



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. E5 OF 2020**

**(Being an appeal from the original judgment and decree of Hon. Noelyne Akee, Resident Magistrate, of 16<sup>th</sup> September 2020 in Kakamega CMCCC No. 192B of 2018)**

**KENYAN ALLIANCE INSURANCE COMPANY LIMITED.....APPELLANT**

**VERSUS**

**MUSA AMALEMBA WERANGAI.....RESPONDENT**

**RULING**

1. What I am called upon to determine is the Motion, dated 4<sup>th</sup> February 2021, which seeks stay of execution of judgment and decree in Kakamega CMCCC No. 192B of 2018 pending appeal.

2. The trial court had on 16<sup>th</sup> September 2020 declined to set aside an *ex parte* judgment. The appellant had been served with summons to enter appearance, together with other accompanying documents. Rather than act on the documents, the same were filed away. The appellant argues that there was honest mistake, inadvertence and lack of lethargy. As a consequence, the appellant did not file defence, and judgment was entered against it.

3. The appeal herein turns on the said ruling of 16<sup>th</sup> September 2020. The trial court is said to have failed to find that the explanation by the appellant for failing to enter appearance was excusable; failed to find that failure to file defence was honest and unintentional; failed to find the delay in filing application to set aside was excusable, among others.

4. The trial court file was not made available to me, so I am unable to tell firsthand what transpired at the trial court. I have to rely on the record of appeal, which does not appear to be complete, for it does not have a copy of the affidavit of service with respect to service of the initial summons. The ruling itself is equally sketchy on what exactly transpired.

5. I believe justice of the situation militates in favour of the appellant getting stay of execution of the *ex parte* judgment, to facilitate appeal, so that they can have their day in court. As a condition, the entire judgment sum in Kakamega CMCCC No. 47 of 2014 shall be deposited in court within 14 days, in default of which the stay order shall lapse. The respondent shall have the costs.

6. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 29TH DAY OF OCTOBER, 2021**

**W. MUSYOKA**

**JUDGE**