REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 254 OF 2013

HELLEN KIRAMANA ….……………………….PLAINTIFF/RESPONDENT

VERSUS

PCEA KIKUYU HOSPITAL …………………….DEFENDANT/APPLICANT

RULING

1. By an application dated 8th June 2016 and filed in court on 5th July 2016, the defendant applicant PCEA Kikuyu Hospital seeks from this court orders for stay of delivery of judgment pending hearing and determination of the application of the defendant's intended appeal in the Court of Appeal.

2. The application is premised on the grounds that there is a ruling delivered on 27th October 2015 by this court which the applicant was dissatisfied with and that the judgment in this suit is due for delivery on 12th July 2016. That the applicant has filed an appeal which appeal is arguable and if stay is declined, then the appeal shall be rendered nugatory and that no prejudice shall be occasioned to the plaintiff but that the defendant shall suffer irreparably if stay is not granted. The application brought under certificate of urgency is anchored on Article 159 of the Constitution, Sections 1, 1A, 1B, 3 and 3A of the Civil Procedure Act Cap 21, Order 42 Rule 6 of the Civil Procedure Rules and all other enabling provisions of the law. The said application is also supported by the affidavit sworn by Mr Patrick Kimpiatu the defendant's Chief Executive Officer on 8th June 2016 annexing copy of Notice of Appeal dated 3rd November 2015 and two letters dated 3rd November 2015 and 10th February 2016 asking for typed proceedings in this matter, filed with the Deputy Registrar of the High Court. The supporting affidavit mirrors the grounds upon which the application is predicated as reproduced above in this ruling.

3. The application by the defendant is opposed by the plaintiff/respondent who swore a replying affidavit on 11th July 2016 wherein she deposes that the application is intended to delay the delivery of judgment, and that it lacks merit. It is also contended that the application is made in bad faith as it was lodged 3 days prior to the date scheduled for the delivery of the judgment notwithstanding the fact that the application was ready on 8th June 2016 hence the application must have been necessitated by the decision of the Medical Practitioners and Dentists Board that the defendant were indeed professionally negligent as shown by exhibit I, the decision of the Medical Practitioners and Dentists Board delivered on 17th March 2016. The plaintiff further deposes that it is only fair and just that the defendant's application be dismissed with costs.

4. Before this matter was brought to my attention to determine, it was placed before Honourable B.

Thuranira Jaden duty judge of the Civil Division on 6th July 2016 who certified the matter as urgent and sent it to me for directions on 11th July 2016 on account that the original file is pending before me for judgment.

5. When the matter was called out at 9.00a.m on 11th July 2016 the applicant's counsel was not in court. Only the plaintiff/respondent's counsel was present so I directed that the file be returned to the registry since the application was made on a skeleton file and that judgment in the main file would be delivered as scheduled on 12th July 2016. However, Miss Kabita holding brief for the Ms Opondo appeared shortly after I had pronounced myself on the matter and urged the court to recall the matter owing to its urgency and the court did recall the file and direct that the applicant's counsel effects service of the application and date upon the plaintiff/respondent's counsel for interpartes hearing today 12th July 2016. I did not grant any interim orders in view of the fact that the plaintiff's counsel Prof Wangai had already left the courtroom to attend to other matters elsewhere.

6. This morning, the two advocates, Miss Kabita for the applicant and professor Wangai for the respondent urged the application orally, relying on the grounds, supporting and replying affidavits. In Ms Kabita's view the intended appeal is arguable hence delivery of judgment in this matter will render the appeal nugatory. She also urged that the application was filed on 5th July 2016 because they had to seek directions from the Deputy Registrar on whether they should file it on a skeleton file and that it is in the interest of justice that the application be allowed.

7. In a rejoinder, Professor Wangai opposed the application for stay of delivery of judgment contending that there has been substantial delay in filing the application, that the ruling which is being challenged was delivered on 27th October 2015 while the application for stay was made in July yet it is dated 8th June 2016. Further, Professor Wangai submitted that the said ruling relates to an application for extension of time which relates to the direction of the court. That this application seeks to stay the discretion of the court hence it is an abuse of court process and unmerited and presumptuous. Professor Wangai further submitted that all parties were heard in this suit on merit and therefore the court should not be barred from delivering its judgment. It was further submitted that in any case, the issue of extension of time will be considered in the judgment and if the applicant is dissatisfied , it can appeal against the judgment. Professor Wangai further submitted that the applicant had not demonstrated which prejudice it will suffer if the application is declined and judgment which is due is delivered as scheduled since the plaintiff too has a right to a judgment being rendered either way. He also submitted that on 17th March 2016 he Medical Practitioners and Dentists Board found the defendant negligent hence this application is an attempt to frustrate the plaintiff and the court. Counsel urges the court to dismiss the application by the defendant and deliver the judgment as scheduled.

8. In brief rejoinder, Miss Kabita responded that parties were before the court on 26th April 2016 when the judgment date was reserved and were directed d to apply for stay. She emphasized that her clients are not seeking to challenge the court's discretion but that they have filed an arguable appeal challenging the ruling of 27th October 2016 and that the issue of that appeal cannot be determined in the judgment pending before this court. She urges the court to apply Article 159 of the Constitution and balance the interests of both parties. She also stated that annexture 1 was only given to them today.

9. I have carefully considered the application by the defendant/applicant, the grounds, and supporting affidavit. I have also considered the replying affidavit by the plaintiff/respondent and the oral rival submissions by both parties' advocates. In my humble view, the only issue for determination on the application before me is whether the applicant has made out a case for stay of delivery of judgment pending hearing and determination of ruling of 27th October 2015.

10. The applicable law is Order 42 Rule 6 of the Civil Procedure Rules which provides that:-

1. ***" No appeal/or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but; the***

court appealed from may for sufficient cause order stay of execution of such decree or order.

2. ***No order of stay of execution shall be made with Sub Rule (1) unless***

   a. ***The court is satisfied that substantial loss may result to the applicant unless the order is made and that;***
   b. ***The application has been made without unreasonable delay; and***
   c. ***Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him as been given by the applicant .”***

11. From the above provision of the law, it is clear that the relief of stay of proceedings pending appeal is discretionary. That discretion, nonetheless, must be exercised judicially, that it to say, upon defined principles of law, not capriciously or whimsically. It therefore follows that stay of proceedings in this case, the proceedings being delivery of judgment in the suit that was heard with full participation of all the parties, pending an appeal arising from a ruling delivered by this court on 27th October 2015, can only be granted where sufficient cause is shown by the applicant. In demonstrating that sufficient cause, the prerequisites under Order 42 Rule 6 of the Civil Procedure Rules; Article 159 and Sections 1,1A, 3 and 3A of the Civil Procedure Act are useful.

12. First, is that under Order 42 Rule 6 of the Civil procedure Rules, the applicant must show that the application was brought without unreasonable delay. As to whether this application was timeously brought, the record is clear that on 27th October 2015, this court delivered a ruling in open court and in the presence of Mr Mambiri advocate holding brief for Ms Opondo counsel for the applicant herein/defendant. The plaintiff’s counsel was absent. Upon delivery of the said ruling, the file was returned to the registry and parties fixed a mention date for 9th December 2015 but there is no record as to what transpired on 9th December 2015. On 21st March 2016, the plaintiff’s counsel again fixed a mention date for 26th April 2016. On the latter date, both parties counsel’s Ms Kabita and Professor Wangai were present in court when the latter sought for a judgment date. In response, Ms Kabita informed the court that they had filed a Notice of Appeal and seeking for stay of proceedings so that the appeal be heard and determined first. In response, Professor Wangai submitted that a Notice of Appeal was not stay and that no law bars this court from rendering a judgment where there was no stay. The court then observed that there was no application for stay filed pending appeal against an interlocutory ruling hence judgment would be delivered on 12th July 2016 at 2.3. pm. Between 26th April 2016 and 5th July 2016 when this application for stay was filed, the applicant never filed any application for stay of proceedings which was well over 2 months. Equally, between 27th October 2015 and 26th April 2016 when judgment date was given, which is six months less one day, no application for stay of proceedings had been filed. However, on 26th April 2016, it is apparent that the applicant sought stay orally which was opposed and the court directed that since there was no formal application for consideration, it would deliver judgment on 12th July 2016. In total, the applicant wasted far over 8 months before bringing this application for stay of proceedings and therefore stay of delivery of judgment pending appeal.

13. In my humble view, the application was filed after an inordinate delay. The explanation offered by the applicant for the delay is that on 26th April 2016 the court advised counsel to file an application for stay and that they prepared the application for stay dated 8th June 2016 but only filed it on 5th July 2016 after getting directions as to the opening of a skeleton file.

14. The applicant has not attempted to explain the reasons for the delay from 27th October 2015 when the ruling was delivered and 26th April 2016 when the date for judgment was fixed, yet they had timeously filed their Notice of Appeal on 5th November 2015 seeking to challenge the ruling delivered on 27th October 2015. In addition, there is no explanation given why between 26th April 2016 and 8th June 2016 no application was made. The allegation that the application is dated 8th June 2016 but filed on 5th July 2016 because the applicant was waiting for directions from the Deputy Registrar on whether to open a skeleton file flies in the face of this court for reasons that all along the applicant’s

counsel knew that the main file was with the trial judge pending judgment, could the applicant have drawn the application on 8th June 2016 and waited for directions for nearly one month on where to file it without raising any issue with the trial judge who was holding the file for purposes of writing and delivery of a judgment? I am not persuaded that the applicant's counsel is genuine in her submissions. I am inclined to believe the respondent/plaintiff's counsel's submission that the reason why the application was filed belately is to frustrate the court which had retired on 26th April 2016 to write a judgment only for the applicant to appear last minute to arrest judgment which was ready for delivery, and therefore to delay justice.

15. The applicant having filed Notice of Appeal on 5th November 2015 knew or ought to have known that this matter had been heard fully and what remained was a date for judgment. The plaintiff then fixed dates in the registry and served the applicant's counsel with mention notices with a view to fixing a date for judgment. The applicant cannot feign ignorance of the provisions s of Order 42 Rule 6(1) of the Civil Procedure Rules which speak in no unclear terms that:

> ***" No Appeal or Second Appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may for sufficient cause order….."***

16. In other words, the law is clear that an appeal perse does not operate as automatic stay. One has to seek and obtain an order of stay of proceedings. One has to seek and obtain an order of stay of proceedings. In this case, the applicant took over 8 month's to come for stay, 6 months after the case was closed and the ruling complained of delivered. In the absence of any sufficient cause or explanation, this court would not and is not inclined to exercise its discretion in favour of the defendant/applicant.

17. Even Article 159 of the Constitution which was cited cannot come to the aid of a party who seeks to delay justice and who seeks for justice too late for it is the same Article which abhors delayed justice by providing that justice shall be administered without undue delay. Furthermore, the applicant did not even submit on how Article 159 of the Constitution could be applied in its favour in the circumstances of this case. In my humble view, Article 159 of the Constitution cannot just be hurled at the court. There must be material supplied to support its invocation. Article 159 of the Constitution, in my view, was not meant to be the prescription for all manner of ills and, although the court's authority under the said Article 159 of the Constitution remains unfettered, especially where procedural technicalities pose an impediment to the administration of justice.

18. In the present case, the applicant did not demonstrate to this court what procedural technicality would impede its accessing justice. Neither did it demonstrate to the satisfaction of this court that despite the long delay, justice could still be done. Neither did the applicant attempt to demonstrate what purpose and principles of the Constitution would risk being violated if the court considered delay as a factor to deny the applicant the orders sought.

19. The applicant must also demonstrate that substantial loss will occur if stay is not granted and therefore, that the appeal as intended shall if successful shall be rendered nugatory. Apart from making that common statement that the applicant shall suffer irreparably and that the appeal which is arguable shall be rendered nugatory, the applicant did not demonstrate to court what loss if any it would suffer if the application for stay is not granted. Order 42 Rule 6 speaks of **'substantial loss.'** In **Tropical Commodities Supplies Ltd and others v. International Credit Bank Ltd (in liquidation), (2004) EA** the court held inter alia:

> ***"……substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal…….." See also* Joseph Chege vs. Gikiru Heho (2008) eKLR, Ben Mukhwana Wepukhulu Vs. Tom David Wanyonyi, (2014)eKLR, and Butt vs. Rent Restriction Tribunal, Civil Application No. NAI 6 of 1979.**

20. In Bungoma **HC Misc 42/2011 James Wangalwa V Agnes Naliaka Cheseto** it was held that:

> ***" The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the appeal……"***

21. Thus, the applicant must demonstrate that it will be reduced to a mere pious explorer in the judicial process if its application for stay of delivery of judgment is not granted, and not to merely state that the appeal shall be rendered nugatory if successful or that substantial loss shall result, where no pecuniary or tangible loss is shown to the satisfaction of the court as is the case here. Consequently, the court cannot exercise discretion in favour of the **applicant (See Machira & Co v EA Standard No. 2 (2002) KLR 63.**

22. This court would nonetheless go further to determine whether any prejudice would be suffered by the applicant if stay if not granted. I note that the ruling that is being challenged concerns a decision made on 27/10/2015 to the effect that this suit was filed within the statutory period of 3 years from the date when the cause of action arose and or that even if that were not the case, the applicant/plaintiff had satisfied the court on her application that she deserved orders for extension of time within which the suit herein, allegedly filed out of time could have been filed. The court notes that the defendant did raise the issue of the suit being statute barred in the defence as filed but never sought to have that issue determined as a preliminary point of law. It participated in the full trial of the suit by sending its advocate to cross examine the plaintiff and her witness. Its advocate also filed submissions where the same issue was also raised. The plaintiff, fearing that the issue not having been raised substantively during the trial, might affect the outcome of the suit, filed an application before judgment, seeking for extension of time and the court determined that application in her favour.

23. In the above circumstances, I am satisfied that whether the pending judgment turns out to be for the plaintiff, the applicant herein has an unfettered right to challenge the decision by this court to the Court of Appeal and continue with its quest for a determination that the suit was statute barred. In other words, the applicant herein stands to suffer no real or perceived prejudice should the judgment in this matter be delivered as scheduled, and no such prejudice has been demonstrated since it was given an opportunity to challenge the application for leave in the suit.

24. Order 42 Rule 6 also obliges the applicant in an application for stay pending appeal to deposit security for the due performance of decree or order, as may be ordered by the court and which would be binding on the applicant. In the instant case, the applicant never offered to deposit any such security. Nonetheless, this court would, if it found it necessary, order for deposit of such security. However, in view of my findings that the application was filed with inordinate delay and that no substantial loss or prejudice has been demonstrated to be likely to be suffered by the applicant should stay be declined, I do not find it necessary to order for deposit of any security for the due performance of the order.

25. The applicant's counsel also argued that the appeal as intended is arguable. However, in the instant case, I do not find that the real question is that of measuring the prospects of the appeal itself; but rather, whether by declining to stay delivery of judgment, the applicant will become a pious explorer in the judicial process.

26. In my humble view, the discretionary order of stay of proceedings pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantages, but administer the justice that the case deserves, in recognition that both parties have equal rights of knowing the outcome of a case they have actively participated in its trial to the very end and even filed submissions to assist the court reach a determination. I find that the overriding objectives of the law as stipulated in Sections 1,1A of the Civil Procedure Act shall only be served if this court proceeds to render the judgment in this matter in a timely manner as scheduled and whoever shall be aggrieved by the judgment will have an unfettered right to challenge the outcome.

27. For the foregoing reasons, I find that the applicant/defendant has not satisfied the conditions for the grant of stay of delivery of judgment pending hearing and determination of an intended appeal challenging the ruling of this court made on 27th October 2015.

28. Accordingly, the application dated 8th June 2016 and filed in court on 5th July 2016 is hereby dismissed with costs to the plaintiff/respondent.

Dated, signed and delivered at Nairobi this 12th day of July 2016.

Reasons given this 14th day of July, 2016 at 2.30 PM.

R.E. ABURILI

JUDGE