REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

HIGH COURT CIVIL APPEAL NO. 4 OF 2021

DUNCAN LANGAT.....1ST APPLICANT

JOHN RUKENYA KABUGUA.....2ND APPLICANT

VERSUS

PAUL MULI & ANASTACIA PAUL

(Suing as the administrators to the estate of the late **PAULINE MUNAINE.....RESPONDENT**

The Appeal is derived from the Ruling delivered on 16th December, 2020

by the Hon. Court in ***Mwingi PMCC NO. 42 OF 2017.***

R U L I N G

1. Before me, is the Appellants' application brought by way of **Notice of Motion** dated **12th January, 2021**, seeking for the following orders/reliefs namely; -

(i) Spent

(ii) Spent

(iii) That this Hon. Court be pleased to order a stay of execution of the decree in Mwingi Chief Magistrate Court Civil Case Number 42 of 2017 Paul Muli & Anastacia Paul (suing on their behalf and administrator of the estate of Pauline Munaine –deceased) versus Duncan Langat and John Rukenya, pending the hearing and determination of the intended Appeal.

(iv) That this Honorable Court be pleased to order a stay of proceedings in Milimani Chief Magistrate Court Number 9359 of 2019 Paul Muli 9359 of 2019 Paul Muli & Anastacia Paul (Suing on their behalf and Administrator of the estate of Pauline Munaine-deceased - versus Cannon Assurance (K) Limited being the resultant declaratory suit, pending the hearing and determination of this application

(v) That this Honorable Court, be pleased to order a stay of proceedings in Milimani Chief Magistrate Civil Case Number 9359 of 2019, pending the hearing and determination of the intended appeal.

(vi) Costs of this application.

2. The grounds upon which this application is based are listed on the face of the application as follows: -

a) That the Applicant's application seeking to set aside Exparte proceedings and judgement was dismissed by the trial court vide its ruling delivered on 16th December, 2020.

b) That the Applicants are dissatisfied with the said ruling and intend to appeal against the same and seeks a stay of execution of the judgement entered on 23rd May, 2018, where the Respondent was awarded Kshs. 5,226,355 and for which the Respondent has filed

a declaratory suit.

c) This Applicants were interested in defending the suit, but were let down by their former advocate and that the mistake of former Counsel should not be visited on them.

d) That the Applicants are bound to suffer prejudice and miscarriage of justice.

3. The above grounds are supported by the find of John Rukenya Kahugua, the second (2nd) Applicant herein, sworn on 12th January, 2021.

4. The Respondents aver that, failure to attend court on 21st March, 2018, was due to mistake of their former advocate who failed to update them on the progress of the case and aver that they should not be made to suffer from mistakes of former Counsels.

5. The Applicant claim that they are ready to deposit security and abide by any condition that maybe set by this court.

6. In their written submissions through Learned Counsel, M/s MNM Advocates, the Applicant assert that they have brought this application without unreasonable delay pointing that the ruling, the subject of this ruling was delivered on 16th December, 2020 while their Memorandum of Appeal was budged on 14th January, 2021.

7. They have urged this court to consider the fact they may suffer a substantial loss contending that, the question of substantial loss is an issue that should be considered in circumstances of each case.

They submit that, they are faced with an enviable task of paying a cumulative figure of more than five million shillings an amount they contend is substantial. They aver that the Respondent case went unchallenged and that the fact that his means of livelihood is unknown, leaves them with real fear that the decretal amount once paid may not be recovered.

8. They submit that, an order for security would be fair for all the parties in this instance, and have relied on the case of ***Hosea Kiplagat versus John Allan Okemwa 2012 eKLR*** to buttress their assertion. In that case, the court held *inter alia*

> ***''the law is that, where the Applicant intends to exercise its undoubted right of appeal, and in the event it was to eventually to succeed it should not be faced with a situation in which it would finds itself unable to get back its money, Likewise, the Respondent who has a decree in his favour should not if the Applicant were eventually to be unsuccessful it its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security.''***

The Appellant has urged this court to balance the interests of both parties and allow this application.

9. On the other hand, the Respondent has opposed this appeal through written submissions by his Learned Counsel, M/s Musili Mbiti & Associates Advocates.

The Respondents objection is based on **Order 42 Rule 6 of the Civil Procedure Rule,** which provide that an appeal does not operate as an automatic stay except where sufficient cause is shown.

10. The Respondent contends that; the Applicants have not satisfied the conditions for a grant of stay as stipulated under ***Order 42 Rule 6 of Civil Procedure Code.*** He submits that, he is entitled to fruits of judgement and that the Applicant must satisfy all conditions set by law before they can be granted a stay of execution. He relies on the case of ***James Wangala & Another versus Agnes Naliaka Cheseto 2012 eKLR*** where the court held that, a lawful execution process does not in itself amount to substantial loss because execution levied in accordance with the law is a lawful process. The Respondent contend that, the Applicant has not discharged the obligation to establish that substantial loss will occur unless stay of execution is granted.

11. The Respondent has urged this court to be persuaded in the reasoning in the case of ***Edward Kamau & Another versus Hannah Mukui Gichuki & Another 2015 eKLR,*** where the court held that, a court must employ a balancing act between the two competing rights of a party who wants to appeal and a successful party who wants to enjoy fruits of judgement.

12. The Respondents have also pointed out the Applicants here are not parties in Milimani Case Number 9359 of 2019 and that they should not be seeking orders that will affect a case they are not parties to.

13. This court has considered this application and the response made. This is an application for both a stay of proceedings in *Milimani Chief Magistrate Civil Case number 9359 of 2019 and a stay of execution in Mwingi Chief Magistrate Civil Case Number 42 of 2017*.

14. To begin with the prayer for stay of proceedings in Milimani Chief Magistrate Civil Case Number 9359 of 2019, this court finds that a relief of stay of proceedings is a relief that is given in rare circumstances and only where sufficient cause is shown. This is because of the nature of the relief itself. The relief or remedy once given stops the wheels of justice from ruling to give a party access to justice which I find to be a serious matter. The Respondent has pointed out the Applicants are not parties to the suit in Milimani Chief Magistrate Civil Case number 9359 of 2019 which I find to be a legitimate issue.

15. The Applicants have not elaborated the nexus between Chief Magistrate Court Civil Case Number 42 of 2017 from which the ruling is the subject of this appeal and the Civil Suit pending in Milimani Law Courts. There is no affidavit from the defendant in Milimani Civil Magistrate Civil Case Number 9359 of 2019 explaining their grievance about Mwingi Chief Magistrate Civil Case 42 of 2017 or its nexus to

Nairobi Chief Magistrate Civil case number 9359 of 2019. It has also not been shown that the issues in Mwingi Chief Magistrate Civil Case Number 42 of 2017 are also substantially in issue in *Milimani Chief Magistrate Civil Case number 9359 of 201*9 in order for this court to exercise its discretion under ***Section 6 of the Civil Procedure Act***.

16. The Applicants have invoked the inherent powers of this court under ***Section 3A, 63 and 95 of the Civil Procedure Act Sections 3A and 63 of Civil Procedure Act*** deal with inherent powers given to this court to prevent abuse of process of court and meet the ends of justice. The provisions of ***Section 95 of Civil Procedure Act,*** deals with enlargement of time when a party finds itself in a corner because of lapse of time to seek as prescribed.

17. The Applicants, have not shown that the Respondent has abused a court process to their detriment. They have also failed to demonstrate that ends of justice will be met if a stay of proceedings is ordered in *Milimani Chief Magistrate Civil Case number 9359 of 2019.*

18. On the question of stay of execution pending an intended appeal, it is true that an intended appeal or an appeal in itself, does not operate as an automatic stay of execution. ***Order 46 Rule 6 of Civil Procedure Rule,*** is clear on that as it provides:

> ***''No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 seem just and any person assigned 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.''***

19. The above provision therefore, shows that an Applicant must show ''*sufficient cause*'' *to be entitled to a grant of stay*''. *Subsection 2* of the above Rule is even more explicit. It states:

> ***''No order of stay of execution shall be made under sub rule (1) unless-***
>
> > ***a. ''the court is satisfied that substantial loss may result to the Applicant…. and that the application has been made without unreasonable delay….and that the application has been made without unreasonable delay……...''***

20. The Applicant herein, was obligated by law to show ''*sufficient cause*'' for stay and secondly, demonstrate that a substantial loss is likely to be incurred unless stay is granted. This court is satisfied that, while the Applicant has satisfied the condition of presenting this application without delay, the primary condition has not been met. I find so for the following reasons;

> (i) The Applicants have not enclosed a copy of the proceedings from the lower court to help this court determine the weight of their grievances in respect to the ruling delivered by the trial court on 16th December, 2020. The Applicant should have at the very least (if they were unable to get proceedings on time), file the pleadings or the application, the responses filed or the copy of the ruling the subject of this appeal. This court, in the absence of all these is totally handicapped to determine if the Applicants have met the threshold of ''sufficient cause'' stipulated under the above cited rule. The circumstances leading to their failure to attend court on 21st of March, 2018 are matters of conjecture, which do not aid this application in any way.
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> (ii) Secondly, the main ground relied by the Applicant in this application as I understand, is ''mistake of Counsel.'' They blame their Counsel for their woes but they have not indicated if the Respondent played any role and if he played no role, the question posed is why would he be made to pay or put in another way, why would he be made to suffer prejudice (delay in enjoyment of fruits of judgement) because of ''mistake of Counsel'' of the apposite party? The reason I pose this question is due to the fact that, parties in court and their Counsel wherever they find themselves in a corner due to lack of diligence of the advocate, often cite ''mistake of Counsel'' to get away with inaction, omission which at times is due to indolence or simply out of negligence. Either way, the consequences are the same. A delay of justice which I find undesirable. This court for that reason, has in some instances taken the position that setting aside an exparte order or indeed any other relief cannot be granted solely on the ground of ''mistake of Counsel'' because in my view, there is a remedy for a litigant who has suffered purely because of negligent acts of omission, or commission by Counsel. That remedy is to sue the concerned advocate and obtain reliefs against that advocate without prejudicing the interests of an innocent party whose only mistake would be proceeding with the due process of court and has nothing to do with the negligent acts of omission or commission by the advocate of the opposing party. The Applicants have not demonstrated they suffered due to an excusable mistake, inadvertence, or error.

21. The Applicant have also stated that, the sum in question is cumulatively about five million which is huge. This court finds that, while the sum is big by any standards, it is not enough to state that the amount is huge and that he is likely to suffer a substantial loss. An Applicant must demonstrate that there is a prima facie case with a likelihood of success that would mean that the chances of succeeding in reversing the judgement and asking for refund are high. That was the holding in the case of ***Dr. Daniel Chebutuk Rotich (Nakuru High Court Civil Case Number 368 of 2001).*** As I have observed above, the Applicants made a fatal mistake of failing to annex pleadings from the Lower Court that would have enabled this court to determine if the defence filed disclosed any triable issue as observed by the court of Appeal in *Hosea Kiplagat (Supra)* which is a decision cited by the Applicants. I have perused that decision and it observed in part;

> ***''…. The Learned Judge did not look at the draft defence to see if it contained a valid reasonable defence to the Plaintiff's claim where a draft defence is tendered with the application to set aside the default judgement. The court is obliged to consider it to see if it raises a reasonable defence to the plaintiff's claim. If it does the defendant should be given leave to enter appearance and defend ''…….the law is now well settled that in an application for setting aside exparte judgement, the court must consider not only reasons why the defence was not filed, or for that matter why the Applicant failed to turn up for hearing on the hearing date, but also whether the Applicant has reasonable defence which is usually referred as whether the defence if filed already or if a draft defence annexed to the application raises triable issues.''***

In the end, this court finds that the Applicants have not shown any merit in this application. This court is unable to know the basis upon which the trial court declined to set aside the judgement it entered. The ruling, the subject of this appeal has not been exhibited for this court to determine if there's a prima facie chance of success in the appeal filed herein. This court is unable to find any ground leave alone ''sufficient cause'' to grant reliefs sought in this application. The end result is that the Notice of Motion dated 12th January, 2021 is disallowed. The Respondent will have costs of this application.

Dated, Signed and **Delivered** at **Kitui** this **26th day of May, 2021.**

HON. JUSTICE R. K. LIMO

JUDGE