



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & M'INOTI, J.J.A.)

CIVIL APPEAL NO. 254 OF 2013

BETWEEN

R. BILLING & CO. ADVOCATES.....APPELLANT

AND

KUNDAN SINGH CONSTRUCTION LIMITED.....RESPONDENT

(An application for leave to proceed and commence proceedings against the respondent in receivership and for leave to substitute the name of the respondent and extension of time from appeal from the Ruling/order of the High Court of Kenya at Nairobi (J. B. Havelock, J.) dated 15th July 2013 in Misc. Cause No. 291 of 2010)

RULING OF THE COURT

1. The applicant, **R. Billing & Co. Advocates**, in its application dated 14th March 2018 seeks leave to commence proceedings against the respondent company that is under receivership. The applicant also seeks extension of time to have the appellant's submissions deemed duly filed and served, albeit out of time, and to substitute the respondent's name to **KSC INTERNATIONAL LTD.**
2. The application is premised upon the affidavit sworn on the same date by **Rajinder Billing**, Advocate, on behalf of the applicant. The applicant deposes that according to information he obtained from the registrar of companies on 2nd December 2016, there was change of name of the respondent company and further, the respondent had been placed under receivership.
3. The applicant states that the issue of the respondent being placed under receivership will have obvious implications in respect of the pending appeal and to the proposed course of action to be taken to formalize the legal proceedings. He indicated that the respondent was placed under receivership on or about 18th February 2015 by Bank of Africa and on 20th March 2015 by Kenya Commercial Bank.
4. In that regard, the applicant seeks leave to proceed and commence litigation against the respondent under receivership. He also seeks leave for extension of time to have his submissions deemed duly filed and served as per the court's direction, albeit out of time.
5. He contends that when the appeal came up for hearing on 16th February 2017, there was no appearance by the respondent's counsel, **Mr. O.P. Nagpal**. Subsequently, the court issued an order setting the timetable for the expeditious determination of the main appeal. In a letter dated 2nd March 2017, Mr. Nagpal informed the applicant that he had no further instructions in the matter.
6. The applicant further contends that there will be no prejudice or hardship caused to the respondent if leave is granted to amend the correct name of the respondent from **Kundan Singh Construction Limited** to the current one, **KSC International Limited**.
7. He argues that he has a justifiable, substantial and arguable case which ought to be allowed to continue to full hearing and determination. The applicant urges this Court to invoke the provisions of **Section 66(1), (2), and (3)** of the **Companies Act 2015**, **Section 1A and 1B** of the **Civil Procedure Act** and **Article 159 (1) (d)** of the **Constitution** and deal with the matter justly and uphold the principles enshrined in the overriding objectives.
8. The applicant concluded by stating that there has been no inordinate or culpable delay in filing this application as the respondent still requires to file its written submissions as ordered by the Court, albeit out of time. He urged the application as it is unopposed.

9. We have considered the submissions and affidavit filed by the applicant which contains sufficient material to determine this application.

From the arguments presented by the applicant, we find that the core issues to be determined is whether the court should: 1) grant leave for the applicant to proceed and commence litigation against the respondent under receivership; 2) grant extension of time to have the appellant's submissions deemed duly filed and served out of time.

10. First and foremost, the necessity to apply for leave to commence litigation against the respondent arises out of the fact that the Company was placed under receivership which was published in the **"Daily Nation"** newspaper on 18th February 2015 and receivers and managers duly appointed. According to the respondent's counsel, **Mr. Nagpal**, he has never received any instructions from the receivers and managers to represent the respondent in the appeal, even after seeking instructions from them.

11. It is trite that no claim can be brought against a company under statutory management or receivership without leave of the court.

The grant of leave by a court is therefore necessary. However, the Court must be satisfied that sufficient cause has been shown to grant leave to institute proceedings. The discretion is exercised on a case to case basis.

12. A perusal of the record shows that the applicant's case raises contentious issues which can only be resolved through judicial intervention. In our view, the intended litigation is not likely to affect the receivership adversely. In fact, the determination of issues in the pending appeal is necessary as the issues involve taxation of a bill of costs in a subject matter whose value is **Kshs 1,734,581,100.00/=**, which is a colossal amount of money.

13. In **Branco Arabe Espanol v Bank of Uganda [1999] 2 EA 22 Oder, JSC** stated:

"The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered".

14. In this regard, the interests of justice dictate that parties ought to be afforded an opportunity to fully present their case unless the conduct of a party has made it difficult for justice to be achieved in a particular case through adverse actions. In the premises, we therefore grant leave to the applicant to commence proceedings against the respondent.

15. The second issue for determination is whether this Court should extend time to have the appellant's submissions deemed as duly filed and served out of time. The principles upon which this Court exercises its discretion under **rule 4** of the **Court of Appeal Rules** are firmly settled. The court has unfettered discretion whether to extend time or not. However, in exercising its discretion the Court should do so judiciously, and in accordance with the principles set out in **Leo Sila Mutiso v Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997** where the Court stated;

"It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted."

16. Pursuant to a ruling dated 16th February 2017, the Court directed the applicant to file and serve their written submissions within 30 days from the date thereof and the respondent to file its response within 21 days of such service. The appellant's submissions were filed on 30th November 2018. Based on the above, there has been an inordinate delay in filing the submissions. That notwithstanding, we are inclined to exercise our unfettered discretion in allowing that prayer as no prejudice will be occasioned to the respondent for the reason that they had also been given sufficient time to respond upon service. In any case, the appeal had already been set down for hearing and it was directed that it be disposed of by way of written submissions and leave granted to counsel to highlight if they so wish. This prayer is equally allowed.

17. Before we conclude, we think it is important to briefly address the issue of leave to amend the pleadings. It is the applicant's prayer that leave be granted to substitute the name of the respondent to reflect the respondent's current name, **KSC INTERNATIONAL LIMITED**, for purposes of consistency in the pleadings. We find no reason not to grant the said prayer. The law allows parties to amend their pleadings at any stage of the proceedings as long as it does not prejudice or cause injustice to the other party.

18. This was enunciated in **Central Kenya Ltd. v Trust Bank Ltd. (2000) 2 EA 365** where the Court held thus:-

"Hence the guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs."

19. Having considered the foregoing, and this being an ex-parte application, we are satisfied that the grant of the orders sought herein will not occasion any prejudice or injustice to the respondent. We find that the application has merit and we are inclined to grant the orders sought by the applicant, which we hereby do. The costs of this application shall be in the appeal.

Dated and delivered at Nairobi the 5th day of April, 2019.

R.N. NAMBUYE

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JUDGE OF APPEAL

D.K. MUSINGA

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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.

DEPUTY REGISTRAR