

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 135 OF 2018

(FORMERLY HCA NO. 75 OF 2016 AND ELCA NO. 59 OF 2017)

WESLEY KIBAGENDI JASONAPPELLANT

VERSUS

ECO BANK LTD.....1ST RESPONDENT

GESOKO CONSTRUCTION LIMITED.....2ND RESPONDENT

(An appeal arising from the ruling and order of the Hon. BS Khapoya, Senior Resident Magistrate (SRM), in Kakamega CMCCC No. 30 of 2016 of 5th September 2016)

RULING

1. What I am called upon to determine is the interlocutory application by way of Motion dated 13th October 2016 and filed herein on even date. The appeal herein was itself filed on 22nd September 2016. The appeal arises from a ruling that was delivered by the trial court on 5th September 2016, on an application for injunctive relief to restrain sale of a property that was the subject of a suit that was before the trial court. The Motion for injunction was denied hence the appeal.

2. Directions were given on 16th February 2017, for disposal of the application dated 13th October 2016 by way of written submissions. There has been compliance with those directions, for both sides have filed their detailed written submissions, complete with the authorities that they rely on. The matter was placed before me on 3rd July 2019 and I reserved it for ruling.

3. I have perused through the ruling of the trial court of 5th September 2016 for the purpose of drafting a ruling to the application before me. I have noted from that ruling that the primary consideration by the trial court in denying the appellant the injunctive orders sought was that the appellant's pleadings at the trial court were in total variance with the submissions that were made in support of the application that was the subject of that ruling. The impugned ruling has been placed on the record before me by way of the affidavit sworn by the appellant in support of his Motion of 13th October 2016.

4. For me to properly and effectually determine the matter before me, I should have sight of and peruse the pleadings that formed the basis for the determination of the application that was before the trial court. I have scrupulously ploughed through the file of papers before me, and I have not come across the pleadings that the parties had lodged at the trial court, neither do I see a copy of the application that was the subject of the impugned ruling. I have scoured through the file before me, and it is apparent to me that no record of appeal has been filed so far, neither have the original records of the trial court been made available.

5. The record reflects that the Deputy Registrar of this court wrote a letter, dated 22nd September 2016, to the Kakamega Chief Magistrate's Court, the custodians of the trial court's original records, asking that the said original records be forwarded to the High Court for the purpose of these proceedings. That letter was received at the Chief Magistrate's Court on 23rd September 2016. It would appear that that request has not been honoured to date. It is unfortunate and disappointing that this matter cannot proceed because crucial records have not been availed from the Chief Magistrate's Court, which is within walking distance from the High Court civil appeals registry. Justice has to be delayed because of indolence, laxity and incompetence on the part of court staff, who should at all times be alive to the mantra that justice delayed amounts to justice denied.

6. I am not able to determine the interlocutory Motion before me without having sight of the pleadings that were filed at the trial court. After analyzing the respective cases of the parties as pleaded in the papers filed in the suit, the trial court stated:

"However, the applicant in his submission (sic) took a tangent from his pleadings and traversed new lines of arguments not envisaged areas (sic) and thus not covered by any other party to the dispute ... The applicant deliberately dodged the essentials that he should apply his mind to in particular by failing to converse (sic) issue of notice in his submissions which issue is pleaded and evidence ought to have been provided to court for consideration."

7. Therefore, at the core of the dismissal of the application, the subject of the impugned ruling, were the pleadings that were before the trial court. I need to have a look at those pleadings for the purpose of determining the Motion that has been placed before me. As it is, I am unable to determine the said Motion without those pleadings.

8. Consequently, it is my order that the Deputy Registrar do, again, call for the original records from the trial court. I also direct that a certified copy of this ruling be made available to the Chief Magistrate, Kakamega, for information, and particularly so that the Chief Magistrate may get the lower court's registry working efficiently, regarding requests from the High Court for files from that court's registry that are the subject of appeal. The matter shall be allocated a date for mention at the delivery of this ruling for compliance with the directions that I have given in paragraph 7 hereabove, and so that I can give further directions on the disposal of the Motion dated 13th October 2016.

DATED, SIGNED and DELIVERED in OPEN COURT at KAKAMEGA this 9TH DAY OF OCTOBER , 2019

W. MUSYOKA

JUDGE