



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO 530 OF 2018

CO-OPERATIVE BANK LIMITED.....1ST APPELLANT

GEORGE MUIRURI T/A LEAKEY AUCTIONEERS.....2ND APPELLANT

VERSUS

PERIS K NYAREGA..... RESPONDENT

RULING

INTRODUCTION

1. The Appellants' Notice of Motion application dated and filed on 28th March 2019 was brought pursuant to the provisions of Order 42 Rule 6 and Order 51 Rule (1) (**sic**) of the Civil Procedure Rules 2010, Section 1A, IB and 3A of the Civil Procedure Act, Article 159 sub-article (2) (d) and (e) of the Constitution and all enabling provisions of the law. Prayers Nos (1) and (2) were spent. It sought the following remaining orders:-

1. Spent.

2. Spent.

3. THAT this Honourable Court be and is hereby pleased to stay the proceedings in Civil Suit No 8387 of 2009 at the Chief Magistrates Court at Milimani Peris K. Nyarega versus Co-operative Bank Limited and George Muiruri T/A Leakey Auctioneers pending the hearing and determination of the appeal.

4. THAT costs of this application be provided for.

2. Their Written Submissions were dated and filed on 27th May 2019 while those of the Respondent were dated 10th June 2019 and filed on 11th June 2019.

3. The parties requested the court to deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE APPELLANTS' CASE

4. The Appellants' present application was supported by the Affidavits of its advocate, Wahura Mwangi, that were sworn on 26th April 2019 and 27th May 2019.

5. Through their said advocate, they contended that they filed their application seeking to set aside the interlocutory judgment that was entered against them and the amendment of their Statement of Defence but the same was dismissed by the Trial Magistrate on 8th October 2018. They pointed out that the effect of the said Ruling was that the matter would proceed for formal proof. They stated that their advocates only became aware of entry of the said interlocutory judgment during the Pre-trial conference.

6. It was their averment that if their present application was not granted, it would render their appeal nugatory as they would be ousted from the seat of justice and denied their fundamental right to be heard as a result of which they would suffer prejudice that could not be met by way of costs.

7. They further averred that their application was filed without any delay and denied having caused any delays in the prosecution of the matter in the lower court. They were emphatic that it was the duty of the Respondent to have steered her case for expeditious disposal.

8. They therefore urged this court to allow their application as prayed.

THE RESPONDENT'S CASE

9. In response to the said application, the Respondent swore a Replying Affidavit on 3rd May 2019. It was filed on even date.

10. She stated no material had been placed before this court to show why the formal proof should not proceed and that the present application was similar to the one that was dismissed in the lower court. It was her contention that the Appellant herein ought to have filed an application for review or filed an appeal and not filed the same application, which was now *res judicata*.

11. She pointed out that the lower court matter had been pending for approximately ten (10) years and any further delays would only prolong the matter. She averred that justice delayed is justice denied.

12. She therefore urged this court to dismiss the Appellants' application on the ground that it had not been brought in good faith.

LEGAL ANALYSIS

13. The Appellants relied on the provisions of Order 42 Rule 6 of the Civil Procedure Rules that gives the court power to stay proceedings. They placed reliance on the cases of **Stanley Karanja Wainaina & Another vs Ridon Anyangu Mutubwa [2016] eKLR** and **Patrick Kalava Kulamba & Another vs Phillip Kamosu & Another (suing as the Legal representative of the Estate of Jackline Ndinda Philip (Deceased) [2016] eKLR** where the common holding was if an application for an order for stay of execution is denied by a lower court, the High Court, in its original jurisdiction has power to grant such an order of sought.

14. They also referred this court to the case of **Daniel Maore M'birithi vs Miriti M'ikanatha [2007] eKLR** where the court held that it had unfettered discretion to grant an order for stay of proceedings pending appeal. They also relied on several cases amongst them **Gideon Mose Onchwati vs Kenya Oil Co Ltd & Another [2017] eKLR** which addressed the question of what constitutes "sufficient cause". It was their contention that the courts have to consider if sufficient cause has been demonstrated when considering whether or not to grant an order for stay of proceedings pending appeal.

15. They further averred that although the Respondent filed suit in 2009, she only listed the matter for Pre-Trial Conference when they came to learn of the irregular entry of judgment against them. It was their argument that their defence had raised triable issues and hence their application ought to be allowed to advance substantive justice. They submitted that if their Appeal was to succeed and the hearing proceeded for formal proof, it would not be fair for the same to proceed without hearing their version of events.

16. On her part, the Respondent submitted that the question of whether or not the Appellants had filed a Statement of Defence was a matter of debate in the lower court because they did not have any receipt to prove that they had indeed filed the said Statement of Defence. She added that they had failed to demonstrate that the court mechanically entered interlocutory judgment against them. She averred that they were trying to steal a match.

17. She placed reliance on the case of **Global Tours & Travels Limited Nairobi HC Winding Up Cause No 43 of 2000** where the court therein observed that the litmus test in matters of stay of proceedings is that the court must be kept in mind of the need for expeditious disposal of cases, scarcity and optimal utilisation of judicial time and consider whether the applicant had established a *prima facie* case and if the application was filed expeditiously.

18. She was emphatic that an application for a stay of proceedings does not fall within the conditions set out in Order 42 Rule 6 (2) of the Civil Procedure Rules and in this regard, she referred this court to the case of **Kenya Power & Lighting Company Limited vs Esther Wanjiru Wokabi [2014] eKLR** where Githua J arrived at a similar conclusion.

19. In support of her contention that the present application was *res judicata*, she referred this court to the case of **Henderson vs Henderson (1843-60) ALL ER 378** where it was held that the court will not permit parties to reopen the same subject matter that had been adjudicated upon by a court of competent jurisdiction.

20. She further relied on the case of **Interactive Gaming & Lotteries Limited vs Flint East Africa & 2 Others [2014] eKLR** to argue that the Appellants herein were not entitled to the orders they had sought as they failed to disclose material facts, which was to disclose why the lower court directed that the matter proceed for formal proof. She submitted that they were awoken from slumber when her matter was fixed for formal proof and consequently, they had unclean hands which disentitled them from being granted the orders they had sought.

21. This court carefully considered the parties' written submissions and the case law they each relied upon and noted that as the Appellants correctly submitted, the appellate court has power to grant an order for stay of execution or stay of proceedings pending the hearing and determination of an appeal.

22. Order 42 Rule 6 (1) of the Civil Procedure Rules provides as follows:-

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of

execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from (emphasis court), the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

23. It was therefore immaterial that the lower court had dismissed the Appellants’ application for an order for stay of proceedings pending appeal because it still had a life line in this court.

24. As the Court of Appeal held in the case of **UAP Insurance Company Ltd vs Michael John Beckett[2004] eKLR**, all an applicant is required to show is that he has an arguable appeal which is not frivolous and that the appeal will be rendered nugatory if the stay of proceedings is not granted. In that case, it stayed proceedings pending hearing and determination of an appeal that had arisen from an order that had been made by the High Court. It held that an appeal would be futile if the proceedings before the arbitrator were not stayed.

25. This court took a similar view that in the event the formal proof was to proceed in the lower court and the appellate court found that the Trial Court had erred in not allowing the Appellants herein to participate in the lower court matter, then their appeal would have been rendered nugatory. Indeed, much precious time would have been wasted in the hearing of the case by way of formal appeal only for the proceedings to be overturned on appeal. It is better that a case is delayed for a little while longer and is heard on merit and an appeal be heard and determined on merit as opposed to an appellant seeking to be allowed to participate in lower proceedings if it is found that he had been unfairly locked out in those proceedings.

26. The Appellants were categorical that interlocutory judgment ought not to have been entered against them because they had already filed their Statement of Defence. On the other hand, the Respondent argued that they never filed any defence and the court therefore acted correctly in entering interlocutory judgment against them. The Respondent admitted in her submissions that that was an issue that was debated in the lower court and a determination made.

27. There was therefore merit in the Appellants’ arguments that this court ought to be given an opportunity to interrogate the correctness and/or veracity or otherwise of theirand the Respondent’s said contentions because they were on diametrically opposite side of the poles. Their assertions could not be wished away. Their Appeal was not frivolous as they had raised a triable issue that wasbest determined on appeal before any further proceedings could continue in the lower court.

28. Accordingly, having considered the affidavit evidence, the Written Submissions and the case law that each party relied upon, it was the considered view of this court that if the matter proceeded for formal hearing in the lower court, the appellate court would have been denied an opportunity of determining whether or not there was any justification in the Trial Court having reached the decision it did and thus direct that the matter proceed for formal proof. It was necessary that the appellate court determine if the Trial Court exercised its discretion judiciously so as not to shut out the Appellants from tendering oral evidence should there be merit in their appeal.

DISPOSITION

29. For the foregoing reasons, the upshot of this court’s decision was that the Appellants’ application that was dated and filed on 28th March 2019 was merited and the same is hereby allowed in terms of Prayer No (3) therein. **Costs of the application herein will be in the cause.**

30. It is so ordered.

DATED and DELIVERED at NAIROBI this 10th day of December 2019

J. KAMAU

JUDGE