



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 81 OF 2021

ROBINSON MUTUIRI ELIAS NKANATA..... APPELLANT

VERSUS

PETERSON KOBIA NKANATA.....1ST RESPONDENT

LOYFORD MUTHURI GITANGATA..... 2ND RESPONDENT

JOSEPH KIRIMI KIRUKI.....3RD RESPONDENT

RULING

The application

1. The court has considered the application for stay of execution pending appeal by Notice of Motion dated 15th June 2021 and the Respondents' reply by way of the Replying Affidavit sworn by the 1st Respondent on 12th July 2021, and the oral submissions made by counsel for the parties at the hearing on 21st July 2021 when ruling was reserved for the 29th July 2021.
2. The appeal is from a decision of the trial court on an application dated 23rd December 2020 for the setting aside of an *ex parte* judgment in default of appearance and defence whose stay of execution is sought. The trial upheld the Affidavit of service in the case as set out in the Ruling of 3rd June 2021 as follows:

*“I have read the affidavit of service sworn by Mr. Joseph Kithinji M’Kiambati sworn on the 15th September 2020. At paragraph 3 thereof, the process server has elaborately deposed as to how, where and when he effected service upon the defendant. He stated that he also served a hearing notice. **The defendant did not seek to have the process server availed before court for cross-examination. As such his affidavit as to service remains un rebutted.** The affidavit is made under oath and the court does not have any reasons whatsoever to doubt the depositions therein. I am therefore convinced that the defendant was duly served as per the affidavit of service.*

In the light of the above, is the defendant/applicant deserving of the orders sought?”

The trial court did not think so!

3. Additionally, the trial found no triable issues in the draft defence proffered by the defendant in the application for setting aside, finding *“the same is riddled with mere denials”*.

Sufficient cause

4. Counsel for the appellant, Mr. Ngugi, challenged the correctness of the trial court's finding that the defendant had not sought to have process server availed before the court for cross-examination pointing to paragraph 17 of the affidavit in support of the application for setting aside and urged that the constitution guarantees right to fair hearing under Article 50 (1) of the Constitution.
5. Ms. Murithi, counsel for the respondent urged that in terms of Order 42 rule 6 of the Civil Procedure Rules, the applicant had not shown *“irreparable loss which cannot be compensated by monetary damages”* (sic) meaning that there was no substantial loss and that, in any event, the appellant had admitted owing the money.
6. Of course, the decision to set aside an *ex parte* judgment is in the discretion of the trial court and the appellate court shall not easily interfere with such discretion except in circumscribed situation set out in *Mbogo v. Shah* [1968] EA 93 as follows:

“a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice”.

”

7. The appellant, however, does have an arguable case on the question of service of the summons to enter appearance and the call for cross-examination of the process server. An arguable case does not mean one that must eventually succeed and there is sufficient cause in sparing the appellant the hardship of satisfaction or execution of the judgment before a determination whether the service of summons and, therefore, the entry of the *ex parte* judgment and consequent proceedings and orders were valid.

Substantial loss

8. The court does not doubt that the payment of the not unsubstantial amount of Ksh.950,000/- is a substantial loss when there is no evidence of possibility of recovery from the Respondents in the event of successful appeal. Although the Replying Affidavit of the 1st Respondent at paragraph 9 suggests that any loss that may be suffered by the applicant “*can be compensated by way of damages*”, no evidence of the respondents’ means and ability so to do is offered.

9. To avoid the appeal process being abused to delay the fair determination of the dispute and enjoyment of the Respondents of the fruits of their judgement as urged by the counsel for the Respondents, the deposit of the security and the hearing of the appeal shall be expedited in terms of the provisions of Section 1A and 1B of the Civil Procedure Act.

Security

10. Pursuant to Order 42 rule 6 (2) of the Civil Procedure Rules, the court must enforce the security provisions by requiring an assurance by the appellant of payment of the decretal sum, interest and costs as may become due from him upon the determination of the appeal in the event the arguable case fails. As urged by Ms. Murithi, in the interest of both parties, the court shall order the deposit of the decretal sum of Ksh.950,000/- into an interest earning joint account. To the same end the appellant who is an individual person may secure the decree by depositing with the said amount in the event that the advocates for the respondent fail to cooperate in the opening of a joint account in time or at all.

ORDERS

11. Accordingly, for the reasons set out above, the Court makes the following orders:

1. The applicant is granted an order of stay of execution of the decree and Judgment of the trial court in ***NKUBU PMCC NO. 10 OF 2020 PETERSON KOBIA NKANATA & 2 OTHERS VERSUS ROBINSON MUTUIRI ELIAS NKANATA*** pending hearing and determination of the appeal herein.

2. The order for stay is granted on condition that the applicant deposits within fourteen (14) days the sum of **Ksh.950,000/-** in an interest earning account in the joint names of advocates for the parties, or the deposit into court of the same amount within three (3) days thereafter if the Respondent’s counsel fail to cooperate in the opening of such a joint account.

3. In default of the deposit in Order (2) above, the order for stay shall lapse and execution to issue.

Order accordingly.

DATED AND DELIVERED ON THIS 30TH DAY OF JULY, 2021.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

M/S KIOGORA MUGAMBI & CO. ADVOCATES for the Appellant.

M/S KIAUTHA RITHI & CO. ADVOCATES for the Respondent.