



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NUMBER 603 OF 2009

PAULINA WANZA MAINGI. PLAINTIFF

VERSUS

DIAMOND TRUST BANK LIMITED. 1ST DEFENDANT

FRANCIS KOMU GITAU T/A

BOMAS MOTOR MART. 2ND DEFENDANT

R U L I N G

The application for determination by this Honourable court is the Notice of Motion dated 19th April, 2014 brought under Order 42 Rule 6 (1) and 6(6), Order 22 Rule 22(1), Order 50 Rule 6 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya.

The Applicant/1st Defendant has sought the following orders: -

1. Spent.

2. That the honourable Court be pleased to order a stay of any further proceedings in this matter pending the inter-partes hearing and determination of this application.

3. That the Honourable court be pleased to order a stay of any further proceedings in this matter pending the hearing and determination of the Appeal.

4. That the cost of this Application be provided for.

It is premised on the grounds set out on the face of the application and it's supported by the affidavit of Lwanga Mwangi sworn on the 19th April, 2016.

The summary of the facts as captured in the affidavit are that, a ruling was delivered on the 10th November, 2015 by Hon. Lady Justice Aburili dismissing the 1st Defendant's application dated 11th June, 2013 which sought orders to dismiss the suit herein for failure to issue summons on the 1st Defendant/Applicant.

In the application dated 11th June, 2013, the Applicant/1st Defendant had argued that the suit herein automatically abated after 24 months as the Plaintiff/Respondent had failed to issue and serves the summons within the stipulated period.

Upon hearing the said application, the learned Judge dismissed the same with costs to the Plaintiff vide a ruling delivered on the 10th day of November 2015. The 1st Defendant has appealed against the said ruling and on the 11th November, 2015, it applied for certified copies of the proceedings and the order emanating from the aforesaid ruling.

The 1st Defendant through its advocate on record filed a Notice of Appeal on the 11th November, 2015 and thereafter a record of Appeal on the 1st day of April, 2016 and the same was served upon the Plaintiff on the 5th April, 2016. That the 1st Defendant has made numerous efforts to have the appeal set down for hearing but its efforts have not born any fruits. It is its contention that the Appeal is arguable and as such it should be preserved in order to ensure that it is not rendered a mere academic exercise.

The 1st Defendant avers that notwithstanding the pendency of the appeal, the Plaintiff has proceeded to fix the matter herein for pre-trial conference which was scheduled for 11th May, 2016. That unless the proceedings in the suit herein are stayed pending the hearing and determination of the appeal, and the matter proceeds, the appeal shall be rendered nugatory. The 1st Defendant has urged the court to grant the orders sought in the application dated the 19th April, 2016.

The Plaintiff has not filed any response to the 1st Defendant's aforesaid application and when it came up for hearing on 12th July, 2016, there was no appearance on the part of the Plaintiff notwithstanding that his advocate on record had been notified of the hearing date and in those circumstances, the court heard the counsel for the 1st Defendant ex parte.

This court has considered the application herein and the affidavit in support of the same. It is true from the annexures to the supporting affidavit that a notice of appeal was filed on the 12th day of November, 2015 it was served upon the Plaintiff on the same day. A certified copy of the proceedings and the order emanating from the ruling were applied for vide a letter dated 11th November, 2015 and a record of Appeal filed.

This court is alive to the fact that it is not the duty of this court to consider the merits of the appeal as doing so, would be stepping into the shoes of the court that will hear the Appeal but it suffices to state, for now, that the 1st Defendant has an arguable appeal and it's only fair that it is given a chance to prosecute the same before this matter can proceed further. It shall also save judicial time to stay the matter herein pending the hearing and determination of the Appeal because in any event, if the Appeal does not succeed, the Plaintiff will have his day in court. No prejudice will be suffered by the Plaintiff if the orders for stay of the proceedings is granted save for delay in having his matter heard which can be compensated by an award of costs. Since the application is not opposed, the court holds that no such prejudice will be suffered as the Plaintiff did not attend court to argue his case for such prejudice.

In the circumstances, the application dated 19th April, 2016 is granted as prayed. The proceedings herein are stayed pending the hearing and determination of the Appeal.

Costs of the application shall be in the cause.

Dated, signed and delivered at Nairobi this 15th day of September, 2016.

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L NJUGUNA

JUDGE

In the presence of

Miss Matata for the Plaintiff

Mr. Kisinga for the 1st Defendant/Applicant.