REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. E295 OF 2020

KCB BANK KENYA LIMITED.....APPELLANT

VERSUS

ODIDIO SPARK LIMITED.....RESPONDENT

(Being an Appeal in respect of the Ruling delivered on 12th November, 2019 by Hon. B.J OFISI (RM) in Chief Magistrate's Case Number MCCC/4168/2019, Nairobi in respect of an application for stay of execution of Exparte Judgment entered on 1st October 2020 and grant of leave to defend suit.)

RULING

The application dated 28th December, 2020 seeks the following orders.

1. Spent

2. Spent

3. THAT there be a temporary stay of execution of the proclamation of attachment of movable Goods issued against the Appellant and all consequential orders issued therewith pursuant to the exparte Judgement in default of Defence issued in Chief Magistrate's Civil Suit No 4168 of 2019, Nairobi, pending the hearing and determination of the Applicant's intended appeal.

4. THAT costs be in the cause.

The application is supported by the affidavit of Veronica Wamuki Kihiu. The Respondent filed grounds of opposition. The application was determined by way of written submissions.

Miss Wamucii appeared for the applicant/ appellant. Counsel submit that the dispute originated before the High Court and was transferred to the Magistrate's Court on 30th May, 2019 by Justice Okwany. A default Judgement was entered by the Magistrate's court and on 6th November, 2020, warrants of execution were served upon the applicant yet the applicant had not been able to file its defence due to the confusion caused by the transfer of the file to the Magistrate's court. The applicant sought interim measures of protection so as to safeguard the subject matter of the dispute. The applicant filed an application for stay of execution before the trial court but the same was not heard. Due to the threat of execution as the respondent had proclaimed the applicant's goods, the applicant sought redress before this court. According to counsel the trial magistrate did not appreciate the special circumstances of the case which involved fraud and theft of public funds and declined to grant interim relief measures.

It is further submitted that Article 165 (6) of the constitution gives the High Court Supervisory jurisdiction over subordinate courts. Counsel further contend that section 78 of the Civil Procedure Act confers the High Court with appellate jurisdiction powers. The funds involved in the dispute were subject to criminal investigation by the banking fraud investigations unit. While the matter was before the High Court, the late Justice Onguto in a ruling delivered on 17th February, 2017 declined to grant a prayer for the release of the sum of ksh. 8,000,000 delivered by the respondent. If the funds are to be released to the respondents, fraud will be perpetual on public funds.

Mr. Odhiambo, Counsel for the Respondent, submits that the application is a non- starter as it is premised on a non-existent appeal. The intended amended memorandum of appeal seeks to overturn a default Judgment that was entered on 1/10/2020. The appeal is irredeemably incompetent as no appeal can lie from a default Judgement. The applicant filed an application on 10th November, 2020 seeking stay of execution and setting aside the default Judgement. On 12th November, 2020 the court directed that the application be served on the parties

and be heard on 26th November, 2020, instead of prosecuting the application, the applicant preferred an appeal. No appeal could arise from the nature of directions given by the court.

Counsel for the Respondent maintains that the appeal is time barred. The default Judgement was entered on 1/10/2020. The Appeal was filed on 28/1/2020 which is 90 days after the date of the default Judgement. No leave to file the appeal out of time was obtained. The court is being urged to sit on a non- existent appeal. Counsel referred to the case of WILLY KIPKOECH KIRUI (Suing as the Legal Representative of JOHN K. ARAP ROTICH) V PERTER KIPLANGAT RONO & 2 OTHERS (2020) EKLR where the court stated:-

> **"However, the Appellant has opted for a totally unorthodox method of obtaining relief against an exparte Judgement. As far as this court is concerned, it is the trial court which in the first instance has jurisdiction to set aside such a Judgement. The appellant court can only handle an appeal against a refusal to set a side such an exparte Judgment by the trial court."**

Counsel for the respondent further submits that the application for stay of execution before the lower court has never been heard. The applicant is forum shopping for orders and has engaged the jurisdiction of both the High court and the subordinate court over the same issue at the same time. Counsel relies on the case of HERITAGE INSURANCE COMPANY LIMITED V PATRICK KANISA KISISLU (2015) Eklr where the court stated:

> **In accordance with the hierarchical authority of laws, as part of the Civil Procedure Rules the provisions for the filing or repeat of application for stay of execution in the court to which the appeal is preferred, regardless of whether such an application has been granted or refused [and I daresay made] in the court appealed from, must be subject to the ordinary principles of civil litigation on *sub judice* and *res judicata,* which are statutorily underpinned under sections 6 and 7 of the Civil Procedure Act, respectively. Accordingly, the filing of the application herein by the appellant falls to be considered with reference to the principles of *res judicata* and *sub judice* as well as other considerations relating to abuse of process. The application, having been filed upon appeal, is similarly subject to common law principles on regarding the setting aside, alteration or variation of orders made by a trial court by the appellate court.**

According to counsel for the respondent, there is no arguable appeal. The appellant is appealing against the failure of the trial court to issue interim orders of stay. The appeal is misconceived with zero chances of success. Counsel relies on the case of THOMAS VAITAS KOBWA VS GEOFFREY ONGOYA OMURENDE (2019) eKLR where the court stated as follows

> **The principles governing the exercise of the court's jurisdiction are now well settled. Firstly, the intended appeal should not be frivolous or put another way, the applicants must show that they have an arguable appeal; and second, this Court should ensure that the appeal, if successful, should not be rendered nugatory.**

The record shows that the original memorandum of appeal was filed on 13th November, 2020. The appeal was against a ruling delivered on 12th November, 2020 relating to an application for stay of execution of the exparte Judgment entered on 1st October, 2020. Indeed, as per the record, there was no formal ruling. What the trial court did as per the respondent's submissions is that the trial court directed the applicant to serve the application and have it heard on 26th November, 2020. By that time warrants of execution were out and proclamation of attachment of the applicant's goods had already been done on 6/11/2020. The applicant was apprehensive that by 26th November 2020. The auctioneer would have sold the proclaimed goods since no temporary relief in form of stay of execution was granted at the interim.

The Memorandum of Appeal was later amended on 16th November, 2020. The appeal is now against the exparte Judgment and decree entered on 1st October, 2020 in chief Magistrate's case numbers MCCC 4168 of 2019, Nairobi. The seven grounds of appeal mainly deal with the issue of the exparte Judgment.

The dispute herein started from the High Court and was later transferred to the Magistrate's Court. The Magistrate's court did not hear the parties dispute but entered exparte Judgement. There is a draft defence for the matter that was pending before the High court. The applicant admits that it was served with fresh summons when the matter was transferred to the magistrate's court.

The normal procedure would be for the applicant to have prosecuted its application for stay of execution and setting aside the default Judgement before the trial court. Upon dismissal of that application the applicant would have approached this court by way of appeal against the trial court's refusal to set aside its default Judgment and stay of execution. I believe that was the advise given to the applicant by Justice Sergon. The applicant's position is understandable. The trial court seems not to have been in a position to grant stay of execution orders ex-parte. The date given for inter partes hearing would have rendered the application nugatory. That is why the applicant preferred an appeal against the directions of the court which appeal was subsequently amended.

The Dispute herein involved money that was transferred to the Respondent's accounts. According to the applicant that money was proceeds of crime and was re-wired back to the source. The applicant's suit is seeking the release of that money to the respondent. If the court fails to grant orders of stay of execution, the Respondent will be at liberty to execute and recover the money plus costs and interest. All what the applicant is seeking is the opportunity to be heard. This is a court of equity and it is prudent that the applicant be granted an opportunity to prosecute its application seeking orders setting aside the default Judgement. The trial court did not take into account the urgency of the applicant's application to the effect that execution was on- going and the date of 26th November, 2020 fixed for the hearing of the application was not the most ideal remedy given the circumstance of the case.

This court has supervisory powers under Article 165 (6) of the constitution over subordinate courts. There is need to stay the execution so that the applicant's application which is pending before the trial court can be heard on merit. Dismissing the application will enable the respondent to execute. There is need to hear both parties so that the issue being raised by the applicant that the money is proceeds of crime can be determined on merit. I do therefore find that the application dated 28th December, 2020 is merited and is granted on the following terms.

1. There shall be stay of execution of the proclamation of the attachment of movable goods against the applicant as per the warrants of execution issued by the trial court pursuant to the default Judgement for a period of Ninety (90) days hereof.

2. The application to prosecute the application for setting aside the exparte Judgement before the trial court within the same period of ninety (90) days hereof.

3. Should the trial court take longer than the ninety (90) days period to determine the application, each party shall be at liberty to apply

4. Parties shall meet their own costs of this application.

DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF MAY, 2021

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S. CHITEMBWE

JUDGE