REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 499 OF 2017

VALLEY VIEW OFFICE PARK LIMITED.....APPELLANT

VERSUS

PAULO BARASA ONGWETO.....RESPONDENT

RULING

1. The Notice of Motion dated 7th February 2017 seeks stay of further proceedings in Nairobi CMCC No. 867 of 2016 pending determination of the appeal filed herein and provision of costs for the application. The other prayers in the motion are now spent.

2. In the main, the application is premised on grounds that if the proceedings in the lower court are not stayed, the applicant will suffer great prejudice as he will be denied an opportunity to present evidence in support of his case and the appeal will be rendered nugatory.

3. The application is supported by an affidavit sworn on 2nd February 2018 by *Simon Karuri*, the manager in charge of operations in the applicant's company. In the affidavit, the deponent illuminated the background against which the appeal and the application were filed. He deponed that the applicant was the defendant in Milimani CMCC No. 867 of 2016; that after close of pleadings, the case was scheduled for hearing on 21st August 2017. On that date, the applicant's counsel made two applications for adjournment which were denied with the result that the plaintiff who is the respondent in the application and the appeal prosecuted his case to conclusion but the applicant was denied an opportunity to present evidence in support of its case.

4. The applicant was aggrieved by the orders of the lower court hence the appeal filed herein. It is the applicant's contention that despite being informed of the pendency of the appeal, the trial court ordered parties to file their written submissions and thereafter fixed the case for delivery of judgment on 29th January 2017.

5. It is the applicant's case that if further proceedings are not stayed, the trial court will proceed to deliver judgment without having given the applicant an opportunity to be heard on its case which will violate the rules of natural justice.

6. The application is opposed through a replying affidavit filed by the respondent on 7th May 2018. The gist of the respondent's opposition to the motion is that the trial court had good reasons to deny the applicant its twin applications for adjournment and that the application has now been overtaken by events as judgment in that case was delivered on 29th January 2018. The respondent did not however substantiate this claim by annexing a copy of the said judgment to his replying affidavit.

7. Given the prayers sought in the application and noting the respondent's averment that judgment in the lower court had already been delivered when the application came up for hearing on 25th June 2018, I directed the parties to find out the actual position regarding whether or not judgment in the suit had been delivered and report their findings to the court on 10th July 2018.

8. For reasons which are not clear on record, the matter was not mentioned on 10th July 2018 but when it was mentioned on 24th September 2018, counsel for the applicant informed the court that she had been unable to trace the lower court file and she was consequently unable to establish the status of proceedings in the lower court. Counsel therefore requested the court to determine the application based on the written submissions that had been filed by the parties.

9. I have considered the application, the affidavits on record and the parties' rival submissions. I find that though the main prayer in the application is for stay of proceedings in the lower court pending the determination of the appeal, it is evident from the face of the application and the appellant's submissions that the application is anchored on *Order 42 rule 6* of the *Civil Procedure Rules (* the *Rules)* which is clearly inapplicable in this case.

A reading of *order 42 rule 6* of the *Rules* shows that the provision applies to applications for stay of execution pending appeal not stay of proceedings pending appeals. It sets out the parameters which an applicant seeking stay of execution pending appeal must satisfy before the court can exercise its discretion in his or her favour.

10. Having established that *order 42 rule 6* of the *Rules* does not apply to applications such as the present one, I find that the conditions set therein cannot guide the court in determining the current application. The court will have to be guided by other considerations to ensure that justice is done between the parties and that none of the parties suffers any prejudice.

11. As I held in ***Kenya Power & Lighting Company Limited V Esther Wanjiru Wokabi, [2014] eKLR***, the court in deciding such applications must be guided by the following three principles:

i. Whether the applicant has established that he/she has a prima facie arguable appeal;

ii. Whether the application was filed expeditiously;

iii. Whether the applicant had established sufficient cause to convince the court that it is in the interest of justice to grant the orders sought.

12. Looking at the material placed before me including the memorandum of appeal, it is clear that the order sought to be appealed against was issued on 21st August 2017. The memorandum of appeal was filed on 20th September 2017 while the instant application was filed on 2nd February 2018 about six months later and about four months after the memorandum of appeal was filed. From these facts, whichever way one looks at it, it cannot be said that the application was filed expeditiously.

13. Regarding whether the applicant has established sufficient cause to warrant the grant of the orders sought, the respondent has maintained that there are no proceedings to stay in the lower court since the trial court delivered its judgment on 29th January 2018. He did not however furnish this court with any evidence to that effect. When prompted by the court, the applicant's counsel claimed that she was unable to confirm the existence or otherwise of the alleged judgement because the court file in the lower court could not be traced.

14. The above information by the applicant's counsel is misleading because when I called for the lower court file, it was readily available. I have perused the said record and I have confirmed that indeed the trial court has already delivered its judgment in the suit subject matter of the application. The record shows that the judgment was delivered on 2nd February 2018 and not on 29th January 2018 as alleged by the respondent. This in effect means that the judgment had in fact been delivered even before the application was filed.

15. In view of the foregoing, I am in full agreement with the respondent's submissions that the delivery of judgment in the suit concluded the proceedings in the lower court and there are therefore no proceedings which are capable of being stayed by this court. It is thus my finding that the application must fail as no useful purpose will be served by granting orders which are unenforceable. It is a settled principle of law that courts should not issue orders in vain.

16. In the circumstances, the application is dismissed with costs to the respondent.

It is so ordered.

DATED, DELIVERED and **SIGNED** at **NAIROBI** this 9th day of November, 2018.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Kamau for the respondent

Mr. Odhiambo holding brief for Mr. Mwangi for the appellant

Mr. Fidel: Court Assistant