



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO. 340 OF 2014

RAMBOO COLOURCANE LTD APPELLANT

VERSUS

I.B.S. TRADING RESPONDENT

R U L I N G

Before me is an application dated 4th August 2014 by way of notice of motion wherein the applicant seeks for:-

- 1) Stay of execution of decree issued on 23rd July 2014 pending hearing and determination of the appeal.
- 2) The memorandum of appeal filed by the applicant on 4th August 2011 out of the prescribed period be deemed to have been filed in time.

The said motion is supported by grounds on the face of the application and annexed affidavits sworn by Karan Kals & Job Odhiambo on behalf of the applicant which grounds and affidavit explain the genesis and basis for the applicant's application for stay of execution of the decree and delay occasioned in filing the appeal.

The parties agreed to dispose of the application by way of written submissions. The applicant filed theirs on 16th September 2014 whereas the respondent, relying on replying affidavit sworn by Ian Smart the Managing Director of the respondent company sworn on 20th August 2014, grounds of opposition, written submissions, opposing the notice of motion. The said submissions were filed on 21st September 2014.

The applicant's counsel argues that there has been no inordinate delay in filing the intended appeal out of time and that the said intended appeal has overwhelming chances of success.

Further, that the applicants are willing to give security as the decree is a monetary one. Finally, that the applicants stand to suffer an injustice and prejudice if the prayers sought are not granted.

The respondent in opposition to the application submits that the notice of motion dated 4th August 2014 is not brought in good faith, is mischievous, bad in law and an abuse of the court process. Further, that the said purported appeal has been filed out of time without leave of court therefore the same is incompetent. It is submitted that the application is intended to vex the respondent, a successful litigant and keep it away from the fruits of a lawfully obtained judgment. Finally, that the notice of motion lacks merit, is misconceived, frivolous and vexatious and sought to be dismissed with costs.

Both counsels for the parties have cited relevant authorities in support of their rival positions.

The background to this matter is that Milimani Chief Magistrate's Court Civil Case No. 4607 of 2011 was heard interparties and the matter was slated for mention on 29th May 2014 for purposes of taking a judgment date.

The applicant's counsel did effect service of a mention notice upon the respondent's counsel on 24th March 2014. The mention notice is dated 25th April 2014.

Regrettably, counsel for the respondent inadvertently failed to diarize the said matter as scheduled hence their inability to attend court on 29th May 2014 to know when judgment in the matter would be delivered. They only learnt of the judgment in July 2014 from M/s Mackasila counsel for the respondent and embarked on tracing the court file unsuccessfully until when the auctioneers went to attach the applicant's property.

Similarly, as they were unaware of the judgment which was delivered on 10th June 2014, they could therefore not file an appeal challenging the judgment and decree within the prescribed period.

They therefore rushed to court and filed a memorandum of appeal out of time and sought, vide the notice of motion herein, leave of court to extend the period within which to file the said memorandum of appeal and to have the filed memorandum of appeal deemed to have been filed within the stipulated statutory period.

The decree was for the sum of Ksh. 3,377,016.00 inclusive of interest together with costs of the suit.

The applicants complain that the said judgment of Hon. Teresia Ngugi Senior Principal Magistrate failed to appreciate the respondent's submissions which were on record duly filed and paid for. They also challenge the award of interest prior to filing of suit in court. They further content that the magistrate erred in holding that there was an agreement for payment of interest at 1.5% per month on any unpaid sums and that she failed to exercise her discretion in a proper manner resulting in injustice to the applicant and that her decision was unsupported in law.

I have carefully considered the application, the grounds of opposition, the affidavits and rival submissions of learned counsel and the law.

The principles upon which this court can grant the orders sought are well settled. On the issue of whether or not the application for stay of execution should be granted, it is critical to point out that at this juncture the court cannot delve into the merits of the intended appeal, but attempt to balance the interests of both parties. In so doing, the court will consider the following issue:

- 1) Whether the intended appeal raises arguable issues; and whether the said appeal will be rendered nugatory should the court fail to issue the stay of execution in the event that the appeal is successful.

It has been held severally by this court and the Court of Appeal that the applicant must demonstrate both limbs and demonstrating only one limb will not avail him the order sought if he failed to demonstrate the other limb.

My perusal of the application and the annexures among them, a mention notice dated 25th April 2014 annexed to the supplementary affidavit sworn by Job Odhiambo Ochieng on 4th August 2014 clearly stipulates that the matter had been fixed for mention on 29th May 2014 for purposes of taking a judgment date and not for delivery of judgment.

Further, the said notice of mention warned that failure to attend court, the court would mention the matter *ex parte* and give such judgment date, absence of the applicant or their counsel notwithstanding. There is no denial from the respondent to the fact that the applicant was not served with a notice to attend court on judgment date of 10th June 2014.

In my view, as the date of 29th May 2014 was meant to be a mention date with a view to fixing a judgment date, it was incumbent upon the respondents and or the court to notify the respondent that notwithstanding their absence on 29th May 2014, the matter was mentioned and that judgment would be delivered on 10th June 2014. This was not done. Taking into account the submission admitting that counsel for the applicant had received mention notice but inadvertently failed to diarize the same, I believe them that they only knew of the judgment in July by which time period for lodging an appeal had elapsed.

It should be noted that the application herein was filed on 4th August 2014 together with the intended memorandum of appeal, in less than one month after the expiry date of filing the intended appeal. That being the case, in my view, the same were timeously filed and I see no reason why they should be demonized for an act they did not commit deliberately. I find no intention calculated to vex the respondent. I further do not find any evidence of bad faith.

Under Section 79G of the Civil Procedure Act, the applicant ought to have filed the intended appeal within 30 days from 20th June 2014. The proviso thereto allows discretion to this court to admit any appeal filed out of time if it is satisfied that there was good and sufficient cause for not filing the appeal on time. It has demonstrated that under Order 42 Rule 6 (2) of the civil Procedure Rules, the application was timeously lodged.

I am satisfied with the explanation given by counsel for the applicant for the failure to file the intended appeal within 30 days but nonetheless the same was filed in 45 days, which delay as I have stated, is not inordinate and as the orders sought are allowable in law, I accordingly grant leave to the applicant to file their memorandum of appeal out of time.

I however notice that the said draft memorandum of appeal challenges the judgment delivered on 29th May 2014. As I have stated, the judgment in question was delivered on 10th June 2014 not 20th May 2014.

In exercise of my judicial discretion, I grant the applicant leave to file a fresh memorandum of appeal within the next 14 days from the date of this ruling.

On whether the intended appeal is arguable, I reiterate the principles set out in the case of **Dennis Mogambi Mongare – Vs – Attorney General & 3 Others in CA 265/2011 (UR 175/11)** that:-

“An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court’s consideration.”

Without necessarily going into the merits of the intended appeal, the right of appeal is equivalent to a right to be heard, which is a constitutional right that must be respected. It is not the intention of this court to bar any party from ventilating their grievances and as a result oust them from the seat of justice. The applicant is aggrieved as per the draft memorandum of appeal; that submissions by counsel were disregarded by the learned magistrate. They are further challenging the interest charged and awarded prior to the filing of suit alleging that no evidence was led to prove entitlement. In addition, they

challenge the learned Magistrate's conclusion that there was an agreement between the disputing parties that 1.5% interest would be charged per month on any unpaid sum.

In my view, and without delivering into the merits of the appeal, the above grounds are arguable. They are not frivolous or baseless. The applicant deserves an opportunity to ventilate the said grounds.

It has been submitted that the intended appellant stands to suffer prejudice if stay of execution of decree is not granted. Order 42 Rule 6 (2) (a) provides that no order for stay of execution shall be made under sub rule (1) unless the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) Such security as the court orders for the due performance of such decree or order as way ultimately be binding on him has been given by the applicant.

On whether or not the applicant will suffer substantial loss of the application for stay is not granted, it has not been demonstrated that this being a monetary decree, if the decretal sum is paid, then the applicant will suffer substantial loss or that the respondent is so impecunious that if the money is paid, should the appeal succeed, it will not be possible to recover the same. However, the applicant is willing to deposit the decretal sum in court less what is contested indicating mainly on alleged excessive interest awarded running from the period before the suit was filed in court.

I see no reason why the respondents who are successful in a monetary decree should be kept away from the whole award to which they are entitled. As the amount challenged appears to be only interest and not the principal sum, I exercise my discretion and order that the applicant do pay to the respondent the principal sum of Ksh. 1,882,596.00 being part of the decretal sum of Sh. 3,377,016.00 together with costs of Ksh. 161,039.00 as taxed within 14 days from the date hereof.

The balance of decretal sum being 1,494,429.00 shall be deposited in a counsels joint savings interest earning account with a bank of their choice within 14 days from the date hereof.

I further order that in default of compliance with any of the conditions set in the ruling herein, the leave granted to file memorandum of appeal out of time and a stay of execution granted as above shall lapse and stand discharged.

The costs of this application shall be for the respondents.

Dated, signed and delivered at Nairobi this 13th Day of November, 2014.

R.E. ABURILI

JUDGE