



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 1468 OF 2013

SANJEET K. SHAH.....1ST PLAINTIFF

MANISHAH SHAH.....2ND PLAINTIFF

VERSUS

SADRUDDIN TARMOHAMED MULJI GOVANI.....DEFENDANT

DR. KIBWANA ABDALLAH ATHMAN JAFF.....THIRD PARTY

RULING

Through the application dated 26/3/2019, the Defendant seeks to stay proceedings in this matter pending hearing and determination of his appeal to the Court of Appeal against the orders and directions of this court issued on 7/3/2019. The application was made on the grounds that the Defendant was not able to file his witness statement within the time lines directed by the court on 18/1/2019. The Defendant claimed that his witness statement was prepared on 5/3/2019 but the clerk was unable to file it. On 7/3/2019 when parties appeared before the court they attempted to explain to the court that an agreement had been reached by the parties to adjourn the matter to enable the Defendant comply with the court's directions given on 19/1/2019, the court declined to adjourn the matter stating that this was an old matter which had to proceed for hearing on that day. The Defendant proceeded to file its witness statement but the court declined to admit it and ordered that parties were to file submissions since the Plaintiff had closed his case. Being dissatisfied with these orders, the Defendant lodged an appeal urging that it was denied an opportunity to be heard and was denied the constitutional right to a fair trial. The application was supported by the affidavit of Erick Govani, the Defendant's son.

Mugambi Imanyara advocate swore the replying affidavit in opposition to the application for stay of proceedings. He deponed that he wrote to the Defendant's advocate on 27/1/2015 reminding them that they had not filed their witness statements and documents as directed by the court. He averred that the Defendant's failure to comply with the court's orders had not been explained and that it was improper for the Defendant to shift the blame to the court. Further, that it would have been a miscarriage of justice to the Plaintiff had the Defendant been allowed to file and serve witness statements and documents in the middle of a hearing after the Plaintiff had testified. The Plaintiff urged that staying the proceedings would amount to disregarding the very purpose for which the court declined to adjourn the hearing on 7/3/2019. The Plaintiff urged the court to decide the case without further delay as the Plaintiff had filed his submissions on the suit as directed by the court.

The Defendant's advocate submitted that the issues the court has to consider is whether there is an arguable appeal which was filed without delay and if the appeal will be rendered nugatory if proceedings are not stayed. He submitted that the appeal was not frivolous. Further, that if the hearing of this suit progresses and is concluded and the Court of Appeal later directs that there be a re-trial, the Defendant would have had to fulfill the court's judgement while his appeal was pending before the Court of Appeal. That if a retrial were ordered, it would escalate the costs for the parties contrary to Section 1A of the Civil Procedure Act.

The Plaintiff submitted that the principles relied on by the Defendant were applicable to stay of execution and not of proceedings. He submitted that the principles to be considered in applications for stay of proceedings are whether it is in the interest of justice; on what terms it should be granted if the court weigh the pros and cons of not granting the order; the need for expeditious disposal of cases in light of the scarcity of judicial time and its effective utilisation; and that there must be an arguable appeal based on the pleadings and facts of the case. The Plaintiff submitted that the court was conscious of the need to have the suit proceed expeditiously at the time it made the orders being challenged by the Defendant. The Plaintiff urged the court to decline the application.

Mr. Situma responded to Mr. Imanyara's submissions and urged that the Defendant's application was merited and that it would be in the interest of justice to stay proceedings considering the judgment that may be given by the Court of Appeal. He added that the court will not have made optimal use of the limited judicial time if this suit were to be retried after the Court of Appeal determines the appeal while urging that the Defendant had a good defence to the Plaintiff's claim.

The court has considered the application, the affidavits and submissions by the Plaintiff and the Defendant. The court agrees with the Defendant that it is in the interest of justice to stay proceedings in this suit pending the hearing of his appeal. The appeal will be rendered nugatory if this court proceeds and delivers its judgment in the suit considering that the Court of Appeal may allow the Defendant's appeal.

The court stays further proceedings in this suit pending the determination of the Defendant's appeal. The Plaintiff is awarded the costs of the application dated 26/3/2019.

Dated and delivered at Nairobi this 8th day of August 2019.

K.BOR

JUDGE

In the presence of:-

Ms. B. Mureithi holding brief for Mr. M. Imanyara for the Plaintiffs

Mr. B. Situma for the Defendants

Mr. V. Owuor- Court Assistant