



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CIVIL APPEAL NO. E10 OF 2020**

**STANLEY MIRITI.....APPELLANT/APPLICANT**

**VERSUS**

**JULIUS MURIUNGI MURIANKI (Suing on behalf of**

**AGUSTA KARIGU MURUNGI (Deceased)).....RESPONDENT**

**RULING**

1. On 22<sup>nd</sup> October 2014, *ex parte* Judgment was entered against the Appellant in Meru CMCC No. 202 of 2021. The Appellant subsequently filed an application dated 22<sup>nd</sup> June 2020 seeking to set aside the *ex parte* Judgment for the reasons that he was never served with the summons to enter appearance and/or pleadings in the matter. On 19<sup>th</sup> October 2020, the Senior Principal Magistrate Hon S. N. Abuya sitting in Meru delivered Ruling in CMCC No. 202 of 2012 dismissing the Appellant's application seeking to have the *ex parte* judgment set aside.

2. Being dissatisfied with the above decision, the Respondent filed a Memorandum of Appeal dated 23<sup>rd</sup> October 2020 and subsequently filed an application dated 9<sup>th</sup> February 2021 seeking the following orders: -

***i. Spent***

***ii. THAT this Honourable Court be pleased to grant stay of execution of the Judgment entered/delivered on 22<sup>nd</sup> October 2014 and the decree herein pending hearing and determination of this application.***

***iii. THAT this Honourable Court be pleased to stay the execution of the Judgment/Decree obtained herein pending the hearing and determination of the Applicant's Appeal filed at the High Court of Kenya at Meru as Civil Appeal No. E010 of 2020.***

***iv. THAT the costs of this Application abide the outcome of the Appeal.***

***Applicants' Case***

3. The application is supported by the grounds on the face of the application and by the supporting affidavit of Kevin Ngure, the Deputy Claims Manager at Directline Assurance Company Limited who are the insurers of the motor vehicle registration number KBF 503E which is the subject of the matter. He avers that *ex parte* Judgment was entered on 22<sup>nd</sup> October 2014 when the Respondent was awarded a total of Ksh1,429,350/= plus costs and interests and that the Applicant's application to have the *ex parte* Judgment set aside was dismissed vide a Ruling delivered on 19<sup>th</sup> October 2020 and being dissatisfied with the said Ruling, the Applicant has proffered Civil Appeal No. E10 of 2020, which Appeal has high chances of success and that at any time the Respondent may proceed and sell the Applicant's motor vehicle and he is apprehensive that should the Appeal be successful, the Respondents may not be in a position to settle the substantial sums involved. He states that the Appellant is willing and ready to furnish such reasonable security as the Court may order. He states that the Respondent has not disclosed nor furnished the Court with any documentary evidence to prove his financial standing.

***Respondents' Case***

4. The application is opposed vide the Respondent's replying affidavit sworn on 19<sup>th</sup> February 2021. The Respondent states that he instituted the suit in the lower Court following the death of his sister who was involved in a road traffic accident involving motor vehicle registration number KBF 563E belonging to the Applicant. He states that at the time of her demise, the deceased was the sole provider for her seven children. He states that the matter proceeded for formal proof after interlocutory judgment was entered as the Applicant failed to enter appearance despite proper service of summons and that prior to that his Advocates had issued a statutory notice and demand to which the Applicant's insurers responded to but failed to take proper action. He states that the deceased's children have been suffering after losing their

sole bread winner for over 12 years and that the instant application is meant to further delay the enjoyment of the fruits of Judgment. He states that the application is merely a tactic to avoid payment of the decretal sum and that the Applicant never bothered to challenge the contents of the affidavit of service by the process server before the trial Court and that in any event, sufficient evidence was adduced to prove that the deceased, his late sister died as a result of the accident involving the Applicant's motor vehicle and that dependency was also proved. He prays that the application be dismissed as it is a delay tactic.

### **Respondent's Submissions**

5. Only the Respondent filed submissions. The Respondent's submissions are dated 22<sup>nd</sup> March 2021. The Respondent restates the facts as set out in the application and affidavits. He also gave a brief history of the matter and stated that vide a plaint dated 20<sup>th</sup> July 2012, the Respondent sued the Applicant to recover damages under the provisions of the Fatal Accidents Act and the Law Reforms Act (Cap 32 and 26) respectively on his own behalf and on behalf of the deceased's other dependents; That the deceased's death was as a result of a road traffic accident which occurred on 21<sup>st</sup> July 2009 at Maili - Tatu along Meru – Maua road when the deceased was lawfully walking along the road and was hit by motor vehicle registration number KBF 563E belonging to the Appellant; That prior to the filing of the suit, the Respondent, through his Advocates had issued a statutory notice and demand letter which was responded to by the Applicant's insurer; That upon service of summons upon the Applicant, he neither entered appearance nor filed a defence and the Respondent thereby requested for interlocutory judgment to be entered which was so entered on the strength of return of service by a qualified court process server and there that the matter proceeded for formal proof hearing on 16<sup>th</sup> June 2014 and judgment was delivered on 22<sup>nd</sup> October 2014 and that the Applicant subsequently filed an application seeking to set aside both the interlocutory judgment delivered on 22<sup>nd</sup> October 2014 and to be allowed to file his defence out of time, which application was dismissed vide the Court's Ruling delivered on 19<sup>th</sup> October 2020 and this is what led to the filing of the Memorandum of Appeal on 27<sup>th</sup> October 2020. The Respondent adds that all along, there has never been any orders for stay before the lower Court and he has greatly indulged the Appellant.

6. On whether or not the application has met the threshold for grant of stay orders, the Respondent submits that the Applicant has not substantiated what loss he is likely to suffer should stay not be granted. The Respondent seems to state that it is not enough for the Applicant to state that he (the Respondent) may not be able to pay the decretal sum should the Appeal succeed; The Respondent further states that there was inordinate delay in bringing the instant application as it has taken more than 3 months after filing the Memorandum of Appeal.

7. The Respondent has however further submitted that he is willing to indulge the Appellant on the conditions that the Appellant deposits in a joint interest earning account in the names of the Advocates for the respective parties and in a bank of the Respondent's election within 30 days from the date of the Ruling to be given by the Court, both the decretal amount with interests accrued; and the costs awarded to the Respondent in the Ruling delivered on 10<sup>th</sup> August 2020 and 19<sup>th</sup> October 2020 proposed to amount to the sum of Ksh 40,000/=; and finally that the Appellant pays the auctioneers fees at a rate to be agreed between the Appellant and the Auctioneer or reasonably taxed by the Court.

### **Issues for Determination**

8. There is only one issue which the instant Application presents for determination: -

#### ***i. Whether or not this Court should grant stay of execution pending Appeal.***

### **Stay of Execution Pending Appeal**

9. The law concerning applications for stay of execution of a Judgment and/or Ruling are well espoused in the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010, as follows: -

***'No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.***

***No order for stay of execution shall be made under sub rule (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.***

***(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.'***

### **Arguable Appeal**

10. Although the rules do not expressly provide for it, in such applications for stay, the Court must be satisfied that there is an arguable appeal as a frivolous appeal cannot support a substantial loss. The instant Appeal seeks to challenge the Ruling and/or Order of the lower Court refusing to set aside an *ex parte* judgment. This is nature of appeal is indeed allowed in law. The gravamen of the Applicant's claim is that the lower Court erred in failing to apply the correct principles in setting aside a judgment and that it erred in finding that he was duly served but failed to enter appearance. Without going into the merits of the claim so as not to embarrass the Appeal Court, this Court finds that there is indeed an arguable case in the intended appeal. An arguable case does not mean one that must eventually succeed and it is not

for this Court to go into the merits of the claim at this stage. See the case of **Omar Shurie v. Marian Rashe Yafar (Civil Application No. 107 of 2020)**.

#### ***Nature of application vis a vis the Ruling/Order being appealed against.***

11. This Court observes that although the instant Appeal is one against the Ruling delivered on 19<sup>th</sup> October 2020 refusing to set aside the *ex parte* judgment, the application before the Court seeks stay pending Appeal of the main Judgment delivered on 22<sup>nd</sup> October 2014. This is not the proper procedure as the Civil Procedure Rules envisage that such an application for stay ought to be a direct consequence of the decision being appealed.

12. By filing an application for stay of a main judgement pending appeal of a subsequent Ruling, it is indeed possible that the Applicant may be using the said Ruling to make an application for stay through the backdoor. This observation is heightened by the fact that the Judgment in issue herein was delivered a long while back, in 2014. This should not be the case. The application before the court ought to have been one for stay of proceedings based on the ruling appealed from, which was ruling refusing to set aside *ex parte* judgment of 22 October 2014.

13. The total effect of the stay of proceedings would be to stop the execution of the *ex parte* judgment of 2014 and this Court, being a court of justice and the Respondent not having made any submissions on this issue, this Court will go ahead and determine the application for stay on its merit. This Court is also mindful of the fact that the Applicant would still be at liberty to file an application for injunction pending appeal of the said Ruling, which if successful, would have served the purpose the instant applications seeks to serve.

#### ***Substantial loss and whether the Appeal will be rendered nugatory***

14. One of the leading authorities in the issue of substantial loss is the case of **Kenya Shell Limited v Kibiru Another Civil Application No. NAI 97 of 1986 (1986) KLR 416** where Platt, AG JA held 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”.***

15. On whether substantial loss may result to the Applicant unless the order is made, this Court observes that subject matter of the matter is money decrees being the award of damages of Ksh 1,429,350/=. The Applicant has argued that should the appeal succeed, he is apprehensive that he may not be able to recover same from the Respondent. In response, the Respondent merely states that it is not enough for the Applicant to state that he, the Respondent may not be able to pay the decretal sum should the appeal succeed.

16. Once an Applicant states that they are apprehensive of the inability of the Respondent to pay the decretal sum should the appeal succeed, the burden of proof shifts to the Respondent to prove that they can pay. See the case of **National Industrial Credit Bank Limited -v- Aquinas Francis Wasike and Another (UR) C.A and Bonface Kariuki Wahome v. Peter Nziki Nyamai & Another Kajiado Civil Appeal No. 43 of 2018 (2019) eKLR**. The Applicant having raised his suspicions as to the ability of the Respondent to settle the decretal amount, the Respondent ought to have refuted this claim and stated that he has the financial muscle to pay. He failed to do so.

#### ***Application without undue delay***

17. As to whether this application for stay was made without unreasonable delay, the Applicant has argued that the same has been made without unreasonable delay. On the other hand, the Respondent has argued that there has been inordinate delay in making the instant application seeing that it has taken the Applicant more than 3 months to make the application, following filing of the Memorandum of Appeal. This Court finds that a delay of 3 months is not inordinate. However, this Court cannot turn a blind eye to the wanting delays with respect to the main Judgment which was delivered on 22<sup>nd</sup> October 2014. Instructively, although the appeal is on the Ruling delivered on 19<sup>th</sup> October 2020, the application for stay herein seeks to stay a Judgment which was delivered in the year 2014. The same has been filed 5 years post judgment. This Court must point out that the Applicant has been indolent and is guilty of laches to this extent.

#### ***Security***

18. On security, the Applicant has confirmed that he is willing and ready to furnish such reasonable security as the Court may order. The Respondent has also indicated that he is willing to indulge the Applicant on condition that security is deposited in a joint interest earning account. The Respondent has asked the court to grant the conditional stay with a number of other conditions touching on deposit of interests and costs of various applications. This Court however, has discretion in the interests of justice to grant stay or injunction upon reasonable conditions.

#### ***Conclusion***

19. In the end, this Court finds that although there is an anomaly in the way the instant application has been brought, parties failed to address the Court on the same and therefore this Court in determining the merits of the application finds that the Applicant indeed has an arguable appeal and therefore stands to suffer substantial loss as the Respondent failed to demonstrate his capability to settle any such decretal amount as may be awarded should the Appeal be successful. Further, the Applicant is guilty of delay. Both parties are, however, amenable to the deposit of security pending determination of the Appeal, and this Court will not stand in the way of the parties in the interests of substantive justice.

#### ***Orders***

20. Accordingly, for the reasons set out above, this Court makes the following orders: -

*(i) An order for stay of execution of the Judgment and Decree in Meru CMCC No. 202 of 2012 delivered on 22<sup>nd</sup> October 2014 is hereby issued pending the filing, hearing and determination of Meru High Court Civil Appeal No. E010 of 2020.*

*(ii) The Applicants shall within thirty (30) days from the date of this order deposit the sum of Ksh.1,429,350/= in a joint interest earning account in names of the respective Advocates for the parties.*

*(iii) In default of the deposit as per order ii) above, the orders for stay shall automatically lapse.*

*(iv) The costs of the application shall abide the outcome of the Appeal.*

Ordered accordingly.

**DATED AND DELIVERED ON THIS 22<sup>ND</sup> DAY OF APRIL, 2021.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

M/S Kimondo Gachoka & Co. Advocates for the Applicant.

M/S F. J. Mugambi & Co. Advocates for the Respondent.