Ngumbi v Mulala & another (Miscellaneous Application 217 of 2021) [2022] KEHC 10107 (KLR) (20 May 2022) (Ruling)

Neutral citation: [2022] KEHC 10107 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

MISCELLANEOUS APPLICATION 217 OF 2021

GV ODUNGA, J

MAY 20, 2022

BETWEEN

ALEXANDER MULI NGUMBI ..... APPLICANT

AND

GRANTON UKONDE MULALA ..... 1ST RESPONDENT

NJERU PATRICK ..... 2ND RESPONDENT

RULING

1. By a Motion on Notice dated 22nd November, 2021, the applicant herein seeks the following orders:
    1. Thatthis matter be certified urgent and heard ex parte in the first instance and service thereof be dispensed with.
    2. Thatthis Honourable Court be pleased to order a stay of execution of the ex-parte judgment delivered on 3rd February, 2021 by Hon. G. Shikwe in Kithimani PMCC No.317 of 2016 pending the hearing and determination of the application.
    3. Thatthis Honourable Court be pleased grant the Applicant leave to appeal out of time against the Ruling delivered on 18th day of August,2021 by Hon. Hon. G.Shikwe (SRM) in Kithimani PMCC No.317 of 2016 .
    4. That the costs of this application be provided for.
2. The application was supported by an affidavit sworn by Kelvin Ngure, a Legal Officer at Directline Assurance Company Limited, the insurers of the suit motor vehicle registration number KAV 294X and at whose instance this claim is being defended. According to him, he swore the said affidavit by virtue of the rights of subrogation under the relevant policy of insurance and at common law and the right to defend, settle or prosecute any claims in the insured's name.

3. It was averred that judgment in Kithimani PMCC No. 317 of 2016 was entered on 3rd February,2021 in favour of the 1st Respondent as against the Applicant to the tune of Kshs1,281,865/- subject to apportionment of liability in the ratio of 50:50 against the Applicant and the 2nd Respondent. According to him, the afore-stated judgment was entered ex-parte as the applicant did not defend himself in the said matter as he was never served with the Summons to enter appearance together with the claim supporting documents. Though the applicant vide an application dated 3rd June,2021 in Kithimani PMCC No. 317 of 2016 sought the set aside the ex-parte judgment entered on 3rd February, 2021, the application was dismissed on 18th August, 2021.

4. According to the deponent, the delay in lodging the Appeal within the requisite statutory timeline was occasioned by fact the insurance issued instructions to appeal the Ruling after the required timelines due internal office challenges. However, the applicant is still desirous of appealing against the said Ruling as the Applicant has a strong case on defence. However, without orders of stay, the applicant was apprehensive that the 1st Respondent would commence execution proceedings in which event, the Applicant stands to suffer irreparable loss and damage if the orders sought in the application herein is not granted.

5. It was averred that the applicants are ready and willing to offer security in form of a bank guarantee for the half the decretal sum of Kshs. 640,000/= as held by the trial court pending the hearing and determination of the intended Appeal.

6. The Court was urged to adhere to natural justice, doctrines of equity and *the constitution* in this matter as the Applicant will be condemned unheard if the applicant is not granted an opportunity to defend the suit hence it is in the interest of justice that this Court do grant leave to Applicant to lodge an Appeal against the Ruling of Hon. Shikwe delivered on 18th August,2021 since to do so will not occasion any prejudice to the respondents.

7. It was submitted on behalf of the Applicant that the intended Appeal was not filed within the required statutory timeline and the reason for the delay was occasioned by the fact that the instructing client issued the instructions after prescribed timeline had lapsed. Accordingly, the Applicant filed the Application herein three and half months after expiry of the time prescribed for filing Appeal due to the explained circumstances

8. It was the applicant's submission that the delay was not very inordinate to warrant this court to fail to exercise its discretion in favour of the Applicant and admit the Appeal.

9. According to the applicant, he has explained the delay was occasioned by the fact that the instructing client reverted with the instruction after lapse of the prescribed timeline. Reliance was placed in *Kenya Power & Lighting Company Ltd vs. Rose Anyango & Another* [2020] eKLR.

10. It was submitted that the Respondent has not established that he has been prejudiced in any manner by the said delay and in this regard the Applicant relied on the decision of the Court of Appeal in *Nicholas Kinto Arap Korir Salat vs. Independent Electoral and Boundaries Commissions & others* (2013) eKLR.

11. In the applicant's view, no prejudice will be suffered by the Respondent that cannot be ameliorated by an award of costs. Moreover, the Applicant's right to access justice and fair hearing under Articles 48, 50 and 159 of *the Constitution* should be protected and not to be watered down by a mere technicality of failure to file the Memorandum of Appeal with the prescribed timeline.

12. Based on the foregoing, the Court was urged to exercise its discretion in favour of the Applicant and grant leave to file the Memorandum of Appeal out of time.

13. It was submitted that since the Applicant is seeking leave to appeal the ruling of the trial court as he was never served with summons to enter appearance as he has strong case on liability, his intended appeal is arguable and raises serious issues to warrant this Court's intervention on appeal. In this regard, the Applicant relied on *Kenya Revenue Authority vs. Sidney Keitany Changole & 3 Others* (2015) eKLR.

14. It was submitted that since the Applicant's intended Appeal herein is merited and is not frivolous, it is paramount that the Applicant is given an opportunity to ventilate his intended Appeal on merits.

15. On the issue of substantial loss, it was submitted that the Applicant in his affidavit specifically stated that the Respondent's means are unknown and it is highly unlikely that the Respondent will be capable of refunding the decretal amount in the event that the intended Applicant's Appeal succeeds since the Respondent has not disclosed nor furnished the Court with any documentary evidence to prove his financial standing. According to the Applicant, the Respondent herein is the only one who can specifically show that he has means to repay the decretal amount if the court grants stay pending appeal and the said appeal succeeds.

16. The Applicant proposed that the decretal sum be secured by way of bank guarantee as the appeal is for liability and in the event the Ruling of the lower court is set aside and the matter proceeds de novo it will be very difficult to recover the security. Moreover, since there is reasonable apprehension that the Respondent will be unable to repay the decretal amount, the evidentiary burden is shifted to the Respondent to show that she has financial resources to satisfy the decretal amount. It was submitted that since the Respondent has failed to prove that he is a man of means or has financial resources to pay the decretal amount in the event the intended Appeal is filed and in turn succeeds, the court should allow the Application for stay of execution.

17. On the issue of security, it was submitted that the Applicant has already deposed in the Supporting Affidavit to the Application that he is willing to furnish reasonable security in form of a bank guarantee. The Court was urged to carefully weigh the prejudice, if any, to be suffered by Respondent in the event that the Appeal is admitted out of time vis-à-vis the hardship and/or injustice to be suffered by the Applicant in the event leave is not granted to file the Appeal out of time.

18. In view of all the foregoing, the Applicant submitted that he has demonstrated sufficient grounds for this Court to exercise discretion and enlarge time to file the intended Appeal.

19. In opposing the application, the Respondents relied on the replying affidavit sworn by Granton Ukonde Mulala, the 1st Respondent herein.

20. According to him, the Application has not been brought in good faith as the Plaintiff has been and continue to be guilty of laxity in making the 1st Respondent's claim good since the filing of this suit in 2016 to the delivery of the Judgment on the 3rd February 2021.

21. According to the Respondent, the 1st Respondent filed Kithimani Civil Case No. 317 of 2016 against the Applicant, the 2nd Respondent and Mr. Hanifa Mohamed who was the 1st Defendant vide a Plaint dated 17th August, 2016 and filed in court on 8th September, 2016 for injuries that he sustained in a road accident that occurred on 27th September, 2013 while travelling aboard Motor Vehicle Registration number KAV 294X which collided with Motor Vehicle registration number KAG 633R. The Applicant was sued as the driver while the 2nd Respondent was sued as the registered owner of motor vehicle registration number KAG 633R. Mr. Hanifa Mohamed was sued as the registered owner of Motor Vehicle registration number KAV 294X.

22. It was averred that even after the Plaint and summons to enter appearance were served upon the Applicant he did not enter appearance nor file a Defence within the prescribed time which necessitated

the 1st respondent herein to request for Judgment in default which was entered on 20th November, 2018. The matter then proceeded for hearing on 29th January, 2020 when the 1st Respondent/Plaintiff testified and closed his case. Only the 1st Defendant Mr. Hanifa Mohammed testified in court.

23. Judgment was thereafter delivered on 3rd February, 2021 by Hon G.O Shikwe in favor of the Plaintiff and against the Applicant and 2nd Respondent herein. Thereafter, the Applicant then filed a Notice of Motion Application dated 3rd June, 2021 seeking stay of execution and to set aside the ex-parte Judgment entered on 3rd February, 2021 and the Ruling on the said Application was delivered on 18th August, 2021 by Hon G.O Shikwe where the court held that the exparte Judgment entered was regular and the applicant's application dated 3rd June, 2021 was dismissed with costs to the 1st Respondent herein.

24. It was deposed that this Application is a waste of court's time and the purported appeal is an afterthought which has been filed way out of time and there are no sufficient reasons given by the Applicant for the delay in filing the appeal within stipulated timelines. While the Applicant seeks stay, it was noted that the Applicants have not shown any steps that have taken to execute against them.

25. In the deponent's view, the Applicant herein has not proved any substantial loss he stands to suffer if the orders for stay are not issued and that the Applicant has also brought this application with unreasonable delay which has not been explained. To the deponent, a perusal of the annexed memorandum of appeal reveals no chance of success and it's only filed to buy time hence the actions by the Applicant amount to abuse of the court process and should not be entertained at all costs by this Court.

26. Based on legal advice, it was deposed that the wheels of justice demand that there be an end to litigation and therefore injustice shall be occasioned if this case is to be re-opened given that the Applicant had been previously given adequate opportunity to defend the suit within the statutory prescribed timelines under the Civil Procedure Rules, 2010. The deponent lamented that he is still suffering from the injuries he sustained from the said accident caused by the Applicant herein and he continues to incur medical expenses to date.

27. It was averred that the entire Application as drafted and filed is an abuse of the court process, a total disregard of due process, smirks of impunity, trivializes the nature of Application, causes delay and also increases costs on a matter that is already finalized and fails to disclose any valid and legal reason for grant of orders for stay of execution as prayed for and ought to be dismissed with costs to the 1st Respondent herein.

28. In his submissions, the Respondent reiterated the foregoing and it was contended that the present Application was filed on 24th November 2021, after a delay of two (2) months, a clear indication that the Applicant is guilty of laxity and is keen on wasting court's time by making numerous and baseless Applications in court. According to him, this delay is so inordinate as to occasion an injustice and unfair advantage on the 1st Respondent if the Application is to be allowed at this juncture. Since the delivery of the judgment, the 1st Respondent has taken several steps to execute the Judgement including engaging a firm of auctioneers to execute the said Judgement on its behalf. It would be unfair to grant the orders as the 1st Respondent has incurred numerous costs.

29. It was submitted that the Applicant has not proved that it would suffer any loss if the orders sought are not granted and that on the flipside, it is the 1st Respondent on the losing side should the orders sought be granted as he would be kept away from enjoying the fruits of the judgment rendered by a competent court. The 1st Respondent should be allowed to proceed to execute his judgment as earlier scheduled.

30. According to the 1st Respondent, the Applicant sat pretty after belatedly filing the Memorandum of Appeal in March 2020 until after the 1st Respondent has instructed the 2nd Respondent to proceed on to advertise and sell the suit property by public auction to recover the loan advanced to the Plaintiff only to spring a surprise Application for stay of execution pending an intended appeal.

31. Given the age of the matter, it was submitted that the wheels of justice demand that there be an end to litigation and therefore injustice shall be occasioned if this case is to be re-opened given that the Applicant had been previously given adequate opportunity to defend the suit within the statutory prescribed timelines under the Civil Procedure Rules, 2010. To him, this excuse for the delay is a mere sham and ought not to be entertained by this Court.

32. It was further submitted that there is no pending appeal to warrant the granting of the orders sought and that the annexed Memorandum of Appeal stands no chance of success and it's only filed to buy time. Further, the Applicant has not in any way established that it has an arguable appeal and that the grounds given in the Memorandum of Appeal cannot see the light of the day as the same put reliance on unsubstantiated evidence.

33. In the 1st Respondent's view, the Applicant does not stand to suffer any substantial loss should the Application be declined as the Applicant is just but buying time to ensure the 1st Respondent does not enjoy the fruits of his judgement, which was rightfully obtained from a competent court.

34. In support of the submissions the 1st Respondent relied on *Kings Motors Ltd –vs- Shell & BP (Malindi) Kenya Ltd* Civil Application No. 336 of 2004, *Integrated Wood Complex Ltd & another –vs- Kenya National Capital Corporation Limited* Civil Application No. 315 of 2004 and *Joseph Gathanwa Njunge –vs- Dr. Lawrence Gakuu*, HCCC 138 of 2009.

35. It was therefore submitted that the 1st Respondent has not met the threshold set by the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010. The mere filing of a Memorandum of Appeal does not ipso facto connote that a stay of execution order should issue as such issuance will be at the unfettered discretion of the court

Determination

36. I have considered the application, the respective affidavits and the submissions filed as well as the authorities relied upon.

37. Section 79G of the *Civil Procedure Act* provides that:

> Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:
>
> Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

38. Under the proviso to section 79G of the *Civil Procedure Act*, an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so. In determining whether or not there is good cause, the courts have established the principles to be considered in exercising the discretion whether or not to enlarge time in *First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others* Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65 the Court set out the factors to be considered in deciding whether or not to grant such an application

and these are (i). the length of the delay; (ii) the explanation if any for the delay; (ii). the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; (iii). whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

39. Regarding the length of delay, in this case, it is clear that ruling sought to be appealed against was delivered on 18th August, 2021. This application was not made till 24th November, 2021, more than 3 months after delivery of the ruling. The Applicant had 30 days within which to lodge the appeal which means that delay is more than 2 months. Two months' delay is on the face of it an inordinate delay unless a satisfactory explanation is given.

40. As regards the reason for the delay, it was contended that due to internal office challenges, the insurer gave instructions to appeal the ruling after the prescribed period. Waki, JA in *Seventh Day Adventist Church East Africa Ltd. & Another vs. M/S Masosa Construction Company* Civil Application No. Nai. 349 of 2005 held that:

> "As the discretion to extend time is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant; the period of delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with the time limits, the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors...In an application for extension of time, each case must be decided on its own peculiar facts and circumstances and it is neither feasible nor reasonable to lay down a rigid yardstick for measuring periods of delay as explanations for such delays are as many and varied as the cases themselves...The ruling striking out the appeal is not only necessary for exhibiting to the application for extension of time but also for consultations between the applicant's counsel and their clients and the fact that the ruling was returned to Nairobi for corrections is a reasonable explanation for the delay...Where the Respondent has already recovered all the decretal sum and costs attendant to the litigation, the right of appeal being a strong right which is rivalled only to the right to enjoy the fruits of judgement, no prejudice would be caused to the respondent who has enjoyed his rights in full if an opportunity is given to the applicants to enjoy theirs too, even if it is on a matter of principle."

41. It is regrettable that the Applicants have contended themselves by merely stating that the cause of the delay was due to the insurer's internal office challenges without disclosing what these challenges were. I must however consider the fact that the right of appeal is a strong right which is rivalled only to the right to enjoy the fruits of judgement. In this case the matter is compounded by the fact that the 1st Respondent was never heard whether through his own fault or otherwise.

42. As regards prejudice the Respondent's only issue is that he has waited for a very long time to bring this matter to a close. It has been said there is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake which has put the other side to such advantage or that it cannot be cured by the application of that healing medicine. See *Waljee's (Uganda) Ltd vs. Ramji Punjabhai Bugerere Tea Estates Ltd* [1971] EA 188.

43. In this case right to hearing weighs heavily on my mind and unless the e result I find the application for leave to appeal out of time merited. The broad approach under the current constitutional dispensation is that unless there is fraud or intention to overreach, an error or default that can be put right by payment of costs ought not to be a ground for nullifying legal proceedings unless the conduct of the

party in default can be said to be high handed, oppressive, insulting or contumelious. The court, as is often said, exists for the purpose of deciding the rights of the parties and not imposing discipline. See *Philip Chemwolo & Another vs. Augustine Kubende* [1986] KLR 492; (1982-88) KAR 103.

44. I also associate myself with the opinion of the Court of Appeal in Court of Appeal in Nicholas Kinto Arap Korir Salat vs. Independent Electoral and Boundaries Commissions & others (2013) eKLR where it was held as inter alia follows: -

> " Deviation from and lapses in form and procedures which do not go to the jurisdiction of the court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardships and unfairness."

45. Where it is not shown that there is fraud or intention to overreach and an innocent party may adequately be compensated in costs, cases ought as far as possible be determined on their merits rather than on technicalities of procedure.

46. In the premises, I find this application merited. Time is hereby extended to the applicants to lodge their appeal. Let the memorandum of appeal be filed and served within 10 days from the date of delivery of this ruling.

47. As regards the second limb of the application, the principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides as follows:

> No order for stay of execution shall be made under subrule (1) unless—
>
> (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
>
> (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

48. In *Vishram Ravji Halai vs. Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, the Court is nolonger limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions. According to section 1A(2) of the *Civil Procedure Act* "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of

the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

49. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the *Civil Procedure Act* are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See *Suleiman vs. Amboseli Resort Limited* [2004] 2 KLR 589. This was the position of Warsame, J (as he then was) in *Samvir Trustee Limited vs. Guardian Bank Limited* Nairobi (Milimani) HCCC 795 of 1997 where he expressed himself as hereunder:

> " Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive

within the corridors of the court. Justice requires the court to give an order of stay with certain conditions."

50. On the first principle, Platt, Ag.JA (as he then was) in *Kenya Shell Limited vs. Kibiru* [1986] KLR 410, at page 416 expressed himself as follows:

> " It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money".

51. On the part of Gachuhi, Ag.JA (as he then was) at 417 held:

> " It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement."

52. Dealing with the contention that there was no evidence that the 1st Respondent would be able to refund the decretal sum if paid over to the Respondent, Hancox, JA (as he then was) in the above cited case when he expressed himself as follows:

> " I therefore think in the circumstances that these comments were unfortunate. Nevertheless, having considered the matter to the full, and with anxious care, there is in my judgement no justification whatsoever for holding that there is a likelihood that the respondents will not repay the decretal sum if the appeal is successful and that the appeal will thereby be rendered nugatory. The first respondent is a man of substance, with a good position and prospects. It is true his house was, in his words, reduced to ashes, but I do not take that against him. Both seem to me to be respectable people and there is no evidence that either will cease to be so, in particular that the first respondent will not remain in his job until pensionable age."

53. In this case the appeal is against a judgement arising from default proceedings.

54. In the matter before me, it is clear that whether by default of the applicant or otherwise, the applicant's case was never heard on merits. As was stated by the Court of Appeal in *CMC Holdings Ltd vs. Nzioki* [2004] KLR 173:

> " In an application for setting aside ex parte judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle. In the instant case the learned trial magistrate did not exercise her discretion properly when she failed to address herself as to whether the appellant's unchallenged

allegation that its counsel did not inform it of the hearing date for the hearing that took place ex parte and hence it would appear was true and not if true, the effect of the same on the ex parte judgement was entered as a result of the non-appearance of the appellant and on the entire suit. The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate...The second disturbing matter which arises from the decision of the learned magistrate in dismissing the application for setting aside the ex parte judgement is that in so dismissing the same application, the learned trial magistrate does not appear to have considered whether or not the defence which was already on record was reasonable or raised triable issues. The law is now well settled that in an application for setting aside ex parte judgement, the Court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if draft defence is annexed to the application, raises triable issues. The Court has wide discretion in such cases to set aside ex parte judgement. In the instant case, the defence and counterclaim was already in the file when the matter was heard ex parte and the trial magistrate stated that she considered the same and dismissed the same defence and counterclaim when the appellant was not in court to put forward its case. Further it appears that certain matters raised in the defence were not considered at all and indeed could not be considered without the appellant's input...What the Trial Court should have done when hearing the application to set aside the ex parte judgement was to ignore her judgement on record and look at the matter afresh considering the pleadings before her and see if on their face value a prima facie triable issue (even if only one) was raised by the defence and counterclaim. If the same was raised, then whether the reasons for the appellant's appearance were weak, she was in law bound to exercise her discretion and set aside the ex parte judgement so as to allow the appellant to put forward its defence. Of course in such a case, the applicant would be condemned in costs or even ordered to pay thrown away costs. The learned judge should not have considered what the learned Trial Court had concluded on the evidence before her but should have in the same way looked at the pleading and considered whether a triable issue was raised by the defence and if so, then the appeal should have been allowed."

55. In this appeal this court would be called upon to balance between the applicant's right to be heard on merits and the Respondent's right to enjoy the fruits of its judgement. In this case it is my view and I find that this is a case in which the stay ought to be granted on conditions.

56. Accordingly, I hereby grant stay of execution of the judgement appealed against on condition that the applicant deposits the sum of Kshs 300,000.00 in a joint interest earning account in the names of the respective advocates within 3o days from the date of this decision. In the alternative, the Applicant to furnish bank Guarantee from a reputable financial institution specific to this matter in the sum of Kshs 600,000.00 within the same period. In default of compliance, the stay will stand vacated.

57. However, as was appreciated by Platt, JSC in *Henry Bukomeko & 2 Others vs. Statewide Insurance Co. Ltd* Uganda Supreme Court Civil Appeal No. 13 of 1989:

> " Whereas on the authorities, if the delay is caused by the court registry, and the applicant has taken every step possible to prosecute the appeal, further time will be allowed to a blameless intending appellant, there is an overriding factor in this case, and that is that where an interlocutory appeal is taken great care must be exercised in getting the appeal on as quickly

as possible, in order that the trial may proceed with the minimum of delay. It is obvious that the longer an interlocutory appeal intervenes in the trial, the greater is the risk that the trial may be prejudiced. Therefore, rule 4 of the Court of Appeal Rules would be read as requiring an intending appellant to show sufficient cause in the light of the fact that the appeal is an interlocutory appeal which must be brought forward as soon as possible. Indeed, the court itself has a duty to see that such appeals are disposed of with special urgency."

58. In the premises I direct the appellant to ensure that the record of appeal is prepared and directions on the appeal taken within 45 days from the date of this ruling. In default, the orders of stay issued herein shall stand vacated.

59. The costs of the application are awarded to the respondent.

60. It is so ordered.

RULING READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 20TH DAY OF MAY, 2022.

G V ODUNGA

JUDGE

In the absence of the parties.

CA Susan