



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 708 OF 2007

BRAEBURN LIMITED.....APPELLANT

- V E R S U S -

NIZAR HASSANALI KASSAM.....1ST RESPONDENT

SHAMA NIZAR KASSAM.....2ND RESPONDENT

RULING

1. The subject matter of this ruling is the motion dated 22nd August, 2017 taken out by **Nizar Hassanali Kassam** and **Shama Nizar Kassam**, the 1st and 2nd respondent herein in which it sought for the following orders inter alia,

1. Spent

2. That pending the hearing and determination of this application inter partes, this honourable court does issue a temporary order of stay, staying the execution of the judgment of the Hon. Justice Sergon delivered on the 19th August 2016, all other proceedings arising from the said judgment and the consequential orders arising from the said judgment.

3. THAT a temporary orders pending hearing and determination of the notice of motion dated 22nd of August 2017 and filed herein on the 22nd August 2017 interpartes do issue, to stay any further proceedings in respect of CMCC 3718 of 2006 and HCCA 708 of 2007.

4. THAT this honourable court sets aside the judgment of the Hon Justice Sergon delivered on the 19th August 2016 and all the consequential orders arising from the said judgement the consequent the respondent/applicants herein be allowed to submit on the appellant/respondent appeal and that the said appeal be heard and determined on its merits.

5. THAT this honourable court does grant any other order it deems fit in the circumstance.

6. THAT the costs of this application be provided for.

The motion is supported by the affidavit of Nizar Hassanali Kassam, sworn on 23rd October 2017 and a further affidavit of the same deponent.

2) When served with the motion, Braeburn Limited, the appellant herein, filed the replying affidavit of Mercy Wanjiku Kareithi, to oppose the application. When the motion came up for inter-partes hearing, learned counsels were invited to make oral submissions.

3) I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the application. I have further considered the rival oral submissions of learned counsels. The history of this dispute can be discerned from the material placed before this court. The appellant instituted a suit for a sum of Ksh 869,641/- against the respondents. The appellant obtain a default judgment. The respondents moved to the trial court to set aside the exparte judgement. The respondents were given conditional leave to defend the suit. being dissatisfied the appellant preferred this appeal. The appeal was eventually heard and determined in favour of the appellant vide judgement delivered on 19th of August 2016. The respondents are now before this court vide the motion dated 22.8.2017 claiming they only became aware of it on 25th April 2017 upon being served with a notice to show cause why they should not be committed to civil jail. The respondents further aver that the judgement on the appeal was done without the submissions of the respondents on record, thus they were not given a chance to defend the appeal. The respondents aver the failure to attend court and file submission was due to mistake of counsel which mistake should not be visited upon them. The applicants state that they have appointed new advocates on record and would want to have the judgement stayed to enable them defend the appeal.

4) Having outlined the background of this dispute in detail, let me now consider the merits or otherwise of the motion. I have already stated that the applicants are before this court seeking for a temporary order of stay pending the hearing and determination of the application. The prayer for stay shall therefore lapse at the conclusion of this application hence it serves no useful purpose to consider it now. What remains for this court to consider is the prayer 4 of the motion in which the respondents are seeking for this court's judgment delivered on 19.8.2016 together with the consequential orders to be set aside and for the appeal to be heard afresh on its merits.

5) It is the submission of the respondents that their erstwhile advocate failed to oppose the appeal as instructed hence this court rendered its judgment without their participation. The respondents urged this court not to allow mistake of counsel to be visited upon them. The respondents were emphatic that they were not aware of the hearing date of the appeal since they believed their advocate would inform them.

6) The appellant on the other hand has argued that the respondents have admitted that their erstwhile advocate was served and was aware of the hearing date of the appeal. This court was beseeched to find that the respondents have given no good reasons to explain their failure to file submissions and to attend court. This court was also urged to find that there is an inordinate delay to file the motion, the subject matter of this ruling.

7) I have considered the rival submissions and the material placed before this court in support of prayer 4 of the motion. It is not in dispute that judgment in this appeal was prepared without the submissions of the respondents. The record shows the respondents' erstwhile advocate was always served with mention/hearing notices but has in all occasions failed to attend court to protect the respondents' interest. The respondents have admitted that they were led down by their erstwhile advocates. The respondents have urged this court not to punish them for the mistakes of their advocate. They have however not shown any steps they have taken in pursuing their advocates who caused the mess they are now in. The respondents have purported to show vide the supplementary affidavit of Nizar Hassanali Kassim that they are in the process of compiling a complaint against their advocate.

8) It is stated by the respondents they came to now that judgment had been entered against them on 25.4.2017 when they were served with a notice to show cause. It is apparent that the respondents waited until 23rd August 2017 to file the current motion. The respondents have failed to offer an explanation for the delay to approach this court promptly. The question which remains unanswered is why did the respondents wait for four months to bring the motion the subject matter of this ruling. I find the delay to file the motion inordinate and inexcusable.

9) In the circumstances of this case, I am convinced that this is one of those cases where the client has to be left to suffer for the mistakes of his counsel and for being indolent.

10) In the end, I find no merit in the motion dated 22.8.2017. The same is dismissed with costs being awarded to the appellant.

Dated, Signed and Delivered in open court this 2nd day of February, 2018.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent