



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
ELC CIVIL APPEAL NO. 4 OF 2016

MARIE STOPES (K) LIMITEDAPPLICANT

VERSUS

CECILIA KIHARARESPONDENT

RULING

1. The application for determination is dated 25th January 2016 and brought order 50 rule 1, 6 order 51 Rule1, 3 and order 42 rule 6 of the Civil Procedure Rules and section 3A, 79G and 95 of Civil Procedure Act and articles 50 and 159 (2) (d) of the Constitution. The applicant sought the following orders;

1. Spent

2. That the court be pleased to grant leave to the appellant to file appeal out of it against the ruling made by Hon. Justus Kituku (PM) dated 25th April 2015.

3. That in the alternative the memorandum of appeal filed on the 25th January 2016 be deemed to have been filed within time.

4. That there be a stay of further proceedings pending the hearing and determination of the appeal.

5. Costs of this application be provided for.

2. The motion is supported by the grounds listed on its face and the affidavit of Dennis Radak. In brief, the applicant avers that the delivery of the ruling was communicated to them on 10th November 2015 after the 30 days period to lodge the appeal had lapsed. Secondly the applicant contends the appeal is meritorious with high chances of success as the ruling was made in complete violation of statute law and precedent on lack of jurisdiction by the magistrates courts to hear and determine matters that relate to unregistered leases and controlled tenancies. Lastly that the application has been made without inordinate delay.

3. The application is opposed by the Respondent who deposed that this court lacks jurisdiction to hear this application as no leave to appeal has been granted by the trial court in MSA CMCC No.1589 of 2014. Further that the applicant vacated the premises before the expiry of the lease term and refused to pay rent for the full term as was provided under the agreement. The Respondent also deposed that since the applicant had vacated the suit premises the dispute did not now fall under the jurisdiction of the Business Premises Rent Tribunal.

4. That the applicant can only make an application for stay of proceedings of the decree and not of the

ruling. The Respondent deposed further that the applicant has not displayed any prima facie case to warrant the orders sought and urged the court to dismiss the application with costs.

5. The parties also made oral submissions through their advocates on record which submissions were supported by case law filed. The applicant cited the following case law contained in their record of appeal filed;

1. Owners of MV Lilian S vs Caltex Oil (K) Ltd (1989) KLR 1

2. S.K. Macharia vs KCB & 2 others (2012) e KLR

3. Garibi Ltd vs Ogilvy E.A (2014) e KLR

4. Agip (K) Ltd vs Mohideen Gilafu (2003) e KLR

The Respondent on her part cited the following case law;

1. Kajuta Marimai Hamisi vs Peris Pesi Tobiko & 2 others (2013)e KLR

2. Henry Kipkirong & Another vs Robert Chesang (2016)eKLR

3. James Wathingira & another vs Stephen Kariuki & 2 others (2009)eKLR

6. From the pleadings and submissions I deduce the issues for my determination are three;

1) *Whether this application ought to have been filed before leave to appeal was given by the trial court.*

2) *If (1) above is yes, whether the applicant is entitled to extension of time*

3) *And if yes to no (2) above, whether the proceedings in MSA CMCC 1589 of 2014 should be stayed pending the appeal's determination.*

7. On issue 6(1) above, the question to answer is whether an appeal against the ruling in dispute lies as of right or with leave of the trial court. The Respondent argued that the applicant ought to have asked for leave before the magistrate's court before filing this appeal. That the order sought to be appealed against does not lie as of right as it is not among those listed under order 43 rule 1. I have perused the said order and I agree that the issue of jurisdiction is not listed under order 43 rule 1. However, I have also read the provisions of section 65 (1) (b) of the Civil Procedure Act which states as follows;

“(1) Except where otherwise expressly provided by this Act and subject to such provisions to the furnishing of security as may be prescribed, an appeal shall lie to the High Court-

(b) from any original decree or part of a decree of a subordinate court other than a magistrate court on a question of law or fact.”

8. Section 75 (1) deals with orders from which appeals lie. The applicant herein had raised a question vide his preliminary objection on whether the magistrate's court had jurisdiction to handle the matter. In my opinion and I so hold, this is a question of law. It is well settled in precedent that the question of jurisdiction can be raised at any stage of the proceedings. Consequently the right to appeal to the High Court or any other Superior Court on such an issue would lie as of right and not with permission from the court whose order is being appealed. Therefore my answer to the first issue is that the application is competently before this court. I note that the authorities on this point cited by both parties go to the merits of the appeal which is yet to be argued. I will therefore not refer to them at this interlocutory stage.

9. Is the applicant entitled to extension of time? The Respondent did not deny the fact that the ruling

was delivered in the absence of both parties. She has also not denied the facts put forth by the applicant that this application was made without undue delay. Since the reasons for not filing the appeal in time are well explained in the affidavit in support and given that parties are entitled to a right to appeal, I find no reason to refuse the applicant an opportunity to pursue its appeal. I do therefore extend time to the applicant to appeal out of time and the memorandum of appeal filed on 25. 1. 2016 be and is hereby deemed as filed within time on payment of the requisite court fees.

11. The last point is whether I should grant an order staying the proceedings in the lower court in MSA CMCC No.1589 of 2014. The Respondent argued that this prayer was premature as the applicant ought to have made the application before the trial court first. However order 42 rule 6 (1) gives an applicant liberty to make the application for stay either before the court whose order is being appealed or to the court to which such appeal is preferred.

12. Order 42 does not make it mandatory that the application must first be made before the trial court as is being submitted by the Respondent. All the applicant is required to do is to demonstrate that substantial loss may result if the stay is not granted. In this instant, the applicant is saying that the trial court does not have jurisdiction to hear the matter. If the trial proceeds in the court below and his appeal succeeds, then it will result in the matter being heard twice. The success of this appeal if at all would render the proceedings in the court below a nullity having been done without jurisdiction thus a waste of judicial and parties valuable time In order to avoid such a scenario it is only prudent to stay the proceedings to await the determination of this appeal. I am therefore satisfied that this is sufficient cause to grant a stay of proceedings.

13. In conclusions, I am satisfied that the application has merit. I do grant the orders sought in prayers 2, 3 & 4 of the application with an order on prayer 5 that each party to bear their costs of the application.

Dated and Delivered at Mombasa this 20th day of January 2017

A. OMOLLO

JUDGE