



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. E808 OF 2021

KIRAGI TRAVELLERS SACCO SOCIETY LIMITED.....APPELLANT/APPLICANT

VERSUS

NICODEMUS GEORGE NYANDORO.....RESPONDENT

RULING

1) The subject matter of this ruling are two applications. The first application is the motion dated 21st January 2022 in which the appellant/applicant sought for the following orders inter alia:

i. THAT this honourable court be pleased to grant the appellant/applicant leave to appeal out of time by admitting the memorandum of appeal dated 8th December 2021 and filed on 8th December 2021.

ii. THAT this honourable court allow the applicant/intended appellant to furnish the court with security in the form of a bank guarantee from the Family bank.

iii. THAT the costs of this application abide the outcome of the appeal.

2) The second application is the motion dated 31st January 2022 whereof the appellant/applicant sought for the following orders inter alia:

i. THAT this honourable court be pleased to grant the appellant/applicant leave to appeal out of time by admitting the memorandum of appeal dated 8th December 2021 and filed on 8th December 2021 out of time.

ii. THAT this honourable court be pleased to stay, and/or set aside the ruling delivered on 25th November 2021 by the honourable chief magistrate H. M. Nyaberi dismissing the appellant's/applicant's application dated 30th July 2019 that sought orders for stay and/or setting aside ex-parte judgment delivered on 1st March 2019 pending the hearing and determination of this appeal.

iii. THAT this honourable court be pleased to stay the ex-parte judgment delivered on 1st March 2019 pending the hearing and determination of this appeal.

iv. THAT this honourable court be pleased to order that the ex-parte proceedings to enforce the x-pare judgment and decree herein be declared a nullity.

v. THAT the respondent bears the auctioneers costs.

vi. THAT this honourable court allow the appellant/applicant to furnish the court with security in the form of a well-known and very reputable bank guarantee.

vii. THAT the costs of this application abide the outcome of the appeal.

3) The applicant filed in support of motions the affidavit sworn by Anertia Salinde Gulenywa. When served, the respondent filed the replying affidavit sworn by Melitus Opiyo to oppose the applications.

4) I have considered the grounds stated on the two motions. I have also considered the facts deponed in the rival affidavit. I further taken into account the rival oral submissions. It is apparent from the two applications that the appellant/applicant is seeking for the following two

main orders:

i. An order for leave to appeal out of time against the judgment/decree made on 1st March 2019.

ii. An order for stay of execution of the exparte judgment/decree made on 1st March 2019 pending appeal.

5) It is the submission of the appellant/applicant that the trial court delivered an exparte judgment on 1st March 2021 which judgment the applicant applied to set aside but the trial magistrate dismissed the applicant's application dated 30th July 2021 vide the ruling delivered on 25.11.2021.

6) The applicant further avers being dissatisfied it was prompted to file the instant applications. It is argued that the judgment was delivered without notice being given to the appellant/applicant thus the time required to appeal had lapsed at the time when the applicant became aware of the exparte judgment.

7) It is also the submission of the applicant that respondent has gone ahead to execute the decree by proclaiming the applicant's properties which includes office desks, printers, photocopiers, computers and motor vehicles.

8) It is stated that the appellant/applicant was not issued with a notice to show cause before execution could take place. The applicant has further averred that unless an order for stay is granted the respondent may not be in a position to refund the decretal. The applicant offered to provide a bank guarantee.

9) The respondent opposed the motion stating that the applicant was properly served with the summons to enter appearance therefore there is a regular judgment. The respondent averred that there is no dispute that a notice of entry of judgment had been served upon the applicant.

10) The respondent urged this court to direct the applicant to deposit the decretal sum instead of providing a bank guarantee. The respondent further stated that it rightly instructed auctioneers to carry out the attachment because there was no order for stay of execution of the judgment. The respondent averred that he is a man of means that can easily refund the decretal sum should the appeal turn successful.

11) I have already set out the sort of orders the appellant is seeking.

There is no dispute that the time to appeal has lapsed. The applicant has urged this court to grant it leave to appeal out of time. The court has a wide discretion to grant leave so long as an applicant provides sufficient cause.

12) In this matter the applicant has stated that it was not served with judgment and only came to be aware of the exparte judgment after the time required to appeal had lapsed. Though the respondent contested the applicant's assertion, I am satisfied that in the circumstances of this case the applicant was not aware of the judgment until the time to appeal lapsed. I grant the applicant leave to appeal against the decision of the trial court delivered on 1st March 2019.

13) The second main order sought is an order for stay of execution of the judgment/decree delivered on 1st March 2019 pending the hearing and determination of the intended appeal. The principles to be considered in determining such applications are well settled. First, an applicant must show that it filed the application without unreasonable delay. The instant applications were filed in the month of January 2022. The exparte judgment was delivered on 1st March 2019.

14) The applicant filed an application seeking to set aside the exparte judgment. The aforesaid application was heard and dismissed on 25th November 2021. The dismissal order prompted the applicant to file the two motions in the month of January 2022. I am satisfied that the instant motions were filed without unreasonable delay.

15) The second principle is that an applicant must show the substantial loss it would suffer if the order for stay is denied. In this case the applicant has stated that the respondent is not in sound financial position to refund the decretal sum if the appeal succeeds. The respondent has said he is a man of means and that he is capable of refunding the decretal amount when required.

16) Though the respondent avers that he is a man of means, he did not provide any credible evidence to show his financial ability save for the affidavit averments. I am convinced that the applicant will suffer substantial loss if the order for stay is denied.

17) The final principle is that the provision of security for the due performance of the decree. The applicant has offered to provide a bank guarantee from a reputable bank. The respondent is of the submission that a good form of security is to deposit the decretal sum.

18) In my view the offer to provide a bank guarantee from a reputable bank is a good form of security just like depositing cash. In end I am convinced that the applicant's motion meets the requisite conditions for a grant of the orders sought.

19) The applicant's motions are found to be meritorious hence they are allowed thus giving rise to issuance of the following orders:

i. The applicant is granted leave of 10 days from the date hereof to file an appeal out of time against the judgment/decree of the trial court made on 1st March 2019.

ii. An order for stay of execution of the judgment/decree issued on 1st March 2019 is granted pending the hearing and

determination of the intended appeal on condition that the applicant provides a bank guarantee from a reputable bank within a period of 30 days. In default execution to issue.

iii. Costs of the application to abide the outcome of the intended appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 25TH DAY OF MARCH, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent