Kenya Pipeline Company Limited v Cybercom Limited & another (Civil Application 212 of 2012) [2022] KECA 1359 (KLR) (2 December 2022) (Ruling)

Neutral citation: [2022] KECA 1359 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 212 OF 2012

HA OMONDI, KI LAIBUTA & PM GACHOKA, JJA

DECEMBER 2, 2022

BETWEEN

KENYA PIPELINE COMPANY LIMITED ..... APPLICANT

AND

CYBERCOM LIMITED ..... 1ST RESPONDENT

DATALOGIX LIMITED ..... 2ND RESPONDENT

(Being an application seeking to rescind the order of this Court (E. M. Githinji, R. N. Nambuye & W. Ouko, JJ.A.) made on 24th April 2015)

RULING

1. Before us is an application by way of notice of motion expressed to be brought under Articles 50 & 159 of the *Constitution*, section 3B of the *Appellate Jurisdiction Act*, and Rule 57(2) of the *Court of Appeal Rules*.

2. The main prayer sought in the application is that this Court do rescind the order made on April 24, 2015 staying further proceedings in HCCC No 490 of 2004 Nairobi pending the hearing of an intended appeal.

3. By way of background, and to put this application into perspective, the Applicant filed Civil Suit No 490 of 2004 on September 8, 2004 seeking

   various reliefs for breach of contract. On March 20, 2012, the first respondent filed an application seeking leave to amend its defence and introduce a counterclaim against the applicant. The High Court, upon considering the application, held that the intended counterclaim was statute-barred and proceeded to dismiss the application that sought leave to amend the defence.

4. Aggrieved by the decision of the High Court, the 1st respondent filed an application under Rule 5(2)(b) of the *Court of Appeal Rules*, seeking an order for stay of further proceedings in HCCC 490 of 2012 pending the filing and determination of the intended appeal.

5. Upon hearing the application for stay of proceedings, this Court pronounced itself on April 24, 2015 as follows:

> "For this application to succeed, it must satisfy two conditions; that the intended appeal is not frivolous and that the intended appeal will be rendered nugatory if the proceedings in the High Court are not stayed. See *Githunguri v Jimba Credit Corporation Ltd & Others* [1988] KLR 838.
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> From the three grounds contained in the draft memorandum of appeal and the submissions, the main question on appeal will be whether the cause of action in the counterclaim is statute-barred. That question, in our view, is not frivolous.
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> Secondly, if the trial in HCCC No 490 of 2004 were to proceed before the appeal is heard and determined the applicant will be highly prejudiced. The High Court has found that the applicant's cause of action in the proposed counterclaim is statute-barred. Before that question is resolved on appeal, the High Court will make a decision without the counterclaim and any attempt to file a fresh suit will be met with the plea of res judicata.
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> For that reason, we think the appeal, if successful, will be rendered nugatory should the proceedings in the High Court go on.
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> We allow the application and direct that an order staying further proceedings in HCCC No 490 of 2004* be and is hereby issued pending the filing, hearing and determination of the intended appeal.
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> As the applicant complains that delay in filing the appeal is due to failure by the High Court to supply the proceedings, the Registrar of High Court is directed to supply the proceedings as soon as practicable."

6. This is now the order that the Applicant wishes to rescind. In an affidavit sworn on June 18, 2020 in support of the application, Stanley Manduku, the chief legal officer of the applicant, depones as follows: that HCCC 490 of 2004 has been pending in court for over 15 years since it was filed; that it is over 8 years since the 1st respondent wrote a letter to the High Court requesting for proceedings; that no reminder has been written since then and that, since then, the 1st respondent has not taken any action after it obtained the order of stay of proceedings in the Court of Appeal.

7. He further depones that no steps have been taken to file the intended appeal since the ruling made on April 24, 2015; that no diligence or effort has been made in pursuing the proceedings or filing the intended appeal, more than 5 years since the order for stay of proceedings was granted; and that the applicant's witnesses continue to go on retirement, and that there is a likelihood that their memories will fade, which will be prejudicial to the applicant's ability to prosecute its case and defend any counterclaim that may be filed.

8. When this matter was called out for hearing, Mr. Wekesa, advocate for the applicant was present. The respondents' advocates were not present and the Court confirmed that they were duly served with the hearing notice. The respondents have not filed any response to the application or written submissions. Mr. Wekesa highlighted the written submissions and submitted that the ends of justice demand that

this Court should rescind or set aside the order issued on April 24, 2015 as the 1st respondent has not taken any action to file the intended appeal.

9. We have carefully considered the application, the supporting affidavit, the documents on record, and the written submissions. The only question we are required to answer is whether we should rescind the order for stay of proceedings that this Court issued on April 24, 2015. Rule 59 of the *Court of Appeal Rules* provides as follows:

> " 59
>
> (1) .....
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> (2) An order made on an application to the Court may be varied or rescinded in terms of sub-rule (1) by the Court."

10. We note that Rule 59 states that an order of this Court can be varied or set aside if the person on whose application the order was made, has failed to show diligence in the matter. The question of whether this Court can revisit, reopen, or review orders that have already been made was considered extensively in a 5-Judge bench in *Nguruman Limited v Shompole Group Ranch & Another* eKLR where the Court held as follows:

> " .....It therefore follows that, if a merit decision on extension of time or otherwise to perform a task under this Courts' Rules can be revisited, re-opened, re-determined either by the same or other Judges or the full Court, then why not any other merit decision of the Court..." (Per Nambuye, JA)
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> .... I hold the view that rule 57(2) grants this Court jurisdiction to vary or rescind an order made in an application." (Per Musinga, JA)

11. This Court addressed the same question in *Habo Agencies Limited v Wilfred Odhiambo Musingo* eKLR as follows:

> " ... we are of similar persuasion and reiterate that whereas Rule 57
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> 1. specifically empowers the Court to vary, rescind orders made by a single Judge, Rule 57 (2) empowers the Court to review any other orders not covered under sub-rule (1). This Court has jurisdiction to rescind or vary the impugned ruling."
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> 1. The Supreme Court has pronounced itself on the quick dispensation of justice in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others eKLR in which the Court stated that:
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> > " .....Time is a crucial component in dispensation of justice, hence the maxim: Justice delayed is justice denied. It is a litigants' legitimate expectation where they seek justice that the same will be dispensed timeously."

13. Turning to the facts of this case, we note that the applicant filed a case against the respondents on September 8, 2004, which is more than 18 years ago. On April 24, 2015, this Court stayed the

proceedings of the case in the High Court, to give a chance to the 1st respondent to file an appeal against the decision of the trial court to amend its statement of defence and introduce a counterclaim. Rather than take advantage of the order of this Court, the 1st respondent used the order as a blanket and went to sleep. The orders issued under Rule 5(2) (b) are discretionary in nature and, if a party abuses such an order as is the case before us, the Court is at liberty to vary or rescind such orders in the interest of justice. Indeed, we note that one of the principles under Article 159 of the *constitution* is that the courts should ensure that justice is not delayed.

14. We note that for the last 5 years, the 1st respondent has not taken any steps to lodge an appeal in this Court. We further note that it is more than 2 years since this application was filed and the 1st respondent has not filed a replying affidavit to explain the steps, if any, taken to obtain the proceedings. The 1st respondent did not file any written submissions nor attend the hearing of this application, which demonstrates its lethargic behaviour. All these are pointers to a litigant, who is taking advantage of orders of stay of proceedings to the detriment of the applicant who instituted the suit more than 18 years ago.

15. The upshot of the foregoing is that this is a proper case where the Court will revisit orders earlier granted for purposes of varying and rescinding the same. It is obvious by now that we are persuaded that the orders granted by this Court on April 24, 2015 are being used by the 1st respondent as a roadblock to justice. In the interest of justice for all the parties in this litigation, we must remove that roadblock. Accordingly, we allow this application and make the following orders:

    i. the application dated June 18, 2020 merited;

    ii. the orders of this Court issued on April 24, 2015 be and are hereby rescinded; and

    iii. the applicant is at liberty to proceed with the hearing of HCCC No 490 of 2004.

    iv. The costs of this application will be borne by the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2022.

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR