respondent will be greatly prejudiced as this is a 2005 which has been pending for 14 years and the Respondent, who are retirees have to keep travelling from outside jurisdiction to attend to the hearing.

12. Mr Cheruyot in brief response acknowledged that the plaintiff had closed their case on 2011 before the new procedure Rules and reiterated their earlier submissions.

13. Having listened to both counsel in their rival submissions, I have considered the application before the court in terms of the prayers the Applicant seeks. I find that the issue for determination is whether the Applicant is entitled to the orders of stay of proceedings and order of Hon. Kyambia granted on 24<sup>th</sup> May, 2019 in CMCC No 3891 of 2005.

14. In this order, the Applicant Defendant's witnesses statement were expunged from the court records. According to the Applicant, the suit in question was filed under the Civil Procedure Rules, 1963 which did not have the requirement of complying with order 11 of the Civil Procedure rules 2010. However since the case has been in pending till now, the court gave direction on 18.10.2017 that the Applicant file witness statements due to the fact that both witnesses were being substituted. The Respondent has rebutted it on the ground that there is no evidence which has been shown to court to confirm the existence of such order.

15. I wish to point out that the case does not have the benefit of the original file to confirm the claim by either the Applicant or the Respondent, since it is the read of one against the other

Article 50 (1) of the Constitution provides that;

**“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 competent tribunal or body”**

16. The application is anchored on the provision of Order 40 Rule 6 of the Civil Procedure Rules, which provides

**“ Where a suit in respect of which and interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise”.**

17. The decision which is being appealed against was made on 24.5.2019 I note that a memorandum of appeal was filed on 4<sup>th</sup> July, 2019, which is within reasonable period to appeal.

18. I have considered the issue raised by either party and find that the same can only be properly considered by a court if it has the benefit of the record of proceedings to confirm the claims by each party.

19. Also, I find that the appeal has been filed in good time and it would not be prudent and fair to lock out a party who wishes to canvas that case to the highest level. I am therefore inclined to allow the Applicant/Defendant application dated 31<sup>st</sup> May, 2019 with orders that:

(a) There be a stay of proceedings and order of Hon Kyambia as directed on 24<sup>th</sup> May, 2019 in CMCC No 3891 of 2005 pending the hearing and determination of this appeal,

(b) The Applicant /Defendant to file the recorded appeal within 30 days to enable the appeal be admitted for hearing.

(c) Costs shall be in the cause.

**Ruling delivered and dated this 5<sup>th</sup> day of July, 2019.**

**LADY JUSTICE D. O. CHEPKWONY**