



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 443 OF 2015

FRANKLINE MITHIKA LINTURI. 1ST APPELLANT

ARKCHOICE INSURANCE BROKERS LIMITED..... 2ND APPELLANT

VERSUS

PRUDENTIAL VALUERS LIMITED. RESPONDENT

RULING

1. What falls for my determination is the application by way of Notice of Motion dated 4th day of December, 2015 in which the Appellants/Applicants, Frankline Mithika Linturi & Arkchoice Insurance Brokers Limited seeks the following orders: -
 - i. Spent
 - ii. That this honourable court be pleased to grant a stay of further proceedings of CMCC No. 676 of 2012 at Nairobi Milimani and all the consequential orders and decree pending the hearing and determination of this application.
 - iii. That this honourable court be pleased to grant a stay of further proceedings of CMCC 676 of 2012 at Nairobi Milimani, and all the consequential orders and decree pending the hearing and determination of the Appeal filed by the Applicants herein.
 - iv. That the cost of this application be provided for.

The application has been brought under Order 51 Rule 10 of the Civil Procedure Rules and Sections 1, 2, 3 and 3A of the Civil Procedure Act and other enabling provisions of the law. It is premised on the grounds set out on the body of the application and it's supported by the affidavit of Frankline Mithika Linturi sworn on the 4th December, 2015.

2. The facts of the case are that the Respondent filed CMCC No 676 of 2012 on the 16th February, 2012 which came up for hearing on the 11th August, 2015 which date was taken by consent by counsels when they were both in court on the 25th June, 2015. On the said date reserved for hearing, the counsel for the Appellants made an application for time allocation for 11.30 a.m. since his client the 1st Appellant had experienced some severe back pain the previous day and he needed medical attention the following day when the matter was coming up. That the court declined the time allocation requested by the counsel for the appellants and ordered that the matter do proceed at 10.00 O'clock.

3. The matter proceeded and by the time the Respondent finished with his case, the 1st Appellant had not yet arrived and, therefore, his advocate sought for adjournment on the grounds that the 1st Appellant had not finished with his Doctor, a fact that he had not foreseen when he requested for time allocation. The court declined to grant the adjournment sought and ordered the parties to file submissions on the 26th August, 2015.
4. The ruling of the court on the 11th August, 2015 declining to grant an adjournment to the Appellants meant that the Appellant's case was closed without presentation of their case. What followed was an application for review of the said orders but the court upon hearing the parties on the same, declined to review its orders. Since there was no order staying the proceedings, the learned magistrate went ahead and delivered a judgment without hearing the Appellants case. The judgment was delivered on the 23rd November, 2015.
5. The Appellants avers that in failing to grant them an adjournment, the learned magistrate used her discretion to their prejudice and in so doing failed to balance the interests of the parties herein. That the learned magistrate in balancing the interests of the parties ought to have allowed the adjournment and awarded costs of the day to the Respondent. The 1st Appellant further avers that if he is not allowed to re-open the case, he will be condemned to pay the decretal sum in which case he will suffer loss and his appeal will be rendered nugatory.
6. The 1st Appellant depones that he is ready and willing to abide by any terms that the court shall impose. He urges the court to allow the application since he is aggrieved by the decision of the lower court in that he was not given an opportunity to be heard. In the circumstances, it is just and fair that there be a stay of further proceedings out of the court ruling on 11th August 2015 and consequential orders against the Appellants pending the hearing and the determination of the Appeal.
7. The Respondent has opposed the application by way of a replying affidavit sworn by Kiome P Matumbi on 14th December, 2015. The Respondent's case as captured in the said affidavit is that the application and the appeal as filed are fatally defective for want of compliance with the law in that the appeal is not against the judgment/decree of the lower court delivered on the 23rd November, 2015. That the Appeal has been overtaken by events since the lower court heard the case and made a determination in terms of the Decree and Certificate of costs and therefore there are no proceedings to be stayed.
8. The Respondent argues that the purported appeal was filed when the lower court proceedings were still ongoing and the Appellants fully participated in the proceedings. That, while the Appeal was filed on 11th September, 2015 it was only served upon Respondent on the 24th November, 2015.
9. The Respondent depones that when the matter came up in court on the 11th August, 2015, both counsels confirmed to the court that they were ready to proceed, the matter proceeded and the Respondent closed its case. At this juncture, the Appellant's Advocate changed track alleging that he was not ready to proceed since his witness, the 1st Appellant was sick. The court declined to allow the application and the Appellants counsel closed their case. That the counsel for the Appellant filed an application for review of the court ruling declining to grant an adjournment but the same was dismissed.
10. That, all along the counsel for the Appellant did not inform the court or the counsel for the Respondent about the preferred appeal that was running parallel to the proceedings in the lower court. According to the Respondent, the Appellants were heard in the lower court by their continued participation up to and until the judgment. That in the circumstances, the Respondent is greatly being prejudiced in that it is unable to enjoy its lawfully entered judgment yet that judgment is not being challenged at all. That the application herein is meant to delay the respondent in realizing the fruits of its successful litigation which delay is unreasonable and it has

not been explained. The applicants have not shown that they deserve the orders sought and that the reasons given by the appellants were all tendered in the lower court.

11. Parties agreed to dispose off the application by way of written submissions which they filed and the same are on record. The submissions mirror the contents of the affidavits filed by the respective parties.

12. I have carefully considered the materials before me together with the written submissions by the learned counsels. I have also perused the judicial authorities referred to by the Appellants. Reliance is made on the case of **Nyamodi Ochieng Nyamogo Vs Kenya Posts and Telecommunication Corporation (1993) eKLR** in which the learned judge observed: -

“granting a stay is a judicial discretion, I will exercise this discretion on the basis of the facts before me and the legal principle. This discretion is fettered by the three conditions firstly the applicant must establish a prima case, secondly, the court must be satisfied that a substantial loss would suffer from refusal to grant a stay and thirdly the applicant must furnish security.”

The Appellants have also relied on the case of **Jagar Singh Vs Runda Coffee Estates Limited (1966) E.A. 263** and **Butt Vs Rent Restriction Tribunal (1982) KLR 417**.

13. The Respondent has raised two legal issues: -

(1) The Appeal was filed without the leave of the court.

(2) That the appeal was filed out of time.

I will start by considering the two points of law. On whether the appeal was filed without the leave of the court; the guiding provision is order 43 Rule 1 of the Civil Procedure Rules. The Order sets out the **“Orders”** and Rules of the Civil Procedure Rules from which an appeal shall lie as of right. Among the orders listed therein is Order 45 Rule 3 **“Application for Review”**. The Appeal herein arises from a ruling by the lower court in which the learned magistrate dismissed an application for review under order 45 Rule 3. An appeal from this order lies to the High Court as of right and no leave is required.

14. On the second issue of the appeal being filed out of time; It is noted that the ruling appealed against was delivered on the 11th day of August, 2015 while the appeal herein was filed on the 11th September, 2015. Section 79G of the Civil Procedure Act provides as hereunder: -

“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 had good and sufficient cause for not filing the appeal in time.”

15. The above section is very clear that an appeal such as the one before the court should be filed within thirty (30) days from the date of the order. How do you compute the thirty days? Order 50 Rule 8 is the guiding rule and it states: -

“In any case in which any particular number of days not expressed to be clear days is prescribed under these Rules or by an order or direction of the court, the same shall be reckoned exclusively of the first day and inclusively of the last day.”

Section 79G has expressed time for filing an appeal as 30 days.

16. I have taken the liberty to peruse the court file and I did not see any application for leave to file

the appeal out of time. As it stands now, the appeal is incompetent.

17. Having made a finding that the appeal herein is incompetent for having been filed out of time, this court has no option but to dismiss the application dated 4th December, 2015 with costs to the Respondents.

Dated, signed, and delivered at Nairobi this 2nd day of June, 2016.

L NJUGUNA

JUDGE

In The presence of

..... *for the Appellants*

..... *For the Respondent*