



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CIVIL APPEAL NO E025 OF 2020**

**ERASTUS IAN KANDIRA.....APPELLANT**

**-VERSUS-**

**MOST REV ZACCHEAUS OKOTH.....1<sup>ST</sup> RESPONDENT**

**THE REGISTERED TRUSTEES ARCHDIOCESE OF KISUMU.....2<sup>ND</sup> RESPONDENT**

**RULING**

**INTRODUCTION**

1. In his Notice of Motion application dated 26<sup>th</sup> January 2021 and filed on 27<sup>th</sup> January 2021, the Appellant sought that an order for stay of proceedings pending hearing and determination of his Appeal be granted. His said application was supported by his Affidavit and Supplementary Affidavit that he swore on 26<sup>th</sup> January 2021 and on 15<sup>th</sup> February, 2021.

2. His case was that he instituted a suit against the Respondents herein in 2016 seeking to recover a sum of Kshs 12,180,322/=. The matter proceeded for full hearing and judgment was entered in his favour for the said sum plus interest from the date of filing suit and costs. The Respondents failed to pay and he commenced execution proceedings against them. They filed an Appeal against the said judgment but the Appeal was dismissed by Cherere J paving way for fresh execution proceedings.

3. Through their new advocates, the Respondents entered into a consent which was recorded at the Chief Magistrate's Court. They paid him a sum of Kshs 540,593/= but that when the second instalment became due, they reneged on the consent and filed an application seeking to set aside the judgment on the ground that their previous advocates did not have instructions to record a consent. The court hearing the case set aside the judgment and directed that the matter be heard afresh.

4. It is that judgment that aggrieved the Appellant herein necessitating the filing of the present application which he urged this court to grant as his Appeal had a high probability of success and it would be rendered nugatory if the same was not allowed.

5. In opposition to the said application, on 29<sup>th</sup> January 2021, Rev Fr Felix G.O. Atindah swore a Replying Affidavit on behalf of the respondents herein. The same was filed on 1<sup>st</sup> February 2021 together with Grounds of Opposition also dated 29<sup>th</sup> January 2021.

6. The Respondents' case was that the judgment in the lower court was set aside on the ground that the same proceeded *ex parte* as no hearing notice was served upon them. It was their contention that the Appeal herein was seeking to sustain an irregular and/or null and void judgment and therefore had no chances of success. It was their averment that the Appeal will not be rendered nugatory if the lower court proceedings were not stayed as had been sought herein.

7. They added that the *ex parte* judgment in the lower court was set aside because the claim relating to commission on sale of real property was grounded on an illegal contract, that the other part (**sic**) was *res judicata* and/or totally lacking in merit and that the award of interest at thirty (30%) per cent per annum was wholly wrong and contrary to law and was not explained and was unconscionable. They thus urged this court to dismiss the present application.

**LEGAL ANALYSIS**

8. The Appellant submitted that his Appeal would be rendered nugatory and reduced to a mere academic exercise, should the proceedings in the lower court progress. He averred that the Respondents stood to suffer no prejudice and none has been pleaded or even demonstrated in their response.

9. It was his further submission that stay of proceedings pending appeal is provided for under Order 42 Rule 6 of the Civil Procedure Rules and that the purpose of stay is to preserve the subject matter in dispute so that the rights of an Appellant who is exercising the undoubted right of appeal are safeguarded so that if the appeal is successful, it is not rendered nugatory. He argued that grant or refusal of an application for stay of execution pending appeal was discretionary.

10. He placed reliance on the case of **James Wangala & Another vs Agnes Naliaka Cheseto [2012]eKLR**, **Tobias Onyango Kichula & Another vs Samuel (sic) Oler Kichula & Others [2021]eKLR** and **Stanley Kangethe Kinyanjui vs Tony Ketter & Others [2013]e KLR** and **RWW vs EKW [2019] eKLR** to buttress its case. However, he had only annexed copies of was **Tobias Onyango Kichula & Another vs Samuel (sic) Oler Kichula & Others (Supra)** and **RWW vs EKW (Supra)** to his Written Submissions that were filed on 15<sup>th</sup> February 2021.

11. On its part, the Respondents argued that there was no dispute as to whether the Appellant has a right of appeal but that what was in dispute was whether or not the Appeal herein had chances of success. They submitted that the Appeal herein was frivolous and that it was not in the interest of justice to grant the order for stay of proceedings. They added that the present application was filed as an afterthought and delay in filing the same had not been explained and that the Appellant's Appeal will not be rendered nugatory if the proceedings of the Lower Court are allowed to continue.

12. It was their further submission that the lower court was satisfied that they had a defence on record which raised issues entitling them to be heard. They argued that in view of this, this court was unlikely to interfere with the lower court's discretion which therefore rendered the Appeal herein frivolous.

13. To buttress their arguments, they relied on the cases of **David Morton Silverstein vs Atsango Chesoni [2002] e KLR** and **Lucy Waithera Kimanga & 2 Others vs John Waiganjo Gichuri [2015] eKLR**.

14. Although the Appellant relied on the provisions of Order 40 Rule 1 of the Civil Procedure Rules, 2010 and Section 63 (e) of the Civil Procedure Act Cap 21 (Laws of Kenya), he did not submit on this issue and/or demonstrate that the principles of the granting of an interlocutory injunction were applicable in the circumstances of the case herein. This court did not therefore address itself to the merits or otherwise of the granting of an injunction.

15. Turning to Order 42 Rule 6(1) of the Civil Procedure Rules which the Appellant also relied upon, the conditions under which either the trial court or an appellate court may order stay of proceedings pending an appeal have not been specified. However, the conditions under which an order for stay of execution are clearly spelt out in Order 42 Rule 6(2) of the Civil Procedure Rules. The court therefore has to rely on the settled principles on when proceedings may be stayed pending appeal.

16. The question of whether or not to grant an order for stay of proceedings is a discretionary one. This discretionary power must be exercised judiciously. The court has to consider if it will be in the interests of justice to grant the same. The underlying interest ought to be that the appeal should not be rendered nugatory. Gikonyo J addressed the question of an order for stay of proceedings being an important consideration in the case of **Lucy Waithera Kimanga & 2 Others vs John Waiganjo Gichuri (Supra)**.

17. This aspect of being rendered nugatory must be hinged on the fact of whether or not the appeal is an arguable on appeal and not whether the appeal will be successful. The reason for this is that at this stage, a court ought to be very cautious not to look into the merits or otherwise of the appeal as that is under the purview of the appellate court. At this stage, the court should only be concerned with the question of whether or not the appeal will be rendered nugatory.

18. Going further, this court was cognisant of the fact that an arguable appeal only needed to raise a single *bona fide* point worthy of consideration and need not be one that must necessarily succeed as was held in the case of **Co-operative Bank of Kenya Ltd vs Banking Insurance of Finance Union (Kenya) [2015]eKLR**.

19. As the Court of Appeal also held in the case of **UAP Insurance Company Ltd vs Michael John Beckett [2004] eKLR**, all an applicant is required to show is that he has an arguable appeal which is not frivolous and that the appeal will be rendered nugatory if the stay of proceedings is not granted.

20. In the case of **David Morton Silverstein vs. Atsango Chesoni (Supra)**, the Court of Appeal citing **Kenya Commercial Bank Ltd vs. Benjoh Amalgamated Ltd & Another [1998] e KLR** held that it is not the law that a stay of proceedings cannot be granted but that each case depends on its own facts.

21. Further in the case of **Niazsons (K) Ltd. vs. China Road & Bridge Corporation (Kenya) [2001] e KLR**, Onyango-Otieno, J (as he then was) held that:-

**“Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay...should be granted.”**

22. The prayer for stay of proceedings is an equitable relief. An applicant must have come to court with clean hands. It is therefore important for the court to consider whether or not the application for stay of proceedings has been filed expeditiously.

23. The Appellant did not submit on the issue of delay. He may have opted not to submit on the same as on 2<sup>nd</sup> February 2021, when addressing the question as to whether or not to order an order for stay of proceedings pending the hearing and determination of the present application, this court held that there was no delay in filing the present application.

24. A perusal of the Memorandum of Appeal dated 15<sup>th</sup> December 2020 and filed on 18<sup>th</sup> December 2020 led this court to the conclusion that the intended appeal was indeed arguable and not frivolous as the question before the appellate court was whether or not the lower court exercised its discretion correctly in having set aside the judgment after parties had entered into a consent for the payment of the decretal sum.

25. Whereas the Appellant contended that the lower court set aside the judgement on the ground that the Respondents' previous advocates did not consult the Respondents before entering the consent, the Respondents contended that the judgment was set aside due to non-service upon them to attend a defence hearing.

26. In the event the court did not to grant an order for stay of proceedings and the Appeal herein was heard and was successful, the proceedings in the lower court would have been rendered unnecessary, even though an appropriate order for costs could have been made to remedy that.

27. Accordingly, having considered the affidavit evidence and the Written Submissions and the case law by the respective parties, this court came to the firm conclusion that this was a suitable case for it to grant an order of stay of proceedings so as not to render the Appeal herein nugatory. Judicial time is precious and scarce and must not be wasted in proceedings that would end up being academic exercises.

28. As was held in the case of Muchanga Investments Ltd vs Safaris Unlimited (Africa) Ltd & 2 Others [2009]eKLR, the Court of Appeal rendered itself as follows:-

**“Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice.”**

### **DISPOSITION**

29. Accordingly, the upshot of this court's decision was that the Appellant's Notice of Motion application dated 26<sup>th</sup> January 2021 and filed on 27<sup>th</sup> January 2021 was merited and the same be and is hereby granted in terms of Prayer No (3) therein on condition that:-

**1. THAT the Appellant shall file and serve his Record of Appeal within forty five (45) days from the date of this Ruling as the proceedings of the lower court are ready.**

**2. THAT in the event the Appellant shall default in the order given in Paragraph 29(1) hereinabove, the order of stay of proceedings will automatically lapse and the Respondents will be at liberty to move the lower court as provided by the law to proceed with the hearing and determination of CMCC No 303 of 2016 Erastus Ian Khandira vs Most Rev Zaccheus Okoth & Another.**

**3. Costs of the application will be in the cause.**

**4. Either party is at liberty to apply.**

30. It is so ordered.

**DATED and DELIVERED at KISUMU this 26<sup>th</sup> day of April 2021**

**J. KAMAU**

**JUDGE**