



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 707 OF 2019**

**HARUN NGANGA KIBIRIE.....APPELLANT**

**VERSUS**

**ZERAH ANYANGO ONIALA t/a Ogwel General Suppliers.....1<sup>ST</sup> RESPONDENT**

**CHRISTOPHER OMUSALA.....2<sup>ND</sup> RESPONDENT**

**JASON MAROKO.....3<sup>RD</sup> RESPONDENT**

**RULING**

This is an application by way of Notice of Motion dated 8<sup>th</sup> May, 2020 seeking a stay of execution of the ex-parte judgment entered on 20<sup>th</sup> December, 2018 and the ruling delivered on 8<sup>th</sup> November, 2019 (which should read 15<sup>th</sup> November, 2019). It is brought under Order 22 rule 22, Order 42 rules 4 and 6, Order 51 rules 1 and 3 of the Civil Procedure Rules, Sections and 3A of the Civil Procedure Act.

The respondents had sued the appellant in the lower court and served summons to enter appearance and file a defence. However, the appellant only entered appearance but failed to file a defence.

The respondents then applied for judgment to be entered against the appellant which was done on 20<sup>th</sup> December, 2018. An application was then lodged to set aside the said *ex parte* judgment which however was dismissed in a ruling dated 15<sup>th</sup> November, 2019.

Following that dismissal, the appellant filed a Memorandum of Appeal dated 2<sup>nd</sup> December, 2019 raising several grounds therein. The present application is opposed and there is a replying affidavit sworn by the 1<sup>st</sup> respondent. Counsel agreed that this application be addressed by way of affidavit evidence.

The applicant has admitted the default of failing to file a defence which was attributed to the fact that counsel who was handling the matter left the firm without handing over. The step taken to file an appearance is in itself a demonstration that the applicant intended to be heard in the dispute lodged in court.

There is also a requirement that anyone approaching the court should be given a fair hearing if the facts and circumstances of the case allow.

There is no dispute that a judgment entered for failure to file a defence, like in the present case is a valid judgment. However, it is important to consider that the ends of justice require a party who desires to be heard, to have such an opportunity.

In paragraph 18 of the supporting affidavit the applicant is prepared to abide by any reasonable conditions that may be imposed by the court. There is also the contention that the source of income of the 1<sup>st</sup> respondent is not known and that if the appeal succeeds after the decree is settled, the applicant may not recover the money.

I have considered the material presented before the court and as stated in the respective affidavits. I am persuaded that there is an arguable appeal and that the applicant should be granted the orders sought.

There shall therefore be a stay of execution of the ex parte judgment entered against the appellant on 20<sup>th</sup> December, 2018. That being the case, the ruling of the court made on 15<sup>th</sup> November, 2019 is also stayed.

However, the applicant shall pay the respondents all the costs occasioned by this application from the date the entry of the ex parte judgment

was made.

*Dated, signed and delivered at Nairobi this 11<sup>th</sup> day of February, 2021.*

**A. MBOGHOLI MSAGHA**

**JUDGE**