



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
HIGH COURT CIVIL APPEAL NO. 105 OF 2016

BETWEEN

DORCAS CHEPSOI.....APPELLANT

AND

WILLIAM OKUMU MASINDE.....1ST RESPONDENT

MUMIAS SUGAR CO. LTD.....2ND RESPONDENT

RULING

Introduction

1. The appellant's notice of motion dated 17.01.2017 seeks Orders that;-

1.)spent

2.) This Honourable court be pleased to grant leave to the applicant herein to file record of appeal out of time on this appeal against the ruling delivered by the Honourable Senior Principal Magistrate C. N. Sindani on 1st day of December 2016 in Mumias Senior Principal Magistrate Court Civil Case No. 295 of 2012.

3.) The said leave do operate as a stay of all proceedings on this matter in the said Mumias Senior Principal Magistrate Court Civil Case No. 295 of 2012 which is scheduled for further hearing on 20th January, 2017 and other cases related to this matter is heard and determined by the Honourable Court.

4.) The costs of this application be provided for

5.) Any other orders that meet the ends of justice.

2. The application is premised on the grounds that the ruling delivered on the 1st of December 2016 in Mumias SPMCC No. 295 of 2012 did not please the applicant, so she decided to appeal against it and requested for certified typed copies of proceedings ruling and the order itself. That todate the said documents have not been supplied to her yet, though she has filed the memorandum of appeal but without the record of appeal. Her time for filing the appeal has also lapsed. She gives her reason for filing the appeal to have been necessitated by new evidence which was filed by the plaintiff/Respondent and which

evidence would prejudice her case. She has also made mention of the judgment by Hon. A.C. Mrima made on the 13.05.2015 which ordered fresh hearing of the case by a court of competent jurisdiction but with no new evidence to be introduced on record.

3. The appellant claims that if the prayer sought herein is not granted and the appeal succeeds the whole exercise would be rendered nugatory. She claims that documents were produced long after the 1st plaintiff/respondent had testified and by the court declining the application to recall the plaintiff to be cross examined on the documents was prejudicial to the 2nd defendants/Applicants case. She opines that her appeal has high chances of success.

4. The application is supported by the appellants own affidavit sworn on the same date. The affidavit reiterates the grounds on the face of the application.

5. The application was certified urgent on the 18.1.2017 and the appellant was ordered to serve.

1st respondent's grounds of opposition.

6. The 1st Respondent has opposed the application. Vide the grounds of opposition dated the 23.01.2017. The grounds are as follows:-

- 1.) That the application is bad in law and destitute of any merit.
- 2.) The law does not require the memorandum of appeal to be filed alongside the record of appeal.
- 3.) The applicant has not demonstrated any condition to warrant an order of stay of proceedings.
- 4.) The application is made in bad faith.

Submissions

7. On the 25.01.2017 the parties canvassed the application orally. M/S Wilunda appeared for the appellant while Mr. Mukhabani and Mr. Mukisu were present for the 1st and 2nd Respondents respectively.

8. Mr. Mukhabani for the 1st respondent did not oppose the application. According to M/S Wilunda the appellant's prayer is for leave to file record of appeal out of time and for stay of proceedings in Mumias SRMCC NO. 295/2012 pending the hearing and determination of the intended appeal. She expressed the applicant's apprehension that if the orders prayed for are not granted the appeal will be rendered nugatory. Counsel relied on Kisumu Civil Application No. 217 of **2008 [UR 137 of 2008] Nagendra Saxeba – Vrs -Miwani Sugar Mills Ltd and 3 others** which deals with application for stay of execution and proceedings pending an appeal.

9. Mr. Mukisu for the 2nd respondent contends that no leave is required as the instant application is made in the same appeal file. He further argues that the Civil Procedure Act and the Civil Procedure Rules do not limit the time within which a record of appeal can be filed. He adds that the applicant has not demonstrated that the stay of proceedings is necessary at this point. He also submits that the averment that new evidence was introduced by the respondent is a factual issue which was not made in the affidavit and as such it will make it difficult for the court to identify such evidence and whether it will prejudice the applicant's case.

10. Counsel also submits that the case in the subordinate court being a test case which affects 130 other cases right to be determined expeditiously as the other cases are being frustrated by the applicant's numerous applications. He maintains that the 1st respondent is entitled to expeditious disposal of their cases, and asks the court herein to be cautious about the prayers for stay of proceedings.

Determinations

11. The application is brought pursuant to Sections 1A,1B , 33A, 79G and 95 of the Civil Procedure Act, as well as Order 56 Rules 6 and 7 of the Civil Procedure Rules.

12. This court has considered the pleadings on record and the arguments by the rival parties together with the authority cited. Although the order which is being appealed against is not annexed, what this court understands from the supporting affidavit is that the court decided to recall the plaintiff/1st respondent to be cross examined after the appellant had made an application to the effect. It is not clear why the appellant/applicant chose to make this application without annexing the order of the trial court and/or the ruling of 01.12.2016.

13. The information contained in the said ruling must have guided the applicants counsel in preparing the memorandum of appeal but they failed to annex the same in their application. I note that the file has been called for by the Deputy Registrar but the same has not been forwarded by the Mumias Law Court as requested.

14. Be that as it may, the memorandum of appeal as can be seen from the court record was filed on the 13.12.2016 which is about 12 days after the said ruling. To that extent, the ruling having been delivered on the 01.12.2016 and appeal filed on the 01.12.2016, it was filed within time. The CPA and CPR do not limit the time within which a record of appeal can be filed so long as the applicant has shown that there was a delay which is justified.

15. On the issue of stay of proceedings it is incumbent upon the applicant to demonstrate that the appeal is arguable and that it has a high chance of succeeding and further that if the orders sought are not granted and the applicant were eventually to succeed in her appeal that success would be rendered nugatory.

16. The issues raised in the application are that there was new evidence adduced by the 2nd Respondent which evidence was allegedly not interrogated by the appellant/applicant. Since the lower court file has not been availed, this court is unable to test the veracity of these allegations. The applicant has not placed before this court the alleged new evidence adduced by the 2nd respondent and the impact of such evidence on the applicant’s case.

17. In the circumstances, the applicant has failed to demonstrate what substantial loss, if any, may result to the applicant if the orders sought herein are not granted. It is also worth noting that the applicant has not made any offer security for the orders sought. It is not lost to the court that the matter in the lower court have dragged on for years because of the many applications filed by the applicant.

18. For the above reasons, the notice of Motion dated 17.01.2017 is found to be without merit and is accordingly dismissed with costs to the respondent.

Orders accordingly

Ruling delivered, dated and signed in open court at Kakamega this 2nd day of February,2017

RUTH N. SITATI

JUDGE

In the presence of;-

Mr. Mukhabani (absent).....for 1st Respondent

Mr. Mukisu –(Absent).....for 2nd Respondent

Mr. Shivega for Mr. Koross (present).....for Applicant

Polycap.....court Assistant