



Mwangi (Practicing in the name and style of Muturi Mwangi & Associates Advocates) v LSG Lufthansa Services Europa/Afrika GMBH & another (Civil Appeal 202 of 2016) [2022] KECA 542 (KLR) (13 May 2022) (Judgment)

Neutral citation: [2022] KECA 542 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 202 OF 2016
RN NAMBUYE, W KARANJA & MA WARSAME, JJA
MAY 13, 2022**

BETWEEN

**ELIAB MUTURI MWANGI (PRACTICING IN THE NAME AND STYLE OF
MUTURI MWANGI & ASSOCIATES ADVOCATES) APPELLANT**

AND

LSG LUFTHANSA SERVICES EUROPA/AFRIKA GMBH 1ST RESPONDENT

LSG SKY CHEFS KENYA LIMITED 2ND RESPONDENT

*(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi
(C. Kariuki, J) dated 4th July, 2016 in Commercial & Admiralty Case No. 154 of 2014)*

JUDGMENT

1. The genesis of this appeal is a ruling and order made by Honourable Charles Kariuki, J on 4th July, 2016 following the respondents' application dated 10th February, 2016 in which they sought stay of proceedings pending the hearing and determination of the intended appeal and execution of the order granted by the Court on 29th January, 2016. The initial ruling of 29th January 2016 was pursuant to an application by the appellant dated 12th May, 2015 premised on Order 11 rule 3(2) & 7(2) and Order 51 Rule 1 of the *Civil Procedure Rules*, sections 1(2), 1A, 1B and 3A of the *Civil Procedure Act* and section 3 of the *Judicature Act*. The appellant sought the reliefs that: Mr. Tobias Diebold and Mr. Paul M. F. Lyimo be jointly and severally, compelled within 14 days (or such other period as the court may deem fit) to respond fully to all the questions put to each of them by way of interrogatories filed in the Honourable court on 13th March, 2015 and served on the respondent's advocates on the same date; the respondents be deemed to have violated the overriding objective in section 1A and 1B of the Act as well as costs be awarded to the appellant.



2. The application was premised on the grounds on its face and averments in the supporting affidavit. It was opposed by the respondents who filed grounds of opposition and a replying affidavit dated 26th May, 2015. The application was allowed by grant of the said reliefs. Immediately after the ruling the respondents' advocate made an oral application for stay of execution for 30 days pending filing of an appeal which was opposed by the appellant's counsel. The Court granted them 7 days stay at the lapse of which the appellant's advocates were at liberty to execute the order.
3. The respondents failed to comply within this time frame and instead, they filed a notice of appeal intending to challenge in entirety of the High Court ruling dated 29th January, 2016 and subsequently filed an application for stay of execution and proceedings dated 10th February, 2016 at the trial court which was opposed by the appellant through its grounds of opposition dated 15th February, 2016.
4. In its grounds of objection, the appellant averred that an appeal does not lie as a matter of right since the respondents had not sought leave to appeal. The respondents filed a further application on 22nd March, 2016, pursuant to Article 159 of *the Constitution*, section 3A of the *Civil Procedure Act*, Order 50 rule 6 and Order 51 rule 1 of the *Civil Procedure Rules*. It sought orders to extend and enlarge time within which to appeal as well as leave to appeal the ruling dated 29th January 2016. This subsequent application dated 22nd March, 2016 was on the grounds that its counsel believed she had sought requisite leave from the court to file its notice of appeal against the decision dated 29th January, 2016 and that the mistake of counsel was inadvertent and should not therefore be visited against them being innocent litigants and that the court had the power to grant the said orders. This application was supported by an affidavit sworn by Terry Mwangi sworn on 22nd March, 2016. The application was opposed by the appellant vide its grounds of opposition and the replying affidavit dated 30th March, 2016. It was averred that the delay in making the application for stay of proceedings and execution was inordinate and the application to seek leave was prompted by them. The court was therefore requested to dismiss the application.

Upon hearing both applications and the rival responses, the learned Judge delivered a ruling dated 4th July, 2016 and granted the following reliefs:

- 1) That the defendants do pay the plaintiff's costs of the application within seven (7) days of this ruling, which costs have been assessed at Ksh. 20,000/=,
 - 2) Further, and as a condition for the stay, the defendants are to deposit within 30 days with the court or in interest earning account in parties' advocates names, Ksh. 1,000,000 as security for the due performance of the decree as issued on 29th January, 2016,
 - 3) Failure on the part of the defendants to fulfil these two conditions within the stipulated time, the said order shall lapse.
5. Aggrieved by the above ruling, the appellant filed a notice of appeal dated 14th July, 2016 followed by the memorandum of appeal dated 31st August, 2016 raising a prolix 15 grounds. In the said grounds, the learned Judge is faulted for, inter alia,; failing to exercise the court's discretionary power under Order 50 Rule 6 of the *Civil Procedure* cautiously and in the interest of justice in favour of the respondents despite having found that there was inordinate, unexplained and unjustified delay in making the application dated 10th February 2016; failing to exercise the court's discretionary power under Order 50 Rule 6 of the *Civil Procedure Rules* in favour of the respondents despite having found that the application dated 22nd March 2016 was based on blatant falsehoods; failing to find that the respondents had not demonstrated the existence of special and exceptional circumstances to warrant the granting of leave to appeal; granting leave to appeal when the respondents had not demonstrated a serious intention to appeal by failing to annex draft grounds of appeal to their applications dated



10th February 2016 and 22nd March 201; failing to find that the appellant stands to suffer extreme prejudice from the delay; failing to find that the Respondent's application dated 22nd March 2016 was a gross abuse of the court process ; failing to find that the sum of Ksh.1,000,000/= to be furnished as security for costs for the due performance of the order issued by the court requiring the respondent to respond to the appellants interrogatories was inadequate for purposes of ensuring the due performance of the order by the respondents. We were urged to allow the appeal and set aside the orders given in the said ruling.

6. When the parties appeared before us for the plenary hearing of the appeal learned counsel Mr. Wilfred Nderitu and Mr. Kuyo informed the Court that they would rely on the written submissions for application dated 25th May, 2020 while those of the respondents are dated 6th November, 2020. It was observed that both sets of submissions were not on record as at the time of the hearing of the appeal. They were however subsequently availed through the registry and were therefore available at the time of the preparation of the judgment. Both counsel nonetheless said they would rely on their submissions and did not make any oral highlights.
7. We have studied the submissions filed by the respondents in this matter. Apparently, there are two appeals in respect of the same subject matter as referred to by learned counsel, Mr. Nderitu. The other appeal being Civil Appeal No. 272 of 2016, in which an application for stay of execution appears to have been filed. This application is nonetheless strictly in respect of the Ruling dated 4th July, 2016 delivered on 8th July. The said ruling has nothing to do with orders of stay of execution on the order of the High Court related to interrogatories which is addressed by Mr. Kuyo in his submissions. A good dose of confusion has been created in this matter by the filing of a multiplicity of applications over the same subject matter, a practise that appears to have been escalated here by the parties from the High Court.
8. For purposes of this appeal, we shall restrict ourselves to the orders issued in the impugned ruling delivered on 8th July 2016. The Ruling only has 3 orders as outlined earlier in this judgment. Did the learned Judge exercise his discretion judicially in granting the said orders and is there cause for us to interfere with them? On the order of stay for 7 days, on the condition that the respondents pay costs of Ksh. 20,000 to the appellant, the appellant's problem with that order is that it was an under assessment on the part of the learned Judge. In our view however, the assessment was purely at the discretion of the learned Judge, which was unfettered. The learned Judge could even have granted unconditional stay if he deemed it just to do so after considering the circumstances surrounding the matter. Instead, the learned Judge decided to give the appellant throw away costs of Ksh. 20,000 but instead of appreciating that gesture, they are complaining that it was an under assessment. We are not persuaded that this particular order is either oppressive, unreasonable, capricious or whimsical in any way given the history of the matter before the High Court as explained in that ruling, nor do we find the said order prejudicial to the appellant. We have no basis for interfering with the said order.
9. On the condition to deposit Ksh. 1,000,000, Mr. Kuyo seemed to suggest that the same had been complied with in respect to Civil Appeal No. 274 of 2016, which has already been filed, in which case this appeal serves no meaningful purpose as we cannot set aside that which has already been acted on. The respondents have not complained that the amount was oppressive, or that it amounted to a fetter to their constitutional right of access to justice. In fact, it would have been understandable if the respondents were the ones complaining. We make no hesitation in finding that the learned Judge exercised his discretion properly (when he granted the said order?) and he cannot therefore be faulted for issuing the impugned order.



10. In view of the fact that the appeal against the main orders has been filed and served, and the issue of stay of execution on the question of interrogatories is not before us, we find this appeal devoid of merit and dismiss it with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MAY, 2022.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

