



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO E040 OF 2021

AGNETTA AKALO SIMOLI.....APPELLANT

VERSUS

DOROTHY AYIETA AMAYAMU (Suing as legal representative on behalf
of the estate of ROBERT ANDALOO APANTAS).....RESPONDENT

RULING

1. In her Notice of Motion dated 20th May 2021 and filed on 28th May 2021 the Appellant sought for orders of stay of proceedings in **Maseno CMCC No 28 of 2020 Dorothy Ayieta Amayamu (Suing as the legal representative of Robert Andalo Apantas (Deceased) vs Agnetta Akalo Simoli** pending the hearing and determination of this appeal. The prayer for the stay of proceedings pending the hearing and determination of the application was spent.
2. Joan Turgut, her advocate, swore an Affidavit in support of the said application. She averred that she was in conduct of the aforesaid matter on behalf of the Appellant herein. She stated that the Appellant filed its Statement of Defence on 26th March 2019.
3. She pointed out that on 2nd February 2021, she logged into the lobby via a link which had been provided by the court through Maseno WhatsApp Forum and when the said matter was called out, the Respondent's Advocate was not present virtually. She therefore requested the Trial Court to place the file aside so that both parties could address the court on several issues.
4. She added that subsequently, there was connectivity issues with the court's network which kept on hanging. She stated that she waited in the lobby until 11.29 am and when she noticed the delay was still persisting, she requested from the Maseno Whatsapp forum, if there was any advocate in the open court who could assist her in holding her brief but she did not get any response.
5. She contended that she later inquired from the court registry what had transpired and she was informed that the matter proceeded *ex parte* whereupon both the Appellant's and Respondent's cases were closed. A date for submissions was fixed on 23rd February 2021.
6. She pointed out that she thereafter filed an application dated 8th February 2021 seeking to reopen the Respondent's case and to set aside the *ex parte* proceedings of 2nd February 2021 but the said application was dismissed on 8th February 2021 on the ground that the reasons advanced by the Appellant were not sufficient to allow the application and prayers sought. She asserted that the Appellant being dissatisfied with the Trial Court's Ruling, lodged the Appeal herein.
7. She was categorical that the Trial Court had set down the case for submissions and that if the same was concluded, the entire object of the appeal stood to be defeated and rendered nugatory.
8. In opposition to the Appellant's application, Boaz Otanga Otieno, the Respondent's Advocate, swore a Replying Affidavit on 21st June 2021. The same was filed on 23rd June 2021. He averred that the application was an abuse of the court process and was aimed at delaying the hearing and final determination of **Maseno PMCC No 28 of 2020** (Supra).
9. He pointed out that on two (2) occasions, he had offered a consent that the application seeking the setting aside of closing the Appellant's and Respondent's cases and the Respondent be recalled for cross-examination on evidence on record on condition that the Appellant paid costs of Kshs 15,000/=, which offers were declined whereupon directions on the filing of Written Submissions in respect of the said application were given. The application was subsequently dismissed. He was categorical that the Appellant was deliberately delaying the cause of justice.

10. The Appellant's Written Submissions were dated 12th July 2021 and filed on 14th July 2021 while those of the Respondent were dated 27th July 2021 and filed on 28th July 2021. This Ruling is based on the said Written Submissions which both parties relied upon in their entirety.

LEGAL ANALYSIS

11. The Appellant argued that the substantive law on stay of proceedings pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules as well as the inherent jurisdiction reserved in Section 3A of the Civil Procedure Act.

12. She argued further that such a stay is meant to avoid a waste of valuable judicial time, prevent the court from duplication of efforts and multiplicity of suits. She added that where stay was not granted and an applicant succeeded, it would render the appeal nugatory.

13. She further submitted that the legal threshold to consider before exercising such discretion was whether or not an applicant has demonstrated a sufficient cause warranting setting aside of the *ex-parte* decision or proceedings. In this regard, she relied on the case of **Wachira Karani vs Bildad Wachira [2016] eKLR** where the court held that sufficient cause was a question of fact and the court has to exercise its discretion in the varied and special circumstances of a case and that a defendant had to demonstrate that he was prevented from attending court by a sufficient cause.

14. She pointed out that failure to attend the hearing of the trial court case was not due to negligence but a genuine difficulty and that she had therefore demonstrated a sufficient cause upon which the court can exercise its discretion.

15. She further submitted that it is trite that before a court can set aside its *ex-parte* proceedings, it must consider whether or not an applicant has any defence which raises triable issues. In this respect, she relied on the case of **Patel vs East Africa Cargo Handling Services Ltd (1974) EA 75** and the case of **CMC Holdings Limited vs James Mumo Nzioki [2004] eKLR** where the common thread in the above decisions was that a court will not usually set aside the judgment unless it is satisfied that there is a defence on merit which raises triable issues.

16. She further relied on the case of **Mbeki & Others vs Macharia & Another (2005) EA 206** where the court held that it would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.

17. She was categorical that she had a viable defence and failure to participate in the proceedings was not deliberate but due to connectivity challenges as aforesaid and the same ought not be visited upon an innocent litigant.

18. It was her further contention that she had an arguable appeal which would be rendered nugatory if the orders she had sought were not granted.

19. She relied further on Sections 1A, 1B, 1C, 3A of the Civil Procedure Act and Article 159 of the Constitution of Kenya 2010 which requires a court to proceed without undue regard to procedural technicalities.

20. On her part, the Respondent argued that it was apparent that the Appellant had a deliberate intention to delay the course of justice because her counsel had invited the Appellant's counsel to set aside the proceedings by consent but she was adamant.

21. She submitted further that the lower court matter was mentioned on 17th November 2020 for compliance and taking of a hearing date but the Appellant did not seek leave of court to amend defence whereafter the suit was subsequently fixed for hearing on 2nd February 2021. She added that the Appellant was then served with a hearing notice on 26th November 2020 but did not attend court, as a result of which the matter proceeded and a date was given for mention for submissions.

22. She was categorical that failure to attend court by the Appellant's Counsel on the material day was out of negligence and the excuse being tendered was not plausible. She stated that the Appellant's counsel simply slept on her job. She relied on the maxim of equity which states that, 'equity aids the vigilant, not the indolent' and that seeking the remedy for indolence was an afterthought and bad in law. In this respect, she relied on the case of **Julius Mbaabu Marete vs Tom Ayora & 3 Others [2018] eKLR** where the court stated that it is not always that a court will exercise its discretion in favour of a party if the mistake is by its advocates and that an advocate must demonstrate genuine and acceptable mistakes.

23. She further submitted that the Appellant had not shown the court that she had a good and sufficient cause to set aside the proceedings in the lower court. In this regard, she relied on the case of **The Registered Trustees of the Archdiocese of Dar es Salam vs The Chairman Bunju Village Government & Others** where the Court of Appeal of Tanzania held that the words, "sufficient cause" should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction, or want of *bona fides* is imputed to the Appellants.

24. The conditions under which either the trial court or an appellate court may order stay of proceedings pending an appeal under Order 42 Rule 6 of the Civil Procedure Rules have not been specified. The court therefore has to rely on the settled principles on when proceedings may be stayed pending appeal.

25. The question of whether or not to grant an order for stay of proceedings is a discretionary one. This discretionary power must be exercised judiciously. The court has to consider if it will be in the interests of justice to grant the same. The underlying interest ought to be that the appeal should not be rendered nugatory.

26. This aspect of being rendered nugatory must be hinged on the fact of whether or not the appeal is arguable on appeal and not whether the appeal will be successful. An arguable appeal only needs to raise a single *bona fide* point worthy of consideration as was held in the case of **Co-operative Bank of Kenya Ltd vs Banking Insurance of Finance Union (Kenya) [2015] eKLR**.

27. Further, the Court of Appeal also held in the case of **UAP Insurance Company Ltd vs Michael John Beckett [2004] eKLR** that all an applicant is required to show is that he has an arguable appeal which is not frivolous and that the appeal will be rendered nugatory if the stay of proceedings is not granted.

28. The reason for this is that at this stage, a court ought to be very cautious not to look into the merits or otherwise of the appeal as that is under the purview of the appellate court. At this stage, the court should only be concerned with the question of whether or not the appeal will be rendered nugatory.

29. In the case of **Niazsons (K) Ltd. vs. China Road & Bridge Corporation (Kenya) [2001] eKLR**, the court held that:-

“Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay...should be granted.”

30. Both parties relied on the case of **Shah vs Mbogo & Another [1967] EA 116** where the court set out the object of setting aside a judgment in holding that the same is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

31. Notably, the prayer for stay of proceedings is an equitable relief. An applicant must have come to court with clean hands. It is therefore important for the court to consider whether or not the application for stay of proceedings has been filed expeditiously.

32. The Appellant submitted that the application herein had been brought within reasonable time. The Respondent did not oppose this argument. It did not also submit on the issue of delay. As this Appeal was lodged on 6th May 2021 and the application was filed on 20th May 2021, this court was of the considered view that the same was filed within reasonable time.

33. A perusal of the Memorandum of Appeal dated 26th April 2021 and filed on 6th May 2021 led this court to the conclusion that the intended appeal was indeed arguable and not frivolous as the question before the appellate court was whether or not the lower court exercised its discretion correctly in dismissing the Appellant’s application.

34. In the event the court did not grant an order for stay of proceedings and the Appeal herein was heard and was successful, the proceedings in the lower court would be rendered unnecessary, even though an appropriate order for costs could be made to remedy that.

35. Judicial time is precious and scarce and must not be wasted in proceedings that would end up being academic exercises. As was held in the case of **Muchanga Investments Ltd vs Safaris Unlimited (Africa) Ltd & 2 Others [2009] eKLR**, the Court of Appeal rendered itself as follows:-

“Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice.”

36. Accordingly, having considered the affidavit evidence and the Written Submissions and the case law by the respective parties, this court came to the firm conclusion that this was a suitable case for it to grant an order of stay of proceedings so as not to render the Appeal herein nugatory.

DISPOSITION

37. Accordingly, the upshot of this court’s decision was that the Appellant’s Notice of Motion application dated 20th May 2021 and filed on 28th May 2021 was merited and the same be and is hereby granted in terms of Prayer No (3) on the following terms:-

1. THAT the DR High Court Kisumu facilitates the typing of the proceedings and placing of the lower court file herein within ninety (90) days from the date of this Ruling.

2. THAT the Appellant shall file and serve her Record of Appeal within one hundred and twenty (120) days from the date of this Ruling.

3. THAT in the event the Appellant shall default in the order given in Paragraph 37(2) hereinabove, the order of stay of proceedings will automatically lapse and the Respondent will be at liberty to move the lower court as provided by the law to proceed with the hearing and determination of **Maseno CMCC No 28 of 2020 Dorothy Ayieta Amayamu (Suing as the legal representantive of Robert Andalo Apantas (Deceased) vs Agnetta Akalo Simoli.**

4. Costs of the application will be in the cause.

5. Either party is at liberty to apply.

38. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 16TH DAY OF DECEMBER, 2021

J. KAMAU

JUDGE