

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 289 OF 2019

ANTI-COUNTERFEIT AUTHORITY.....APPELLANT/APPLICANT

-VERSUS-

PETER MUGUCIA.....1ST RESPONDENT
ROSE THAARA NJUE.....2ND RESPONDENT
HEWLETT-PACKARD DEVELOPMENT
COMPANY.....3RD RESPONDENT
CANON KABUSHIKI KAISHA.....4TH RESPONDENT
KYOCERA CORPORATION.....5TH RESPONDENT
SEIKO EPSON KABUSHIKI KAISHA.....6TH RESPONDENT
HALLIDAY FINCH LIMITED.....7TH RESPONDENT

R U L I N G

1. The appellant/applicant in the present instance has brought forth the Notice of Motion dated 30th May, 2019. The Motion stands supported by the grounds set out on its face as well as the facts deponed to in the affidavit sworn by *Naylor Mukofu*. The applicant is seeking the substantive order for a stay of the proceedings in CMCC NO. 45 OF 2019 pending the hearing and determination of the appeal currently before this court.
2. *Naylor Mukofu* who is the Chief Legal Officer of the applicant stated that on the premise of various complaints made by the 7th respondent on behalf of the 3rd to 6th respondents as against the

1st and 2nd respondents herein in respect to the purported sale of counterfeit products, the applicant proceeded to investigate the said complaints, later seizing a variety of items belonging to the 1st and 2nd respondents.

3. It is further stated that the 1st and 2nd respondents subsequently instituted a suit against the applicant being CMCC NO. 45 OF 2019 (Peter Mugucia & Another v The Anti-Counterfeit Agency) on the allegation of wrongful seizure of their goods and for which they are claiming the total sum of Kshs.18,571,400/= being the value of the seized goods.

4. The deponent asserted that resultantly, the applicant filed an application on 3rd April, 2019 which application sought to enjoin the 3rd to 7th respondents in the suit, adding that soon thereafter, the 3rd to 6th respondents filed a similar application on 11th April, 2019.

5. It was deponed that when the matter came up before the trial court on 9th May, 2019 for directions, the 1st and 2nd respondents raised an objection relating to the representation of the 3rd to 6th respondents by the firm of Ojiambo & Co. Advocates on the basis

that the purported firm of advocates had not filed a Notice of Appointment. That ultimately, the learned trial magistrate not only allowed the preliminary objection and dismissed the application filed on behalf of the 3rd to 6th respondents but went ahead to determine the issue of addition of the said respondents, thus determining the applicant's application despite the same not having been heard on its merits.

6. The deponent went ahead to aver that being aggrieved by the trial court's decision, the applicant has now lodged an appeal against the same with this court.
7. In opposing the Motion, the 1st and 2nd respondents filed the replying affidavit sworn by the 2nd respondent fundamentally averring that having found that the application filed by the 3rd to 6th respondents was incompetent for failure on the part of its advocates to file a Notice of Appointment, the trial court was not barred from referring to and considering the pleadings.
8. It was further averred that the application is purely an abuse of the court process.

9. From the record, it is clear the 3rd to 7th respondents did not participate in the hearing of the application.

10. The Motion was argued orally before this court with *Mr. Mukofu* learned counsel for the applicant first setting out the history of the matter as conveyed in his affidavit in support of the Motion. The advocate went ahead to then argue that his client stands to suffer grave prejudice should the suit be permitted to proceed before the trial court prior to the hearing and conclusion of the appeal.

11. Mr. Mukofu reiterated that the appeal has high chances of success on the premise that the trial court addressed the issue of joinder which was not before it at the time and therefore urged this court to consider doing substantive justice to the applicant, further pointing out that the record of appeal is already in place and the applicant is more than willing to proceed with the appeal at the earliest opportunity.

12. In his counter submissions, *Mr. Ngoa* advocate for the 1st and 2nd respondents by and large urged this court to dismiss the

application in its entirety, to which *Mr. Mukofu* offered rejoinder arguments.

13. I have considered the grounds featuring on the face of the Motion; the affidavits both supporting and opposing the same; and the rival oral arguments placed before me.

14. I deem it necessary to mention that the merits of the suit and/or appeal do not constitute the subject for consideration at this stage; the mandate of this court for the moment is whether or not to order a stay of the proceedings.

15. The principles surrounding a stay of proceedings were aptly discussed by the Court of Appeal in ***UAP Provincial Insurance Company Limited v Michael John Becket [2004] eKLR*** thus:

“In order for the applicant to succeed in an application for stay of proceedings pending appeal it is necessary for the applicant to satisfy the court, firstly that the pending appeal is an arguable one, which is not frivolous, and secondly that if the stay of proceedings is not granted the appeal when ultimately heard will be a futile exercise...”

16. Moreover, the High Court in advancing the above position as relates to the granting of a stay of proceedings held the following in the case of *William Kamunge & 2 others v Muriuki Mbithi [2016] eKLR*:

“...it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”

17. On the first principle relating to the expeditious filing of the application, I am able to confirm from the record that the impugned ruling was delivered on 9th May, 2019 by Honourable P.N. Gesora (Mr.) (Chief Magistrate) while present Motion was filed on 30th May, 2019. I am satisfied that the application has been brought without unreasonable delay.

18. The second principle concerns whether or not the applicant has an arguable appeal with high chances of success. I have perused the impugned ruling by the learned trial magistrate attached to the Motion. True to the account given by the

applicant, the said ruling relates to the preliminary objection raised by the 1st and 2nd respondents' counsel to the effect that the advocate purportedly on record for the 3rd to 6th respondents is improperly on record, having failed to put in a Notice of Appointment of Advocates.

19. The learned trial magistrate, upon considering the respective submissions on the preliminary objection, not only allowed the preliminary objection but dismissed the 3rd to 6th respondents' application for being incompetent, but went ahead to address the merits of the very same application, by extension addressing the application filed by the applicant.

20. Further to the foregoing, I have looked at the documents annexed to the Motion and ascertained that the applicant had previously filed a similar application for joinder of the 3rd to 7th respondents as defendants in the suit. The said application is still pending before the Lower Court.

21. In my humble view and without going into the merits of the appeal against the aforementioned ruling, there was no basis for the learned trial magistrate to delve into the substance of the

application brought forth by the 3rd to 6th respondents given that he had deemed the same incompetent on the premise of the preliminary objection raised by the 1st and 2nd respondents.

22. Going by the grounds set out in the memorandum of appeal, it is evident that the applicant has raised issues with the trial magistrate's approach of addressing the issue of joinder of the relevant parties despite the same not having been urged before him. On a similar note, I took note of the applicant's argument that it is the 3rd to 7th respondents who made the report regarding the alleged counterfeit goods being sold by the 1st and 2nd respondents, which in my reasoned opinion, would cause them to be necessary parties to the suit. In this respect, I am satisfied that the appeal raises prima facie arguable grounds.

23. Turning to the third principle on expeditious disposal of cases vis-à-vis proper use of judicial time, I have acknowledged that the fundamental contentious issue is that of joinder of the 3rd to 7th respondents. It is true that the learned trial magistrate considered the merits of an application he had deemed incompetent notwithstanding the fact that his analysis ought to

have been limited to the preliminary objection. It is also noteworthy that the learned trial magistrate's decision one way or another has a bearing on the applicant's application which it would appear is still pending before the trial court.


24. In view of the resemblance between the two (2) applications referenced hereinabove and the fact that one of the applications is now the subject of the appeal pending before this court, I am satisfied that it would be proper utilization of judicial time and to have the appeal dispensed with as a matter of priority.

25. This brings me to the principle on whether denying the order for a stay of proceedings would deem the appeal a futile exercise. I find that this principle has adequately been addressed under the third principle hereinabove save to add that it would be of little benefit to both the parties and the respective courts to allow the suit and appeal to run concurrently in this instance. I will revert to my earlier reasoning that the application which was dismissed by the trial court contains fundamentally similar orders to those being sought by the applicant. I am thus satisfied

that the appeal would be rendered futile if the order for a stay of proceedings is declined.

26. In the circumstances, I am persuaded that the Motion is merited and I am therefore inclined to grant the order for a stay of proceedings pending the hearing and determination of the appeal. However, in the interest of justice and expediency, I hereby order that the applicant do ensure to prosecute the appeal within 120 days from today, failing which the order for stay shall lapse. Costs to abide the outcome of the appeal.

Dated, signed and delivered at **NAIROBI** this 25th day of July, 2019

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L. NJUGUNA
JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the 1st and 2nd Respondents