REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 46 OF 2019

JUSTUS ORORA [suing as the Legal

Representative of the estate of

HELLEN KWAMBOKA ORORA].....APPELLANT

=VRS=

JOASH MACHUKI.....RESPONDENT

{Being an appeal against the Ruling of Hon. S. K. Arome – SRM – Keroka dated and delivered on the 10th day of July 2019 in the original Keroka Principal Magistrate's Court Civil Case No. 78 of 2016}

JUDGEMENT

The appellant being aggrieved by the orders of stay of execution issued by the Senior Resident Magistrate in a ruling delivered on 10th July 2019 preferred this appeal and urges this court to set aside the said ruling and all the consequential orders thereto. The appeal is premised on the following grounds: -

> **"1. THAT the learned Trial Magistrate erred in law and fact in granting stay of execution pending the hearing and determination of PMCC No. 43 of 2019 which case the Appellant is not a party.**
>
> **2. THAT the learned Trial Magistrate erred in law and fact by allowing stay of execution whereas there is a consent order filed on 9th June 2017.**
>
> **3. THAT the learned Trial Magistrate erred in law and fact by failing to exercise her discretion judicially.**
>
> **4. THAT the learned Trial Magistrate erred in law and fact by not applying the law on stay of execution correctly.**
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> **5. THAT the Learned Magistrate erred in law and fact by disregarding the appellant's evidence, and submissions.**
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> **6. THAT the Learned Magistrate erred in law and fact by disregarding the appellant's High Court decisions as per List of Authorities filed which are binding on the trial court."**

The appeal was canvassed by way of written submissions. The background of this application is that sometimes on 9th May 2016 the appellant sued the respondent for compensation for fatal injuries sustained by Hellen Kwamboka (deceased) in a motor accident involving a vehicle belonging to the deceased. The respondent did not enter appearance and on 15th July 2016 the lower court entered interlocutory judgement in favour of the appellant. The matter then proceeded to formal proof wherein the court assessed and awarded the respondent a sum of Kshs. 935,000/=, interest and costs of the suit. Thereafter on 9th June 2017 the advocates for the parties filed a consent in the following terms: -

> **" ……..**
>
> **By consent**
>
> **1. The 2nd defendant to pay the decretal amount of Kshs. 1,067,230/= as follows: -**

(i) On or before 20th June 2017 Kshs. 250,000/=.

(ii) The balance thereafter to be paid my monthly instalments of Kshs. 30,000/= starting 5th July 2017 and thereafter on the 5th of each succeeding month until payment in full.

2. That in default of any single instalment the outstanding balance to become due and recoverable and warrant of arrest to issue against the 2nd defendant forthwith for committal to civil jail."

The respondent could not raise the sums agreed and so on 3rd April 2019 he filed a Notice of Motion seeking a temporary injunction to restrain the appellant from executing the decree on the premise that he had filed a declaratory suit (PMCC 43 of 2019) against his insurer which was yet to be heard and determined. He averred that he stood to suffer substantial loss if the injunction was not granted as the appellant was incapable of refunding the decretal sum were the orders not granted and the suit against his insurer succeeded.

The appellant vehemently opposed that application but after hearing and considering the submissions of Learned Counsel for the parties the trial Magistrate found in favour of the appellant and stated: -

"In this case the judgement was delivered after taking into account the pleadings, exhibits produced before the court and submissions by the (sic) both parties. The applicant was served and after the insurer declined to pay he entered into a consent dated 9th June, 2017 and committed to pay. But now he is in financial constraints and is unable to continue. He has filed PMCC No. 43 of 2019 and seeks stay of execution to enable him prosecute the case against the insurer to compel it to pay.

I have perused PMCC No. 43 of 2019 and I confirm this suit is pending. He has paid some decretal amount and this (sic) a confirmation the applicant has demonstrated good faith in this case.

In the shot (sic)

1. I grant stay of execution pending hearing and determination of PMCC No. 43 of 2019.

2. Each party to bear its own costs……."

This appeal proceeded by way of written submissions. For the appellant it was submitted that the application giving rise to the impugned ruling was an abuse of the court process and was brought under the wrong provisions of the law; that the respondent did not in any case satisfy the conditions for stay of execution and that the application was inordinate and the delay was not explained. Counsel for the appellant also submitted that the trial court did not consider his submissions and the authorities he cited and did not exercise his discretion judiciously. To support his arguments Counsel relied on 2 cases: -

1. Sana Industries Limited & another v Robert Ayunga & another [2017] eKLR.

2. Samuel Mbugua Ikumbi v Barclays Bank of Kenya Limited [2015] eKLR.

On her part, Counsel for the respondent submitted that this appeal lacks merit, is frivolous, vexatious and an abuse of the court process and it ought to be dismissed with costs to the respondent. Counsel submitted that the respondent's declaratory suit has high chances of success and that the grounds of appeal and arguments of Counsel for the appellant have no basis and as the declaratory suit will soon be concluded this appeal ought not to be allowed. Counsel urged this court to find the authorities cited by Counsel for the appellant not relevant to this appeal and contended that the respondent demonstrated his good faith by partially settling the decree and by not applying to set aside the judgement of the lower court in toto.

Temporary injunctions and orders for stay of execution are discretionary and an appellate court ought not to interfere with the trial court's exercise of discretion unless that court misdirected itself or acted on the wrong principle ***(see United India Insurance Co. Ltd & 2 others v East African Underwriters (Kenya) Ltd [1985] eKLR and Mbogo & another v Shah [1968] EA 93)*** where the court stated: -

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

I have considered the rival submissions in this appeal and, as I am entitled to, also considered the application that was before the court below so as to arrive at my own conclusion. It is my finding that the court below did not exercise its discretion properly for the following reasons.

Firstly, whereas the application was for a temporary injunction the order granted was one for stay of execution. Whereas the end result of the two orders would have the same effect which was to throw out the respondent from the seat of justice, the conditions to be met by the applicant are distinct. **For a temporary injunction** the respondent was required to satisfy the following conditions: -

(a) A prima facie case with high chances of success.

(b) That he stood to suffer irreparable damage.

(c)* That the balance of convenience tilts in his favour – *see Giellah v Cassman Brown [1973] EA 358.

For stay of execution the respondent should have established: -

(a) That substantial loss would ensue from a refusal to grant stay.

(b) That he was willing to furnish security.

(c)* That the application was made without unreasonable delay. *(See Order 22 Rule 22 of the Civil Procedure Rules and also Butt v Rent Restriction Tribunal [1982] KLR 417 among a long line of authorities).

Secondly, even were we to ignore the above as a procedural technicality it is my finding that even on the merits the respondent's case did not meet the criteria for either of the above remedies. The respondent did not establish that he had a prima facie case with a likelihood of success. I say so because a judgement had already been entered against him and the mere fact that he had filed a declaratory suit which was yet to be heard or that he could not afford to finish paying the decretal sum did not present him with an arguable case more so given that the case was filed almost two years after the judgement. The respondent did not also prove to the court that he was likely to suffer irreparable damage that could not be compensated by an award for damages and I must also dare to say that he did not establish that the balance of convenience tilted in his favour.

As for stay of execution the respondent did not have an appeal that would have warranted a grant of stay of execution. **(See Order 42 rule 6 (2) of the Civil Procedure Rules).** Neither was the respondent seeking to set aside the judgement of the lower court. His concern was to extricate himself from the consent order which he had freely entered into simply because he was facing financial constraints. Further, he did not establish substantial loss as he did not demonstrate that the appellant was in no position to refund the decretal sum was his declaratory suit to succeed. Moreover, there was inordinate delay in bringing the application and one of the conditions for grant of stay is the timelines of the application. Therefore, even on the merits an application either for temporary injunction or for stay of execution should not have succeeded.

Thirdly, there was already on record a consent order between the parties and the respondent had based on that consent partly paid the decretal sum. The application therefore had the effect of altering or setting aside that consent. It is trite law that a consent judgement is akin to a contract between the parties and can only be set aside on grounds which would justify setting aside a contract. ***(See Hirani v Kassam [1952] 19 EACA 131) which was cited with approval in Brooke Bond Liebig Ltd v Mallya [1975] EA 266)*** where it was held that: -

> **"a consent order cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court, or if consent was given without sufficient material facts or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement."**

And **Flora Wasike v Destimo Wamboka [1988] 1 KAR 625** where it was observed: -

> **"It is now settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.**
>
> **…..In Purcell v FC Trigell Ltd [1970] 2 ALLER 671, Winn L J said at 676;**
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> **"It seems to me that if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract."**

The respondent did not establish any of the above circumstances. I am not persuaded that inability to pay the balance of the decretal sum, the belated declaratory suit or the magnanimity of not setting aside the judgement of the trial court qualify as conditions upon which a contract can be set aside. The respondent was not entitled to the orders either of a temporary injunction or stay of execution and it was also unjust to grant the same. This appeal has merit. It is allowed and the ruling dated 10th July 2019 is accordingly set aside. The costs of the impugned application in the court below and of this appeal are awarded to the appellant. It is so ordered.

Signed, dated and delivered in Nyamira this 23rd day of April 2020.

E. N. MAINA

JUDGE

This judgement was delivered electronically in view of the Ministry of Health and the World Health Organization's guidelines on combating the Covid-19 pandemic, the Advocates for the parties having consented.