



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 215 OF 2010

ABDI OSMANAPPELLANT/RESPONDENT

VERSUS

KAMAU C. NJUGUNARESPONDENT/APPLICANT

JUDGMENT

1. The Respondent by a Notice of Motion brought under **Section 79G** of the **Civil Procedure Act, Order 42 Rule 6(1)** and **(6)** of the **Civil Procedure Rules, Section 1A, 1B** and **3A** of the **Civil Procedure Act** and dated 21st March, 2012 seeks the following orders *inter alia*:

- a) **That this honorable court be pleased to give leave to the Respondent to in a way of reply to the Memorandum of Appeal file a memorandum of cross appeal out of time.**
- b) **Spent**
- c) **That this honorable court do order a stay of proceedings in CMCC No. 1108 of 2010 pending the hearing and determination of this appeal**
- d) **That the costs of this application be provided for**

2. The application is based on the grounds on its face as well as the affidavit of **Thomas Ogutu Onyambu** sworn on 21st March, 2012 and filed alongside the application.

3. The Respondent's case is that following a judgment delivered in CMCC No. 1129 of 2007, the court issued a notice to the Respondent that an appeal had been preferred by the appellant herein against the said judgment. On 13th October, 2010 the appellant filed a suit CMCC 1108 of 2010 seeking a declaration that Gateway Insurance Company Limited (The Respondents' insurer) should satisfy the judgment in CMCC No. 1129 of 2007.

4. The Respondent contends that he was never served with the Memorandum of Appeal to enable him file a cross appeal. He thus seeks a stay of proceedings in CMCC 1108 of 2010 to allow all available avenues of appeal be exhausted before the declaratory suit can be heard and determined. He avers that that he has an arguable appeal with high chances of success and that no prejudice would be suffered by the appellant.

5. The Appellant, **Abdi Osman**, swore a Replying Affidavit on 21st May, 2012 in response to the application.

6. The appellant's reply is that the Respondent's application is an afterthought, bad in law, inept, malicious and amounts to an abuse of the court process. The appellant was informed by his counsel that the Respondent was aware of the appeal after they declined to accept service of the Memorandum of Appeal. Despite been aware, the Respondent failed to file an application for stay of execution or a cross appeal. He urged the court that it is only fair and just that the application be dismissed with costs.

7. A supplementary affidavit sworn by **Thomas Ogutu Onyambu** on 15th June, 2012 and filed on even date dismissed the appellant's reply as falsehood bent on misleading the court. He contends that there was no proof of an attempt to serve the Respondent as adduced in the Replying Affidavit. He further contends that the appellant is not entitled to have the judgment satisfied since he has appealed against the said judgment and all the Respondent requests was a cross appeal be allowed out of time.

8. On 17th September, 2012 the court directed that the application be disposed off by way of written submissions. Counsel for both parties filed their respective submissions in support of their case.

9. The Respondent submitted that on 12th August, 2010 the appellant filed an appeal against the decision delivered by the subordinate court. On 14th March, 2012 the Respondent was served with Memorandum of Appeal after numerous correspondences between counsel for the parties. He contends that due to the delay the Respondent could neither file another appeal nor cross appeal in the absence of proper service.

10. Further, the appellant did not cause the matter to be listed before a judge for directions as contemplated by **Order 42 Rule 11** of the **Civil Procedure Rules**. There was therefore no proper service against which cross appeal could be filed. Counsel invited the court to exercise its inherent jurisdiction and grant the Respondent leave of court to file a cross appeal. He relied on the decision **Jet link Express Limited V. East African Safari Air Express Limited**, (2012) eKLR.

11. Counsel urged the court to stay the proceedings in CMCC 1108 of 2010 in order to balance the expectations of parties and all possible outcomes of the appeal. He relied on the case of **Oraro and Rachier Advocates V. Co-operative Bank of Kenya**, (1999) 1 EA 236 where the Court of Appeal while assessing an application for stay of proceedings pending appeal weighed the claims of both sides.

12. It was his further submission that there was an arguable appeal since it was premised on a decision of the subordinate court to which both parties were dissatisfied with.

13. On stay of execution, counsel submitted that there was sufficient cause as the judgment was erroneous and they seek to reverse the entire decision of the subordinate court. That the application was made within reasonable time upon service of the Memorandum of Appeal. Further the amount the appellant seeks to be paid was excessive and if the appeal was successful the insurer will be placed in hardship to recover the same from the appellant. The Respondent was ready to abide by directions of the court on security for costs.

14. The appellant's written submissions were filed on 6th November, 2012. Counsel submitted that despite the Respondent's knowledge of the appeal, he did not take any steps to file a cross-appeal. Moreover he could have filed an appeal against the judgment or applied for leave to file the appeal out of time if he was dissatisfied with the judgment of the subordinate court. According to him, the actions and omissions are of a party that had no intention to file an appeal or a cross appeal for that matter. He urged the court not to exercise its discretion as the Respondent's aim was to delay this matter and deny the Appellant the fruits of his judgment.

15. Counsel submitted that the reason he had not placed the matter before a judge for direction was because the proceedings in the lower court were not ready to allow the Appellant file a Record of Appeal. He submitted that the delay was not within his control and the appellant ought not to be prejudiced.

16. Counsel further submitted that the application is an afterthought. The Respondent had filed a defence and a replying affidavit in the declaratory suit. The matter was canvassed on 2nd March, 2012 before

filing of the instant application. According to counsel, the application is malicious and intended to stop the trial court from delivering its ruling on the declaratory suit.

ISSUES FOR DETERMINATION

17. I have considered the pleadings and submissions of Counsel. The issues for determination are:

- i) whether the declaratory suit in the lower court should be stayed pending the hearing of this appeal and;
- ii) whether there are valid grounds to allow the Respondent to file a cross appeal.

ANALYSIS:

18. This appeal is against the entire judgment of the lower court which was delivered on 21st July 2010 in NAKURU CMCC NO. 1129 OF 2007. The Appellant was aggrieved by how the trial court apportioned liability and her award of damages. In his Memorandum of Appeal filed on 12th August 2010, he has asked this court to find that the Respondent was 100% liable and to make a more favourable award of damages.

19. Notwithstanding his belief that this judgment was erroneous, the Appellant went ahead to enforce it by filing a declaratory suit wherein he sought orders to compel the Respondent's insurer to satisfy the judgment.

20. If this declaratory suit is allowed and the judgment which has been appealed against executed, this appeal will be rendered nugatory. It is an abuse of the court's process for a party to proceed to enforce a judgment against which he has appealed without withdrawing the appeal. Therefore, the declaratory suit was filed subsequent to the appeal herein and must therefore await the outcome of this appeal.

21. The second issue for determination is whether the Respondent should be granted leave to file a cross appeal against the judgment of the lower court. The Respondent is particularly aggrieved with the award of damages which he considered to be excessive under the circumstances. He explained that he did not file his cross appeal within time because he was only served with the Memorandum of Appeal on 14th March 2012.

22. The Appellant has offered no valid reason why the Respondent should be denied leave to appeal. The interests of justice will be served if all the parties are allowed to ventilate their claims.

FINDINGS AND DETERMINATION

23. For the above reasons, the application dated 21st March 2012 is found to be meritorious and is hereby allowed. The Respondent is granted leave to file and serve his cross appeal within fourteen (!4) days from today's date. The proceedings in CMCC No. 1108 of 2010 are stayed pending the hearing and determination of this appeal. The Respondent shall have the costs of this application.

Orders accordingly.

Dated, Signed and Delivered at Nakuru this 8th day of May, 2015.

A. MSHILA

JUDGE