



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CIVIL CASE NO. 70 OF 2019

ABDUL MUGAMBI..... 1ST APPELLANT/APPLICANT

JULIUS NJOROGE GICHIA.....2ND APPELLANT/APPLICANT

-VERSUS-

MARY MUTHONI KANG'ERI

PETER MWANGI GATHERU (Suing as the Legal Representatives of the Estate of

ALICE WACHINGA GATHERU (DECEASED)).....RESPONDENTS

AND

KYALO GREGORY.....1ST THIRD PARTY RESPONDENT

IRENE MUMBI.....2ND THIRD PARTY RESPONDENT

RULING

1. Before me is an application brought by way of Notice of Motion dated 6th November 2020 filed by the Appellants through counsel Kimondo Gachoka & Company.

2. The application was brought under section 1, 1A, 1B, 3 and 3A of the Civil Procedure Act (*Cap 21*) and Order 51 Rules 1 and 3 of the Civil Procedure Rules 2010, as well as Article 159 (2) (d) of the Constitution of Kenya 2010, seeking the following orders –

1. That the order of the Honourable Judge Odunga made on 5th November 2020 dismissing the Applicant's application dated 12th October 2020 be set aside

2. The Applicants application dated 12th October 2020 seeking for stay of execution and extension of time within which to comply with any stay conditions issued on 23rd (should be 22nd) October 2020 pending the hearing and determination of this application be reinstated.

3. The costs of this application be in the cause.

3. The application has grounds on the face of the Notice of Motion. The grounds are that the Applicant was aggrieved by the judgment of the trial court and had filed in the High Court Civil Appeal No. 70 of 2019 and applied for stay of execution, and that temporary stay orders had initially been issued at that Machakos High Court on 22nd October 2020 and the application was to come up for mention on 5/11/2020.

4. It is also a ground that the registry at Machakos High Court erroneously failed to forward the file to the High Court at Makueni and that the advocate travelled all the way to Makueni High court on 5/11/2020, only to discover that the file was again placed before the Judge at Machakos High Court who dismissed the application for non-attendance.

5. The application was filed with a Supporting Affidavit sworn by George Mongeri advocate for the Applicants on 6th November 2020, which provides further details that since the file was a Makueni High Court file; counsel expected that the file would be taken back to

Makueni High Court after the Machakos High Court orders of 22nd October 2020.

6. The application is opposed. In this regard, the Respondents filed a replying affidavit sworn on 13th November 2020 by Geoffrey Kilonzo advocate for the Respondents in which it was deposed that the application dated 6/11/2020 was bad in law and only meant to frustrate the disposal of the application dated 12/10/2020, as the Applicants did not intend to prosecute that application, thus the failure of their advocate to attend court after obtaining interim stay orders.

7. The application proceeded by way of filing written submissions. The Respondents' counsel filed written submissions on 9th December 2020 while the Applicants' counsel filed written submissions later on 7th January 2021. I have perused and considered the submissions filed on both sides. I note that both sides cited a number of legal authorities.

8. I will start by acknowledging that before the hearing of the present application, on 6th November 2020 the court at Machakos reinstated the stay of execution orders issued on 22/10/2020 on interim basis.

9. Coming now to the application – it is an application for setting aside the orders of this court made on 5th November 2020 dismissing the application of the Applicant dated 12th October 2020 for non-attendance, and reinstatement of that application for hearing which application sought for stay of execution and extension of time within which to comply with the stay conditions issued on 22nd October 2020 pending the hearing and determination of the application dated 12/10/2020. As I have said above in this ruling, the stay orders issued on 22nd October 2020 have already been extended by the court, to date.

10. On whether there are merits for setting aside the orders of dismissal of the application dated 12th October 2020, it is quite clear to me that the application dated 12th October 2020 was dismissed for non-attendance of the Applicant or his counsel in court on 5/11/2020 the scheduled day. This court has wide discretion and power in considering whether to set aside such dismissal provided an Applicant has demonstrated sufficient cause. In this, I am guided by case of **Patel –vs- E.A Cargo Handling Services Ltd (1974) E.A 75** wherein the court stated that ***there are no limits or restrictions on the Judge's discretion except that if he does vary the judgment he does so in terms as may be just.***

I also rely on the case of **Shah –vs- Mbogo & Another (1967) E.A 116** on the exercise of such discretionary power by the court.

11. Has the Applicant demonstrated sufficient cause for the setting aside of the ex-parte order of dismissal of their application? The reason given for the non-attendance of the advocate for the Applicant at Machakos High court is that the advocate went to Makueni court instead of Machakos Court because the case was a Makueni file. Is such a sufficient cause?

12. In **Wachira Karani –vs- Bildad Wachira (2016) eKLR** Mativo J. had this to say on sufficient cause -

“However, what constitutes “sufficient cause” to prevent a defendant from appearing in court, and what would be fit conditions for the court to impose when granting such an order, necessarily depend on the circumstances of each case. Although it is an elementary principle of our legal system, that a litigant who is represented by an advocate, is bound by the acts or omissions of the advocate in the cause of the representation, in applying that principle, courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocates default, unless the litigant is privy to the default or the default results from failure, on the part of the litigant, to give the advocate due instructions.

13. In our present situation, it is a fact that the case was a Makueni High Court case. The application was forwarded to Machakos High Court only because there was no Judge sitting at Makueni. Thus the reason given by the advocate for non-attendance at Machakos court are reasonable. I also find nothing that can be blamed on the litigant regarding the failure of the advocate to attend court at Machakos. I will therefore set aside the dismissal of the application for non-attendance and reinstate it.

14. Having determined the issue of reinstatement of the application, I note that this court has not been told that there is an existing appeal filed against the original stay, issued on 12th February 2020. The appeal herein is only against the judgment of the magistrates' court in Makindu CMCC No. 111 of 2015 delivered on 28/08/2019. It is evident also that this matter has dragged so long at application after applications stage, and

I note that the extension of time sought in the pending application dated 12th October 2020 is for a very specific limited short period but the matter has so far dragged on for several months.

15. In my view therefore, in the circumstances of this matter, it is not in the interests of justice to extend the interim stay orders for long. I will thus grant extension of interim stay only up to the end of April 2021 or the determination of the application dated 12/10/2020, whichever comes first.

16. Consequently, the application dated **06/11/2020** is allowed to the extent that. I order as follows:-

1. The order of the Honourable Justice Odunga made on 5th November 2020 dismissing the Appellants/Applicant's application dated 12th October 2020 is hereby set aside.

2. The application dated 12th October 2020 is hereby reinstated and will be heard on priority basis.

3. The interim stay orders granted by court in the application dated 12th October 2020 are extended to 30th April 2021 or the determination of the said application whichever comes first. Costs in the cause.

DATED, DELIVERED AND SIGNED THIS 16TH DAY OF MARCH 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE