



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS CIVIL APPLICATION NO. 136 OF 2018

VEHICLE & EQUIPMENT LEASING LIMITED.....APPLICANT

VERSUS

ADPACK LIMITED.....1ST RESPONDENT

GEORGE N. MIURURI

T/A LEAKEY'S AUCTIONEERS.....2ND RESPONDENT

RULING

1. The Applicant herein has filed an application dated 19/4/2018 pursuant to the provisions of Section 3A, 79 G of the Civil Procedure Act, Order 50 Rule 6 and order 51 Rule 1 of the civil Procedure Rules seeking for the following reliefs namely:-

(i) That the Honourable court be pleased to enlarge and extend the time within which the Applicant may file an appeal against the ruling of the Senior Principal Magistrate's Court at Mavoko delivered on the 21/2/2018 to five days from the date of the determination of this application.

(ii) That the Memorandum of Appeal annexed hereto be deemed as fully filed and served.

(iii) That costs be in the cause.

2. The application is supported by two affidavits of Denis Muchiri who is the Applicants officer at its legal risk and compliance department sworn on the 19/4/2018 and 9/5/2018 and on the following grounds:-

*(i) That the lower court delivered a ruling on 21/2/2018 vide **Miscellaneous Application No. 22 Of 2017** at Mavoko Law Courts in which it set aside its earlier orders authorizing the officer commanding Athi river police station to supervise repossession of the 1st Respondent's assets by the 2nd Respondent who had been instructed by the Applicant.*

(ii) That the Applicant was dissatisfied with the said ruling and opted to seek review of the said ruling and thus filed an application in that regard dated 20/3/2018.

(iii) That when the said application was slated for hearing on 6/4/2018 the trial court stated in open court that its mind was made up and it would not change its earlier verdict despite the pendency of the application dated 20/3/2018 before it.

(iv) That the fate of the applicant appeared sealed as it was condemned unheard and denied justice.

(v) That meanwhile the time for appeal has run out.

(vi) That this court ought not to deny the Applicant an opportunity to appeal as it shall suffer irreparable harm and damage.

(vii) That the appeal stands a high chance of success as the ruling intended to be appealed is substantially flawed.

(viii) That the Respondents will not be prejudiced if the said leave is granted as there has been no inordinate delay.

(ix) That it is in the interest of justice that the Applicant be allowed to appeal the lower court's ruling because the 1st Respondent has refused to return the Applicants assets that had been leased and further refused to remit rental payments yet the rental

agreement had already been terminated and further the Applicant is now being harassed by financial institutions pursuing their loans that had been advanced to Applicant for the purchase of the equipment leased to the 1st Respondent.

(x) That the Applicant had lodged high **Court Civil Case Number 452 of 2017** at Nairobi for purposes of recovering the rental arrears from the 1st Respondent.

(xi) That **Mavoko SPMCC No. 22 of 2017** was purely for purposes of break in orders to enable the Auctioneers gain access into the 1st Respondent's premises and repossess the leased equipment.

(xii) That the Applicant is at the brink of collapse due to the erred ruling and a deviant client (1st Respondent) who has refused to make rental payments and is illegally holding onto the Applicant's assets and utilizing them for personal gain yet the lease agreement had been terminated pursuant to the terms of the lease agreement.

3. The Application is strenuously opposed by the 1st Respondent whose Advocate James Gitau Singh swore a replying affidavit dated 2/5/2018 raising the following grounds of opposition namely:-

(i) That the Applicant has already filed a suit before the High Court being **Nairobi HCC No.452 of 2017** pending determination whereby the Applicant has sued the 1st Respondent and another for rental payments as well as an order for release of leased equipment.

(ii) That the Applicant filed the Nairobi High Court Case after it failed to obtain orders in the **Mavoko SPM Misc. App. No. 22 of 2017** and therefore the issues in both matters are substantially the same and the present application is a belated attempt to revisit the Mavoko matter after it failed to obtain interlocutory orders in **Nairobi HCC 452 of 2017**.

(iii) That the Applicant's conduct in filing several suits is an abuse for the court process.

(iv) That the Applicant is guilty of non disclosure as it has failed to disclose the fact that the issues herein are being litigated in the **NBI HCC No.452 of 2017**.

(v) That some of the alleged assets are not in possession of the 1st Respondent but with other entities.

(vi) That the 1st Respondent has been remitting payments into court under **HCC No. 452 of 2017** on the basis that it is disputing the debts which information is already with the Applicant.

4. Learned Counsels for the parties herein agreed to canvass the application by way of oral submissions. Mr. Muraguri learned Counsel for the Applicant submitted that the delay to lodge appeal in time was not deliberate as the Applicant had attempted to file a Review Application before the lower court after the ruling only to be discouraged by the said court and was thus compelled to move to the high court by which time the period had elapsed.

It was further submitted that the Applicant operates business of leasing vehicles and equipments after obtaining credit from banks and the rental payments are thereby used to repay the loan. That upon the termination of the lease by the Applicant, the 1st Respondent has refused to release the equipment and also refused to pay up the rent arrears and which has greatly prejudiced the Applicant. It was further submitted that the Respondent has suffered no prejudice as it has possession of the assets and has not paid for use of the same and as a consequence financiers are now breathing on the Applicant's neck for repayment of the loans. It was finally submitted that the replying affidavit sworn by the 1st Respondent's Advocate be struck out since they relate to matters of fact.

Mr. Ayisi learned counsel for the 1st Respondent submitted that Order 19 of the civil Procedure Rules allows an Advocate to depone to matters within his knowledge and in the present case the issues are mainly points of law. It was also submitted that the Applicant is guilty of material non disclosure in that it has not disclosed the existence of the **High Court Civil Case Number 452 of 2017** at Nairobi in which the Applicant is seeking similar orders such as for instance the release of the vehicles and equipment and which brings in the aspect of Section 6 of the Civil Procedure Act. It was further submitted that the 1st Respondent has since released the rent monies vide **NBI HCCC No. 453 of 2017** and therefore the Applicant has come to this court with unclean hands as it should wait for the determination of the case at Nairobi High Court as it will lead to two courts trying the same subject matter with a possibility of different verdicts. Finally it was submitted that the Applicant has not given sufficient cause pursuant to Section 79G of the Civil Procedure Act. It was also submitted that the 1st Respondent will be prejudiced if it will be exposed to two court proceedings on a similar case.

5. The Applicant herein is seeking the exercise of this court's discretion in granting leave to file its appeal out of time. Indeed vide the provisions of Section 79G of the Civil Procedure Act the court can allow the filing of appeal out of time. It provides as follows:-

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the Appellant of a copy of the decree or order; provided that an appeal may be admitted out of time if the Appellant satisfies the court that he has good and sufficient cause for not filing the appeal in time.”

The Applicant has stated that the ruling sought to be appealed against was delivered on the 21/2/2018. As per the provisions of Section 79 G of the Civil Procedure Act the Applicant was required to have lodged appeal by the 21/03/2018. Hence there was delay in lodging the appeal by the Applicant. The Applicant was thus required to satisfy the following conditions to warrant the court to exercise its discretion in its

favour:

(i) *The explanation for the delay;*

(ii) *Whether or not the intended appeal is arguable;*

(iii) *Whether there will be prejudice to the Respondent if the Application is granted.*

6. As regards the first condition, it was the Applicant's case that immediately the ruling was delivered in **Mavoko SPM Miscellaneous Civil Application Number 22 of 2017** on 21/2/2018 it sought to seek a review of the same but the trial court did not accord it an opportunity to ventilate the same forcing it to subsequently withdraw the Review Application and move to this court by which time the period of appeal had lapsed. I find the Applicant's explanation to be convincing and that the delay was not inordinate. The Applicant would be entitled to be allowed to lodge appeal out of time if the other two conditions will be fulfilled by it.

7. As regards the second condition, it was submitted for the Applicant that the intended appeal is arguable in that the trial court ought not to have directed the Applicant to first institute a suit from which it could then seek for an order to repossess its assets held by the 1st Respondent yet there was no dispute in the first place as to the Applicant's ownership to the assets.

It was the 1st Respondent's case that the Applicant is guilty of material non-disclosure when it failed to disclose that there is a similar case involving the parties over the same subject matter being **Nairobi HCC No. 452 of 2017** which is currently pending for determination. The 1st Respondent contends that the Applicant has come to court with unclean hands since upon the ruling by the **Mavoko Law Courts in Misc Civil Application No. 22 of 2017** being made, the Applicant rushed to **Nairobi High Court and filed Civil Suit Number 452 of 2017** wherein it seeks for the release of the vehicles and equipment as well as payment of rental arrears. According to the 1st Respondent, the three courts shall be dealing with the same subject matter which offends the provisions of Section 6 of the Civil Procedure Act and is clear that the Applicant is engaging in forum shopping which is an abuse of the process of the court.

I have perused the lower court **Miscellaneous Application Number 22 of 2017** at Mavoko and note that the Applicant had earlier moved the court for an order directing the officer commanding Athi River police station to supervise the breaking in of the 1st Respondent's premises for the purpose of the Applicant repossessing its vehicles and equipment but the said order was later set aside vide the ruling dated 21/2/2018 the subject of the intended appeal. Again a perusal of the **Nairobi High Court Civil Case Number 452 of 2017** vide the plaint dated 7/11/2017 shows that the Applicant has sought for several reliefs inter alia the immediate release of the leased vehicles and equipment by the 1st Respondent as well as the payment of the rental arrears from the date of termination of the lease to the time of the final release of the equipment.

Looking at the two cases, it is clear that the Applicant's interest was to get back its leased vehicles and equipment plus the rental payment. The Applicant moved before the lower court for a breaking order as it needed to access its assets and while that case was being handled by the Mavoko Law courts, it swiftly moved to the High Court at Nairobi where it sought for the release of those assets as well as the rental payments. The Applicant while knowing that the Nairobi High Court matter was being determined has moved to this court seeking to be allowed to lodge appeal against the lower court's ruling setting aside an earlier order sanctioning for the breaking order. To my mind, I find the Nairobi **HCC Number 452 of 2017** adequately catered for the Applicants grievances as it has a prayer for the release of the assets and rental payment. It has also transpired that already the 1st Respondent had deposited a sum of about Kshs.43 million into court vide the above **case number 452 of 2017** and which is awaiting collection by the Applicant. There is therefore absolutely no reason for the Applicant to move to this court seeking to lodge appeal against the lower court ruling out of time when the subject matter has been captured in the **Nairobi HCC Number 452 of 2017**. Proceeding with the two matters would appear to offend the provisions of Section 6 of the Civil Procedure Act which provides thus:-

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim are litigating under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

The Applicant appears to have made a two pronged move against the 1st Respondent both at the lower court at Mavoko and Nairobi High Court. Learned Counsel for the Applicant has sought to differentiate the breaking order from the prayer for release of assets. However it is quite unusual for the Applicant to first seek for a breaking order and then proceed to seek for an order of release of the assets. As it has opted to go for an order of release then I do not now see the need for the Applicant to pursue the breaking order. The order for release of the assets would be sufficient. Hence the intended appeal against the ruling of the lower court dated 21/2/2018 does not have high chances of success in view of the fact that what is being appealed against has already been taken care of vide **Nairobi HCC No. 452 of 2017**. The Applicants should wait for the determination of that case.

8. As regards the last condition on whether prejudice will be occasioned to the Respondent, I find the 1st Respondent is likely to be prejudiced if the Application is granted on ground that it shall be exposed to two court proceedings on a similar cause of action. The prudent thing would be to allow the Nairobi High Court Civil Case Number 452 of 2017 to proceed to final determination. The Applicant's concerns on the rental payments has already been addressed in that case whereby some of the monies has been deposited. It can access the same in order to pay its financiers.

9. In view of the foregoing observations it is the finding of this court that the Applicant's Application dated 19/4/2018 lacks merit. The same is ordered dismissed with costs to the Respondent.

Orders accordingly.

Dated and delivered at Machakos this 4th day of June, 2018.

D.K. KEMEI

JUDGE

In the presence of:

Ngolya – for Muraguri for the Applicant

No appearance for Ayisi for the Respondent

Josephine – Court Assistant