



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL MISC. APPL. NO. E404 OF 2020

THOMAS OKAO & ANOTHERAPPELLANT

-VERSUS-

LUCY MWIKALI KITONYO.....RESPONDENT

RULING

The Notice of Motion dated 5th October, 2020 seeks the following orders: -

2. **That** the Honourable Court do grant leave to the firm of Kimondo Gachoka to come on record for the Defendants/Applicants and to put in a Notice of Appointment of Advocate.
3. **That** there be a stay of execution of ex-parte judgment entered on 29th January, 2020 by the ***Honourable Magistrate P. Muholi (Mr.) Senior Resident Magistrate in CMCC No. 8294 of 2018*** and all other consequential orders against the Defendants/Applicants pending the hearing and determination of this application.
4. **That** pending the hearing and determination of this Application, the defendant's/Applicants attached Motor Vehicle KAL 414S be released.
5. **That** the *ex-parte* judgment and/or the Court proceedings in CMCC No. 8294 of 2018 thereof be set aside, and the matter begin *de-novo* and the Defendants/Applicants be allowed to fairly participate in the proceedings.
6. **That** the *ex-parte* judgment and all other consequential orders thereof entered on 29th January, 2020 herein against the Applicant's be set aside and the Applicants herein be granted a chance to ventilate their Defence of merit.
7. **That** his application be served on the Plaintiff/Respondent and heard *interparties* on such date and time as this Honourable Court may direct.
8. **That** the costs of this Application be borne by the respondent.

The application is supported by the affidavits of **Purity Waikwa and Peter Abuga Okao** both sworn on 5th October, 2020. The respondent filed grounds of opposition in response to the application. The grounds of objection are on points of law and counsel for the respondent considered them to be a preliminary objection. Directions were given that the preliminary objection and the application be heard simultaneously.

Miss Waikwa, counsel for the applicant, submit that the application seeks to set aside the ex-parte judgment so as to enable the applicant participate in the proceedings. The application also seeks to set aside the orders of the trial court entered on 29th January, 2020. A default judgment was entered for non-appearance. The applicant's motor vehicle has been attached yet the applicant notified his insurers after the accident. The insurers instructed an advocate who failed to enter appearance of file defence. The firm of Kairu & Mccourt Advocates were instructed by the insurers. The matter proceeded ex-parte. The mistake of counsel should not be re-visited on the client. The firm of Kimondo Gachoka & Co. Advocates has taken over the matter.

Counsel urged the court to exercise its inherent powers as provided by Section 3A of the Civil Procedure Act and allow the application. Further, under Article 251, every persons has the right to be heard. The applicant will suffer irreparable damage and loss if the orders are not granted.

Mr. Kaburu appeared for the respondent. Counsel contend that there is no Appeal pending and therefore the orders being sought cannot be granted in this application. The court's jurisdiction only involves stay of execution pending appeal. Judgment cannot be set aside pending appeal as the issue at hand involves execution under Section 34 of the Civil Procedure Act.

The two grounds of opposition are: -

- 1. This court has no known original jurisdiction to deal with matters arising out of execution of a decree in the trial court. It can only deal with an appeal or stay of execution pending appeal. No appeal has been alleged or filed herein.**
- 2. This court cannot set aside a trial court's judgment without an appeal therefrom.**

The decree annexed by the applicant indicate that Judgment of the trial court was delivered on 29th January, 2020 and the respondent was awarded Kshs. 602,550. It is the applicant's position that this was a default Judgment. The applicant's insurer instructed an advocate to act for the applicant but failed to do so leading to the entry of the default Judgment. The suit before the trial court is Civil Case number 8294 of 2018. The execution process started after the Judgment was entered on 29/1/2020. The effect of this is that the applicant had over one year (2019) to follow up the suit with his insurers but seems to have gone to sleep until when the execution started when he woke up.

Section 34(1) of the Civil Procedure Act states as follows: -

All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

According to the provisions of Section 34(1), all issues relating to execution of decrees are to be determined by the court which is executing the decree. The applicant is contesting the execution of the decree as he was not represented at the trial. The correct procedure would have been to file an application before the trial court and seek the setting aside of the judgment. I have read the affidavit of Purity Waikwa advocate and the same doesn't indicate whether an application to set aside the Judgment was filed before and determined by the trial court.

Order 10 rule 6 of the Civil Procedure Rules states as follows: -

Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.

Similarly, Order 10 rule 11 provides as follows: -

Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.

Section 29 of the Civil Procedure Act defines the term "court which passed a decree" as follows.

The expression "court which passed a decree", or words to that effect, shall, in relation to the execution of decrees, except where the context otherwise requires, include: -

- a) Where the decree to be executed has been passed in the exercise of appellate jurisdiction, the court of first instance;**
- b) Where the court of first instance has ceased to exist or to have jurisdiction to execute it, the court which, if the suit wherein the decree was passed were instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit.**

It is evident from the record that the applicant did not file an application to set aside the Judgment before the trial court. The proper procedure would have been to file an application to stay execution and also set aside the Judgment before the trial court. Upon dismissal of such an application, the applicant would have approached this court by way of an appeal. The inherent powers of the court also have to be exercised within procedural boundaries. The applicant's position is that the High Court can simply set aside the Judgment of the trial court and order that court to allow the applicant defend himself. This court has to take into account the fact that the respondent followed the correct process and obtained a valid judgment. There is no information on how the applicant's insurer instructed M/s Kairu & Mccourt Advocates. The applicant has to go back to the trial court and explain why no appearance was entered and defence filed yet summons were duly served.

Even if the said advocates were instructed, the non-entry of appearance and filing of defence is not the respondent's problem. Indeed, the contention that an advocate was instructed to defend the applicant does confirm that proper service of summons was effected on the applicant.

It is my considered view that the applicant has approached the court through the back door which is locked. The invocation of Articles 159 and 251 of the constitution cannot cure the application to set aside the ex-parte judgment. Should it be established that attempt was made before the trial court to set aside the said judgment and such attempt was dismissed, then the applicant can move this court by way of an appeal. Time to file the appeal has lapsed and the applicant can seek extension of time. This position is only if such an application was filed before the trial court.

In the end, I do find that the application dated 5th October, 2020 lacks merit and the same is dismissed with costs.

Dated and Signed at Nairobi this 28th day of January 2021

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S. CHITEMBWE

JUDGE