



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 11 OF 2019

REGINA MUMO KIILU.....APPELLANT

VERSUS

CHARLES SAMSON MWONGELA.....1ST RESPONDENT

KENYA WOMEN FINANCE TRUST LTD.....2ND RESPONDENT

(Being an appeal from the ruling of Hon J. A. Agonda (S.R.M)

in Mavoko SPMCC 176 of 2015 delivered on 18.1. 2019)

BETWEEN

CHARLES SAMSON MWONGELA.....PLAINTIFF

VERSUS

REGINA MUMO KIILU.....1ST DEFENDANT

KENYA WOMEN FINANCE TRUST LTD.....2NDDEFENDANT

RULING

1. The applicant herein, **Regina Mumo Kiilu**, has moved this court vide the application dated 28th January, 2019 seeking primarily stay of execution of judgement entered on 19th October 2015 and decree issued on 7th December, 2015 in Mavoko SPMCC No. 176 of 2015 pending the hearing and determination of the appeal against the ruling that was delivered on 18th January, 2019.
2. According to the applicant, following a road accident in 2012 involving her motor vehicle, traffic police officers visited the scene and she was advised that the matter would be dealt with by the respective insurance companies. She therefore, reported the matter to her insurance company and her vehicle was repaired. However, on 27th February, 2015, the 1st Respondent instituted a suit against her and an interlocutory judgement was entered against her on 19th October, 2015 and a decree issued on 7th December, 2017 in the sum of Kshs 645,126/=.
3. It was her case that she was never served with summons to enter appearance and only came to learn of

the suit when she was called by her husband and informed that some auctioneers had warrants of attachment against the applicant. The applicant then applied to have the said judgement set aside but the said application was dismissed on 18th January, 2019.

4. Aggrieved by the said decision, the applicant has lodged this appeal in which she is challenging the said ruling. In the meantime, she is apprehensive that the Respondent will commence the process of executing the said judgement and expose her to irreparable loss. She applicant disclosed that she was ready and willing to abide by any conditions that this court may impose.

5. In opposing the application, the Respondents averred vide replying affidavit deposed to by **Kelvin Gitonga** an advocate from the firm of advocates on record for the 1st respondent that despite service of summons having effected on the applicant, the applicant chose not to enter appearance as a result of which judgement was entered for the Respondent against the Applicant in the sum of Kshs 642,162/=. Subsequently, the applicant was served with notice of entry of judgement through registered post and the applicant was served with a draft decree through the same means but she did not respond. As a result, the Respondent commenced the execution process.

6. According to the Respondent, the Applicant was at all times aware of the suit. It was therefore the Respondents' case that the applicant's application lacks merit and ought to be dismissed with costs as the Respondent stands to suffer great loss in the event that the application is allowed.

7. In her submissions, the applicant averred that there was no proper service of summons as per Order 5 of the **Civil Procedure Rules** and placed reliance on the cases of **Kamau Gikundi v Tabitha Wambui Gichura (2016) eKLR** and **Dim Properties Ltd v J.R. Egesa (2014) eKLR**. It was submitted that there was no proper service of the judgement notice after the default judgement was entered hence the judgement ought to be set aside. According to the applicant, she ought to be granted the order for stay of execution for she had met the requirements set out in Order 42 Rule 6 of the **Civil Procedure Rules**.

8. The Respondent on the other hand submitted that it would be unjust to set aside the regular judgement that was entered by the court and the prayers sought by the applicant are not merited.

Determination

9. I have considered the application, the supporting affidavit, the submissions filed as well as the authorities relied upon.

10. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the **Civil Procedure Rules** which provides as follows:

No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

11. In **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365**, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the **Civil Procedure Rules** is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the **Civil Procedure Act**, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under

the **Civil Procedure Act** or in the interpretation of any of its provisions. According to section 1A(2) of the **Civil Procedure Act** “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

12. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the **Civil Procedure Act** are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589**. This was the position of **Warsame, J** (as he then was) in **Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** where he expressed himself as hereunder:

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is *prima facie* entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

13. On the first principle, **Platt, Ag.JA** (as he then was) in **Kenya Shell Limited vs. Kibiru [1986] KLR 410**, at page 416 expressed himself as follows:

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money”.

14. On the part of **Gachuhi, Ag.JA** (as he then was) at 417 held:

“It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”

15. Dealing with the contention that there was no evidence that the 1st Respondent would be able to refund the decretal sum if paid over to the Respondent, **Hancox, JA** (as he then was) in the above cited case when he expressed himself as follows:

“I therefore think in the circumstances that these comments were unfortunate. Nevertheless, having considered the matter to the full, and with anxious care, there is in my judgement no justification whatsoever for holding that there is a likelihood that the respondents will not repay the decretal sum if the appeal is successful and that the appeal will thereby be rendered nugatory. The first respondent is a man of substance, with a good position and prospects. It is true his house was, in his words, reduced to ashes, but I do not take that against him. Both seem to me to be respectable people and there is no evidence that either will cease to be so, in particular that the first respondent will not remain in his job until pensionable age.”

16. In this case the appeal is against an *ex parte* judgement. With due respect, none of the parties substantially addressed me on the conditions for grant of stay. Instead the averments and submissions were directed at the appeal.

17. In the matter before me, it is clear that whether by default of the applicant or otherwise, the applicant’s case was never heard on merits. As was stated by the Court of Appeal in **CMC Holdings Ltd vs. Nzioki [2004] KLR 173**:

“In an application for setting aside *ex parte* judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law the discretion that a court of law has, in deciding whether or not to set aside *ex parte* order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle. In the instant case the learned trial magistrate did not exercise her discretion properly when she failed to address herself as to whether the appellant’s unchallenged allegation that its counsel did not inform it of the hearing date for the hearing that took place *ex parte* and hence it would appear was true and not if true, the effect of the same on the *ex parte* judgement was entered as a result of the non-appearance of the appellant and on the entire suit. The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate...The second disturbing matter which arises from the decision of the learned magistrate in dismissing the application for setting aside the *ex parte* judgement is that in so dismissing the same application, the learned trial magistrate does not appear to have considered whether or not the defence which was already on record

was reasonable or raised triable issues. The law is now well settled that in an application for setting aside *ex parte* judgement, the Court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence is filed already or if draft defence is annexed to the application, raises triable issues. The Court has wide discretion in such cases to set aside *ex parte* judgement. In the instant case, the defence and counterclaim was already in the file when the matter was heard *ex parte* and the trial magistrate stated that she considered the same and dismissed the same defence and counterclaim when the appellant was not in court to put forward its case. Further it appears that certain matters raised in the defence were not considered at all and indeed could not be considered without the appellant's input...What the Trial Court should have done when hearing the application to set aside the *ex parte* judgement was to ignore her judgement on record and look at the matter afresh considering the pleadings before her and see if on their face value a prima facie triable issue (even if only one) was raised by the defence and counterclaim. If the same was raised, then whether the reasons for the appellant's appearance were weak, she was in law bound to exercise her discretion and set aside the *ex parte* judgement so as to allow the appellant to put forward its defence. Of course in such a case, the applicant would be condemned in costs or even ordered to pay thrown away costs. The learned judge should not have considered what the learned Trial Court had concluded on the evidence before her but should have in the same way looked at the pleading and considered whether a triable issue was raised by the defence and if so, then the appeal should have been allowed."

18. In this appeal this court would be called upon to balance between the applicant's right to be heard on merits and the Respondent's right to enjoy the fruits of its judgement.

19 Since the parties herein did not sufficiently address me on the conditions necessary for grant of stay and considering the issues to be canvassed in tis appeal, it is my view and I find that this is a case in which the stay ought to be granted on conditions.

20. Accordingly, I hereby grant stay of execution of the judgement appealed against on condition that the applicant deposits the sum of Kshs 300,000.00 in a joint interest earning account in the names of the respective advocates for the parties with Kenya Commercial Bank, Machakos Branch, within 30 days from the date of this decision and in default the stay will stand vacated.

21. However, as was appreciated by **Platt, JSC** in **Henry Bukomeko & 2 Others vs. Statewide Insurance Co. Ltd Uganda Supreme Court Civil Appeal No. 13 of 1989:**

"Whereas on the authorities, if the delay is caused by the court registry, and the applicant has taken every step possible to prosecute the appeal, further time will be allowed to a blameless intending appellant, there is an overriding factor in this case, and that is that where an interlocutory appeal is taken great care must be exercised in getting the appeal on as quickly as possible, in order that the trial may proceed with the minimum of delay. It is obvious that the longer an interlocutory appeal intervenes in the trial, the greater is the risk that the trial may be prejudiced. Therefore, rule 4 of the Court of Appeal Rules would be read as requiring an intending appellant to show sufficient cause in the light of the fact that the appeal is an interlocutory appeal which must be brought forward as soon as possible. Indeed, the court itself has a duty to see that such appeals are disposed of with special urgency."

22. In the premises I direct the appellant to ensure that the record of appeal is prepared and directions on the appeal taken within 30 days from the date of this ruling. In default, the orders of stay issued herein shall stand vacated.

23. The costs of the application are awarded to the respondent.

24. It is so ordered.

Ruling read, signed and delivered in open court at Machakos this 12th day of March, 2020.

G V ODUNGA

JUDGE

In the absence of the parties.

CA Geoffrey