



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL CASE 430 OF 2002

1) MANJIT SINGH SETHI

2) PERMINDER SINGH SETHI

3) RUAHA CONCRETE COMPANY LIMITED PLAINTIFFS/RESPONDENTS

VERSUS

PARAMOUNT UNIVERSAL BANK LIMITED..... 1ST DEFENDANT

CREDIT REFERENCE BUREAU AFRICA LIMITED..... 2ND DEFENDANT

MUSA SAID HASSAN 3RD DEFENDANT

RULING

The application before me for consideration is the 1st Defendant's Notice of Motion dated 9th February, 2012. The same has been brought under Sections 3, 3A and 75 of the Civil Procedure Act seeking leave to appeal Court against the decision of Hon. Njagi J delivered on 30th September, 2011. It also seeks leave to file a Notice of Appeal against that decision out of time. As a consequence the Applicant prays that the proceedings herein be stayed pending the hearing and determination of the intended appeal.

The applicant set out a total of 23 grounds on the body of the motion in support of the motion and had the same supported by the Affidavit of Peter Kaluma, Advocate sworn on 9th February, 2012. The 1st Defendant contended that the Plaintiff's suit was struck out on 21/9/2004 and costs awarded to the Defendants that there has been a total of three (3) taxations all of which were contended by the Plaintiffs for various reasons including allegations of malpractice by the taxing officer, that on 22/5/09 Hon. Koome J (as she then was) had ordered payment of Kshs.550,000/- to the 1st Defendant for the grant of stay then given by the court, on 17/7/09, the Court once again directed payment to the 1st Defendant of Kshs.620,723/30 being taxation on all other items except instructions fees, that to date none of the said sums had been paid. That on 30/9/11 Hon. Njagi J allowed the Plaintiff's reference and directed that the bill of costs be taxed afresh. The 1st Defendant is aggrieved by the direction of Hon. Njagi J that the value of the subject matter be based on the sale price and that the Defendants had been paid Kshs.1,398,305/-. The 1st Defendant had applied to review the said order but this court made an order on

23/01/12 that taxation does commence de novo without hearing that application. At the time, this court took the view that the then pending applications by both the Plaintiffs and the 1st Defendant were an unnecessary clog to the system having in mind that the main suit was determined in 2004!

Mr. Kaluma, learned Counsel for the 1st Defendant submitted that the decision of Hon. Njagi J fettered the discretion of the taxing officer were the matter to be taxed again as directed. Counsel urged that the application be allowed.

The Plaintiff filed a Notice of Preliminary Objection on the basis that the application is misconceived, vexatious, frivolous and an abuse of the court process in view of the directions of this court of 23rd January, 2012.

Mr. Kariuki, learned Counsel for the Plaintiff submitted that the directions of 23rd January, 2012 was that the bill of costs be taxed afresh, that the application which this court directed to be marked as spent had sought to review the order of Hon. Njagi J, and that therefore, the 1st Defendant had closed its door to appeal against that order, that there had been delay in the making of the application. Counsel urged the court to dismiss the application.

I have considered the application, the Supporting Affidavit, the Objection thereto and the submissions of Counsel.

Under Order 43 Rule 3, an application for leave to appeal under Section 75 of the Civil Procedure Act must be made within 14 days of the making of the order. The order in respect of which leave is being sought was made on 30th September, 2011. The application before me was made on 10th February, 2012 exactly four months and 10 days after the order of 30th September, 2011. In my view, when a party seeks an extension of time within which to undertake a step whose time is limited or regulated by law or the rules, the delay must be explained. In this case, the delay has not been explained. It was only mentioned in passing that the 1st Defendant had filed an application for review which was marked as spent by this court on 23rd January, 2012.

Even if the court was to take the period between 30/9/2011 until 23/1/12 as consumed by the application for review, there has been no explanation for the period between 23rd January, 2012 and 10th February, 2012. That period will still be outside the 14 days period allowed by law. In my view, a party who fails to give an adequate or any explanation at all of a delay in taking a step in proceedings, is hardly deserving the exercise of the Court's discretion in his favour. In the case before me, the 1st Defendant has not explained the delay of 18 days between 23rd January, 2012 and 10th February, 2012.

On the issue of leave to file a Notice of Appeal out of time against the order of 30th September, 2011, time for filing of any such Notice under the Court of Appeal Rules (Rules 74) is 14 days from the date of the order to be appealed against. Although the jurisdiction of this court has not been properly invoked for giving such an order, such a jurisdiction exists under Section 7 of the Appellate Jurisdiction Act. The principles governing the exercise of that jurisdiction is the length of the delay, the reasons advanced for the delay, the prejudice that the Respondent is likely to suffer and generally whether the appeal has any merit.

As regards the period of delay, as already stated the delay is four months and ten days i.e. 30th September, 2011 and 10th February 2012. Whether an explanation has been given, I have already made a finding that whilst the 1st Defendant was busy prosecuting its application for review between 30/9/11 and 23/1/12, the period 24th January, and 10th February, 2012 has not been explained. The 18 days delay in my view is inordinate and an explanation for the delay for that period lacking, it does not endear the 1st Defendant's case to the court.

The other issue is the merit of the intended appeal. The Plaintiff has argued that the 1st Defendant's

application for review having been rejected, the 1st Defendant cannot purport to appeal against the same order which had been sought to be reviewed. The 1st Defendant contends that that application was not heard on merit. My take of it is that once an order was made on that application for review, the application was determined thereby foreclosing the 1st Defendant from seeking appeal against the order of 30/9/2011. The proper course should have been either to apply to review the order of this court of 23/1/12 or appeal against the same. This the 1st Defendant chose not to. In my view, therefore, I entertain doubts as to whether there could be an appeal at all against the order of 30th September, 2011.

As regard prejudice, as I stated on 23/1/12 while referring the parties to have the bill of costs taxed de novo (of course on the issue of instructions fees only) in terms of Hon. Njagi J's order of 30/9/2011, the issue of costs has lingered in this court for far much too long. Eight years in total. The main suit having been determined in 2004, one would have expected the issue of costs at worst to take 12 months to be resolved. But the parties have been jostling between the judges and the taxing officers of this court without end. This does not augur well for our judicial system. Section 1A of our Civil Procedure Act demands expeditious disposal of civil disputes. Taking eight years to determine the issue of costs, in my view is not only unreasonable but unacceptable. That is why I referred the parties to the taxing master on 23/1/12 to sort out this issue once and for all. Therefore, applying to stay these proceedings at this stage and appeal against the order of 30/9/2011 will in my view be very prejudicial in that litigation will not seem to come to an end. Having a litigation hovering over a party for such a long time is not only unfair and traumatizing but also unacceptable.

One issue that I need to comment on, is the complaint that the ruling of 30/9/11 made a finding that Kshs.1,398,305/- had been paid to the Plaintiffs and should be taken into consideration. Of course since the Plaintiff is alleging having made that payment, the taxing officer will be required to demand prove of payment during taxation before making the necessary adjustment to the total bill. I do not see how that will fetter the discretion of the taxing master.

On the foregoing grounds, I find that the 1st Defendant's motion dated 9/2/12 to be without merit and I dismiss the same with costs.

DATED and delivered at Nairobi this 10th day of July, 2012.

.....
A. MABEYA
JUDGE