



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 499 OF 2012

BEAUTY OPTIONS LIMITED..... APPELLANT

VERSUS

OLD MUTUAL LIFE ASSURANCE COMPANY LIMITED....RESPONDENT

RULING

1. Old Mutual Life Assurance Co. Ltd , the Respondent/Landlord herein took out the summons dated 30th January, 2014 and sought for the following orders:

1. ***THAT this application be certified urgent and be heard ex-parte in the first instance.***
2. ***THAT Diamond trust Bank Kenya Limited be ordered to release the sum of Kenya shillings Five million (Ksh.5,000,000/-) in terms of its bankers guarantee to Muciimi Mbaka & Co. Advocates for the Respondent/Landlord.***
3. ***THAT this court be pleased to dismiss the Appellants' appeal for want of prosecution.***
4. ***THAT costs of this application be provided for.***

2. The summons is supported by the affidavit of Njeru Gitonga sworn on 30.1.2014. Beauty Options Ltd, the Appellant/Tenant, filed the replying affidavit of Shamir Walji to oppose the summons.

3. It is the submission of Mr. Njeru, learned advocate, for Respondent that the Appellant was granted an order for stay of execution pending appeal on condition that the Appellant furnishes a banker's guarantee of ksh. 5 million for the due performance of the decree. The Learned advocate was of the view that the guarantee was only valid for one year and was due to lapse on 6th February 2014. The Respondent argued that it is now a period of more than year since the memorandum of appeal was served and the Appellant has neither taken steps to prepare the record of appeal nor fix the appeal for directions despite receiving reminders from the Deputy Registrar of this court. It was further argued that the Appellant has lost interest in pursuing this appeal. This court was therefore beseeched to dismiss the appeal for want of prosecution.

4. The Appellant has urged this court to dismiss the motion because it could not immediately prepare the record of appeal for lack of typed proceedings. The appellant attached to the replying affidavit various correspondences it exchanged with the registrar of this court and that of the Business Premises Rent Tribunal to show efforts it made in pursuit of the proceedings. There is also evidence shown that the Appellant's advocate and his staff made personal visits to the two registries to secure the supply of typed proceedings.

5. The Appellant's advocate has personally supplied to this court a copy of the bank guarantee of

kshs.5,000,000/= which was duly extended to last upto 5th February 2016.

6. I have considered the grounds set out on the face of the summons plus the facts deponed in the affidavits filed in support and against the application. I have further taken into account the oral submissions of learned counsels. The main ground relied upon by the respondent's advocate in seeking for the dismissal of the appeal is that the appellant has developed some cold feet in expediting the hearing and the determination of the appeal because any delay works to its favour in that it will continue to use the rented premises while paying meagre rent that was last revised before the year 1997. I have carefully gone through the lengthy replying affidavit and the oral submissions of the Appellant's advocate and I am convinced that the appellant and its advocate have made serious efforts to secure the supply of typed proceedings and did not obtain those proceedings within time.
7. This in my view, is not the conduct of a party who is not diligent. The delay to secure the typed proceedings therefore cannot be attributed to the Appellant.
8. For the above reason I find no merit in the summons dated 30.1.2014, it is dismissed. Costs of the summons shall abide the outcome of this appeal.

Dated and delivered in open court this 2nd day of July 2015

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent