



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KIAGE & M'INOTI, J.J.A.)

CIVIL APPEAL NO. 87 OF 2019

BETWEEN

SULEIMAN ENTERPRISES LTD.....APPELLANT

AND

KENSALT LIMITED.....1ST RESPONDENT

KEMU SALT PACKERS PRODUCTIONS LTD (UNDER RECEIVERSHIP)..2ND RESPONDENT

HANSHEWER TRANSPORTERS LTD.....3RD RESPONDENT

SHREEJI EXPRESS.....4TH RESPONDENT

(Appeal from the ruling and order of the Environment and Land Court of Kenya

at Malindi (Olola, J.) dated 4th February 2019

in

ELCC No. 90 of 2018)

JUDGMENT OF THE COURT

In this interlocutory appeal, *the appellant, Suleiman Enterprises Ltd*, challenges the exercise of discretion by the *Environment and Land Court at Mombasa (Olola, J.)*. On 4th February 2019, the learned judge dismissed an application by the appellant to adjourn the hearing of a motion on notice filed by *the 1st respondent, Kensalt Limited*. The appellant urges us to find that the learned judge wrongly exercised his discretion in denying the adjournment.

The brief background to the appeal is as follows. On 14th December 2018, the learned judge granted, on the application of the appellant, an interim injunction and prohibited the 1st respondent from entering upon the parcels of land known as *LR No. 21918* and *LR No. 21983 (the suit property)*. Three days later, the 1st respondent applied to the court for its own interim injunction against the appellant, the purpose of which was to prevent the latter from interfering with the 1st respondent's efforts to remove some machinery and equipment from the suit property. Counsel for the 1st respondent appeared *ex parte* before the learned judge on 17th December 2018 and the court certified the application urgent and directed it to be served upon the other parties for hearing *inter partes* on priority basis on a date to be given by the registry. Subsequently the application was set down for hearing on 16th January 2019.

On 16th January 2019, the appellant was not ready for the hearing of the application and successfully applied for an adjournment. The learned judge adjourned the hearing to 4th February 2019 and directed the appellant to file its response to the application within 14 days. When the parties appeared before the learned judge on 4th February 2019, the appellant had not yet filed its replying affidavit and applied for adjournment to file the same. The learned judge dismissed the application for adjournment, noting that he had already granted the appellant ten days (it was actually 14 days) to file the affidavit. In the event, the learned judge allowed the application by the 1st respondent. That is what aggrieved the appellant, leading to this appeal.

Prior to filing this appeal, on 5th February 2019, the appellant applied to the trial court to review and set aside its order of 4th February 2019. The fate of that application is not readily apparent from the record. Although counsel for the appellant claimed that he had withdrawn the

same, the respondents maintained that they had no notice of the withdrawal. On our part, we confirmed that indeed no notice of withdrawal was on record.

In support of the appeal, **Mr. Oluga**, learned counsel for the appellant, submitted that the learned judge erred by granting the 1st respondent's application without affording the appellant the right to be heard. He contended that even without a replying affidavit, the appellant could have argued points of law. In addition, counsel urged, the learned judge erred by granting the 1st respondent's application which only sought interim relief, pending the hearing and determination of the application. Once the court granted the application, counsel contended, there was nothing left to be heard. On that basis he urged us to find that the learned judge did not exercise his discretion properly, and to allow the appeal.

The appeal was opposed by **Mr Noorani**, learned counsel for the 1st respondent. He contended that the learned judge properly exercised his discretion, taking into account the fact that he had certified the application urgent and granted the appellant 14 days to file a replying affidavit, which it failed to do. Counsel relied on **Order 51 rule 14** of the **Civil Procedure Rules** and submitted that the court was entitled to proceed *ex parte* once the appellant failed to file a replying affidavit or grounds of opposition to the 1st respondent's application.

The appeal was also opposed by **Mr. Muchiri**, learned counsel, for the 2nd respondent who submitted that the learned judge had in the circumstances of the appeal, correctly exercised his discretion. Counsel cited **Mbogo v. Shah [1968] EA 93** and submitted that an appellate court will not interfere with exercise of discretion by the trial court unless it is demonstrated that the trial court misdirected itself and arrived at the wrong decision or that its decision is clearly wrong, leading to misjustice. Counsel also took issue with the appellant's simultaneous pursuit of the remedy of review and appeal, which he contended amounted to abuse of the process of the court. He relied on **Mary Wambui Njuguna v. William ole Nabala & 9 Others [2018] eKIR** to support the proposition that the two remedies cannot be pursued simultaneously.

The other respondents, who we were informed did not take part in the proceedings in the trial court, did not participate in the appeal.

As we stated earlier, the only issue in this appeal is a challenge of exercise of discretion by the trial judge when he rejected an application for adjournment by the appellant. The approach of this Court when an appeal challenges exercise of discretion by the trial court was succinctly stated by **Madan, JA** (as he then was), as follows in **United India Insurance Co. Ltd v. East African Underwriters (Kenya) Ltd [1985] E.A 898**):

“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

We are not persuaded that the appellant has established any of the above factors on the basis of which the learned judge's discretionary decision may be impeached. The learned judge took into account the fact that he had already granted the appellant 14 days to file a replying affidavit or grounds of opposition and that the application before him was under a certificate of urgency and had indeed been certified urgent. The appellant did not present before the learned judge any reasons at all why it had not filed its replying affidavit, even after the learned judge granted it more time. In these circumstances the decision by the learned judge to deny the appellant a further adjournment was well merited. We also bear in mind that the right of the appellant to be heard had to be balanced against the equally fundamental constitutional principle that justice shall not be delayed.

This finding alone is sufficient to dispose of this appeal. The appeal has no merit and is hereby dismissed with costs to the 1st and 2nd respondents. It is so ordered.

Dated and delivered at Nairobi this 29th day of January, 2021

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR