



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO. 150 OF 2018

CEFA ENTERPRISES LTD.....APPELLANT

VERSUS

BENEDICT KYALO KIMUYU.....1ST RESPONDENT

BMG HOLDINGS LIMITED.....2ND RESPONDENT

MULATI SABABI.....3RD RESPONDENT

BENEDICT MBALU.....4TH RESPONDENT

RULING

1. The only prayers that remain for the determination of this court in the Notice of Motion dated 14.1.2019 filed by the Appellant/Applicant is the request by the Applicant to be granted leave to file an amended memorandum of appeal and for a stay of execution pending hearing and determination of the appeal.
2. The Respondents opposed the application through replying affidavits sworn on 18.1.2019 by Geoffrey Kama an accountant with the 2nd Respondent; and by Benedict Kyalo Kimuyu.
3. The application is premised on the grounds that the Applicant was shocked to be served with a notice of entry of judgement against the applicant company that had not been served with the plaint or summons to enter appearance and pursuant to interlocutory judgement entered on 25.5.2018 the appellant was found liable for an accident involving a motorcycle it sold to the 3rd Respondent and had sold the same as an agent of the 2nd Respondent but however the trial court had declined to grant an order of stay of execution pending the determination of the application dated 7th November, 2018 which application was dismissed and being dissatisfied with the ruling the applicant filed an appeal and sought to amend the same to take into account the ruling. It is the Applicant's position that the amendment shall determine the real issues in controversy between the parties and the issues raised go to the root of the interlocutory judgement that had not been taken into account by the trial court. The applicant averred that stay of execution shall allow them come on record and file a defence. It further averred that execution may be levied anytime: That the delay to file the said defence was due to circumstances beyond their control. The Applicant avers that substantial and irreparable loss shall be occasioned if the order is not granted. Vide a further affidavit deponed on 31.1.2019, the applicant's director averred that the prayer by the Respondent for deposit of Kshs 2,500,000/- as security for costs is excessive yet the issue of the ownership of the suit vehicle goes to the root of the case and ought to be determined.
4. The 2nd Respondents accountant, Geoffrey Kamau in opposition to the application, averred that the application lacks merit, is an abuse of the court process; that the Applicant sought to challenge the issue of service yet the said applicant was served on 18th July, 2016 and service was accepted by Shirin Mapara and hence there was a presumption of service in absence of disproving the same. He averred that the appellant was properly enjoined as the registered owner of the suit motorcycle and the appellant had not demonstrated the agency relationship between it and the 2nd Respondent hence the application ought to be dismissed with costs. He also averred that security of costs of Kshs 2.5m/- ought to have been deposited.
5. The advocates for the parties agreed to dispose of the application through written submissions.
6. The Applicants framed two issues for determination, to wit whether stay of execution pending appeal should be granted and whether the applicant ought to be allowed to amend their memorandum of appeal. On the first issue, counsel urged the court to exercise its discretion in their favour as per the decision of the Court in **Amal Hauliers Ltd v Abdulnasir Abukar Hassan (2017) eKLR** where the Court held that

discretion ought to be exercised in a manner that would not prevent an appeal. The Applicant submitted that they have fulfilled the requirements for granting of the orders of stay pending appeal and having filed an appeal, learned counsel submitted that the appeal raises factual issues affecting the right to be heard. On the issue of substantial loss, counsel submitted that the appellant sells motorcycles as an agent and the 1st respondent has failed to show any source for the repayment of the decretal amount if the appeal succeeds. On the condition of a timely application, counsel submitted nothing.

7. Counsel with regard to amendment of the appeal relied on the case of *John Gakuo & Another v County Government of Nairobi & Another* (2017) eKLR that held that

“To start with, this Court has pronounced itself on whether a memorandum of appeal is amenable to amendment or not. This issue was not taken up in this application and so we shall start from the premise that a memorandum of appeal is a pleading like any other and the rules that apply to amendment of pleadings also apply to a memorandum of appeal. See Uhuru Highway Development Ltd vs Central Bank of Kenya (2002) 1 EA 314 where this Court held that “a memorandum of appeal, subject to the interests of justice, is always amenable to amendment”. The general principle is that amendments should be allowed liberally, particularly where the hearing of a case has not commenced. In the case of Eastern Bakery –vs– Castelino (1958) E.A. 461, Sir Kenneth O’Connor P. stated as follows:-

“Generally speaking this Court will not interfere with the discretion of a Judge in allowing or disallowing an amendment to a pleading, unless it appears that in reaching his decision he has proceeded upon wrong materials or a wrong principle.”

The same authority espouses further some of the principles to be taken into account when considering whether to allow an amendment of any pleadings as herein under:-

“It will be sufficient, for the purposes of the present case, to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.... The court will not refuse leave to allow an amendment simply because it introduces a new case.... But there is no power to enable one distinct cause of action to be substituted for another, nor to change by means of amendment, the subject matter of the suit... The court will refuse leave to amend where the amendment would change the action into one of a substantially different character; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment e.g. by depriving him of a defence of limitation accrued since the issue of the writ.”

[22] The learned authors of Halsbury’s Laws of England, 4th Ed. (re-issue), Vol. 36(1) at paragraph 76, give some insights on the amendments of pleadings:-

“...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion.

.... The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”.

The above text was cited with approval by this Court in Wareham t/a AF Wareham & 2 others –vs– Kenya Post Office Savings Bank - Civil Appeal Nos. 5 & 48 of 2002. In this case, the appeal has not been set down for hearing yet and so the respondents cannot say that they are being ambushed. What needs to be addressed is whether this application meets the criteria set in the above decisions.

Before exercising this jurisdiction in favour of the appellants, the court needs to be satisfied that the application is made in good faith; whether the same is material for the proper determination of the issues before court; is it meant to clarify issues or to cloud and confuse issues” will the amendments if allowed be prejudicial to the respondents or can they be compensated by way of costs”

Most important however, which is the issue before us is whether the proposed amendments will introduce a new cause of action”

Learned counsel submitted that the amendment is sought before the appeal was set down for hearing; the good faith if the appellant is shown in the prompt manner of proceeding with the suit and that the copies of the record of the court below shall show the issues in the amendments are within the grounds of appeal and that the applicant has offered to pay the decretal sum should the appeal be decided against them.

8. In reply, the Respondents counsel submitted that there is no security for performance of the decree and there is no evidence to show the inability of the respondent to refund the decretal amount. Counsel emphasized that since the application for stay cannot be granted, the prayer for amendment ought to be disallowed and urged that the application be dismissed with costs, and in the alternative an order be made that half the decretal amount be deposited in a joint interest earning account.

9. This is an application that invokes the discretionary powers of the court. Of course discretionary powers must be exercised judiciously and be done in a way so as not to close the door of discretion. The application raised two issues on whether amendment ought to be granted and whether stay should be granted.

10. With regard to the first issue, the instant application is brought among others under Order 8, 40 Rule 7, 42 Rule 1, 2, 3, 13, 24, 25, 26, 31 and 32, Order 51 Rule 1 of the Civil Procedure Rules, 2010. Order 40, rule 7 provides that ***Any order for an injunction may be discharged, or varied, set aside by the court on application made thereto by any party dissatisfied with such order*** and the said provision is irrelevant to the instant application for no order of injunction has been granted.

11. Order 42 Rule 3 allows for amendment of a memorandum of appeal before directions are given under Rule 13, which show how directions in respect of hearing the appeal are to be given and from the record no such directions have been given. Therefore the applicant has easily met the provisions of Order 42 Rule 3. The respondent's objection to the prayer for amendment is premature because the applicant was entitled as a matter of right to amendment of the memorandum as per Rule 3 of Order 42. Order 42 Rules 24 to 26, 31 and 32 relate to procedure after the appeal is admitted and has reached the hearing stage and are irrelevant to the instant application.

12. With regard to stay of execution, Order 42 Rule 6 empowers this court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided by the Rule 6(2) as follows:

“No order for stay of execution shall be made under sub rule (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.”

13. The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how a court should exercise discretion and held that:

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

The above cited case captures the applicable principles in deciding whether or not to grant a stay of execution pending appeal.

14. In the case at hand, it seems that there is a dispute as to the issue of ownership of the suit vehicle and if it is not determined the appeal will be relegated to an academic exercise. The Applicants have established that they will suffer substantial loss if the execution is not stayed because they are being condemned unheard. It also follows that if the Respondents execute the judgement and the Applicants' appeal succeeds, then not only will the Applicants suffer substantial loss but the appeal will also be rendered nugatory. On the other hand the Respondents have averred that the applicant had exercised their right to be heard in the trial court and they were served. However without having a look at the record of appeal, the court is not able to decide whether or not that right was exercised. The respondents have emphasized the need for deposit of the decretal amount in court and have not disclosed any source of income that they would use to refund the Applicants the decretal amount should the appeal succeed.

15. Was the application filed without unreasonable delay? The first application was filed immediately after the delivery of the orders complained of. It is noted that the appeal was filed on 20th November, 2018 quite within time after the delivery of ruling thus signaling the Applicant's interest in pursuing the appeal. It is only after the final ruling was delivered that the applicant sought to amend the appeal vide the latest application dated 14th January 2019. Be that as it may, there is thus no inordinate delay on the part of the Applicant.

16. The Applicant has indicated its readiness to furnish security for the due performance of the decree. Hence it seems that the Respondents' concerns will be been taken care of by the Applicants depositing the decretal amount. However the applicants' concerns appear not have been assuaged somewhat. A perusal of the memorandum of appeal shows that the Applicants are appealing against the decision on what amounts to breach of his right to be heard and I find it arguable.

17. In the result it is the finding of this court that the appellant's application dated 14th January 2019 has merit. The same is allowed in the following terms:

a) The appellant is granted leave to file and serve an amended memorandum of appeal within seven (7) days subject to payment of the requisite fees.

b) There be an order of stay of execution of the decree in Machakos Cmcc number 534 of 2015 pending the hearing and determination of the appeal herein on condition that a third of the decretal sums be deposited in court within the next thirty (30) days from this ruling failing which the stay shall lapse.

c) The costs of the application shall abide in the appeal.

It is so ordered.

Dated and delivered at Machakos this 18th day of September, 2019.

D.K KEMEI

JUDGE