



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO 292 OF 2019**

**SIMON MBIRUA KARANGU.....APPELLANT**

**VERSUS**

**EAST AFRICAN BREWERIES.....RESPONDENT**

**RULING**

1. In his Notice of Motion application dated and filed on 31<sup>st</sup> May 2019, the Appellant sought an order for stay of execution of the decree, judgment and proceedings in **Nairobi CMCC No 9129 of 2018 East African Breweries vs Simon Mbirua Karangu** pending hearing and determination of the appeal herein. The judgment was delivered on 8<sup>th</sup> June 2018. He swore his Affidavit in support of the said application on 31<sup>st</sup> May 2019.
2. He stated that he only became aware of the aforesaid suit when *ex parte* judgment was entered against him. He was aggrieved by the Ruling of the lower court that was delivered on 17<sup>th</sup> May 2019 in which his application seeking to set aside the said *ex parte* judgment so that he could be allowed to defend the suit was dismissed.
3. He contended that his appeal had a high probability of success but the same would be rendered nugatory if no order for stay of execution pending appeal was granted. He also said that he was ready, able and willing to abide by such security and condition that the court would impose. He therefore urged this court to allow his application as prayed as it was in the wider interest of justice that the orders he had sought be granted.
4. In opposition to the said application, on 30<sup>th</sup> July 2019, the Respondent filed Grounds of Opposition dated 29<sup>th</sup> July 2019 and a Replying Affidavit that was sworn by its advocate, B. Wangari Gathogo on 29<sup>th</sup> July 2019.
5. The Respondent termed the application as unmeritorious, misconceived, an afterthought and abuse of the court process that was bent on denying it enjoyment of fruits of its judgment. It was emphatic that the Appellant was fully aware of the suit in the lower court as he was served with the demand letter, Statutory Notice and Summons to Enter Appearance through his registered postal address.
6. It was its contention that the he had failed to furnish the court with sufficient material to support his application or to demonstrate that there was a triable defence to warrant the setting aside of the said Ruling and hence urged it to dismiss his application with costs.
7. The Applicant placed reliance on the case of **G.N. Muema P/A sic Mt View Maternity & Nursing Home vs Miriam Bishar & Another [2018] eKLR** in which this very court held that difficulties in recovering the decretal sum after succeeding on appeal would amount to suffering substantial loss.
8. In addition, he relied on the case of **JMM vs PM [2018] eKLR** where Meoli J held that if it was shown that enforcement would render a proposed appeal nugatory, then a stay could be properly given.
9. He further referred this court to the case of **Amal Hauliers Limited vs Abdulnasir Abukar Hassan [2017] eKLR** where it was held that where deposit of decretal sum was made, the winner would have ready access to the money once the appeal was determined.
10. It was his further argument that the Replying Affidavit ought to be struck out as the advocate had deponed on contentious matters which he ought to have disclosed the source of his information. He placed reliance on the case of **Magnolia PVT Limited vs Synermed Pharmaceuticals (K) Limited [2018] eKLR** where it was held that advocates are not permitted to swear on contentious matters.
11. On its part, the Respondent submitted that the issue of stay of execution had already been determined by the lower court and hence the

present application was *res judicata*. It added that without prejudice to his right of appeal, the Appellant ought to remit the full decretal amount to it as security before the determination of the appeal.

12. It was its submission that the averments in the Replying Affidavit were non-contentious and hence the advocate could depone to the same. In this regard, it relied on the cases of Salama Beach Hotel Limited vs Mario Rossi [2015] eKLR, Peeraj General Trading & Contracting Company Limited & Another vs Mumias Sugar Company Limited [2016] eKLR amongst other cases which dealt with striking out of affidavit and where the spirit was that it was draconian to strike out pleadings so the same had to be done cautiously.

13. This court considered the Appellant's submissions regarding the striking out of the Replying Affidavits a preliminary issue. It noted that the deponent relied on Affidavits of Service of the firms' Process Server evidencing service of the Summons to Enter Appearance and Plaint upon the Appellant herein. The firm of advocates was the one that also despatched the Demand letter to the Appellant to the address obtained from the Motor Vehicle Records. The other contentions related to the application that was dismissed in the lower court and contained reasons why the Appellant ought not to be granted the orders he had sought in the present application.

14. These were not contentious issues. They were issues that were within the knowledge of the deponent as an advocate. It was difficult to fathom how the Respondent would have deponed to those issues as they were not within its knowledge. In fact, it was the Respondent who would have been required to disclose the source of its information. Without belabouring this point, this court was not persuaded that the said Replying Affidavit ought to be struck out as it was nowhere the threshold of being struck out.

15. Before considering whether or not there was merit in the Appellant's application for an order of stay of execution pending appeal, this court took the view that the court appealed to could still grant an order for stay of execution notwithstanding that the same had been denied by the court to be appealed from. A similar application to the appellate court could not therefore be deemed to have been *res judicata* as the Respondent herein had argued.

16. Indeed, Order 42 Rule 6 of the Civil Procedure Rules provides as follows:-

**“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just (emphasis court), and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”**

17. Having settled the said issue, this court determined that before a court could grant an order for stay of execution pending appeal, it had to be satisfied that the applicant had demonstrated the conditions that have been set out in Order 42 Rule 6(2) of the Civil Procedure Rules, 2010. The said conditions are as follows:-

**a. That substantial loss may result unless the order is made.**

**b. That the application has been made without unreasonable delay.**

**c. Such security as the court orders for the due performance of the decree has been given by the applicant.**

18. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is **“and”**. It connotes that all three (3) conditions must be met simultaneously.

19. The decretal amount herein was Kshs 238,653.70 inclusive of costs. This was not a colossal amount of money. However, in the event the Appellant was to be successful in his Appeal, there were possibilities of commencing litigation to recover the monies from the Respondent herein. There was no guarantee that he would recover the monies on the first demand.

20. In the case of G. N. Muema p/a(sic) Mt View Maternity & Nursing Home vs Miriam Maalim Bishar & Another [2018] eKLR, this very court held as follows:-

**“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”**

21. Going further, judgment was entered without the Appellant having participated in the proceedings in the lower court. There was need for the appellate court to establish whether or not the Trial Magistrate exercised his discretion judiciously in dismissing his application to set aside the *ex parte* judgment so as to allow him to defend the suit.

22. This court noted the Respondent's submissions that had been advanced to explain why the present application ought not to be allowed but could not analyse the same as there was the risk of delving into the merits or otherwise of the Appeal herein. Whether or not the Appellant had a defence that had raised triable matters was not one that could be determined at this instance. That was a question for the Trial court to consider in the event the Appellant was successful in his Appeal herein.

23. Evidently, the Respondent would suffer no loss and/or prejudice if the decretal sum was not paid to it before the hearing and determination of the appeal as it had proposed for the reason that any monies that would have been deposited would be intact and would have accrued interest at the conclusion of the Appeal. Whoever will win will be in a position to access the monies and accrued interest. This court was thus persuaded to find and hold that the Appellant would suffer substantial loss if the decretal sum was released to the Respondent herein before the Appeal herein was heard and determined. In this respect, the Appellant had fulfilled the first condition for being granted an order for stay of execution pending appeal.

24. The Ruling the Appellant wished to appeal against was delivered on 17<sup>th</sup> May 2019. The present application was filed on 31<sup>st</sup> May 2019. The application was thus filed without undue delay and consequently, the Appellant had also satisfied the second condition for the granting of an order for stay of execution pending appeal.

25. The Appellant averred that he was ready and willing to abide by such security and condition that the court would impose. This court was satisfied that he had also demonstrated that he had complied with the third condition of being granted an order for stay of execution pending appeal.

26. Weighing his right to have his dispute determined fairly in a court of law or competent tribunal as provided in Article 50(1) of the Constitution of Kenya and the equally important Respondent's fundamental right that justice delayed is justice denied as stipulated in Article 159(2) (b) of the Constitution of Kenya, this court determined that there would be more injustice and prejudice to be suffered by the Appellant if he was denied an opportunity to ventilate his Appeal on merit in the event an order for stay of execution was not granted.

### **DISPOSITION**

27. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated and filed on 31<sup>st</sup> May 2019 was merited and the same is hereby allowed in terms of Prayer No (3) therein in the following terms:-

**1. There shall be a stay of execution of the decree in Nairobi CMCC No 9129 of 2018 East African Breweries vs Simon Mbirua Karangu that was delivered on 17<sup>th</sup> May 2019 on condition that the Appellant shall deposit into an interest earning account in the joint names of his counsel and counsel for the Respondent, the decretal sum of Kshs 238,653.70 within forty five (45) days from the date of this Ruling.**

**2. For the avoidance of doubt, in the event, the Appellant shall default on Paragraph 27(1) hereinabove, the conditional stay of execution shall automatically lapse.**

**3. Either party is at liberty to apply.**

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

28. It is so ordered.

**DATED and DELIVERED at NAIROBI this 28<sup>th</sup> day of May 2020**

**J. KAMAU**

**JUDGE**