



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 767 OF 2019

FUAD HUSSEIN MOHAMED.....APPLICANT

VERSUS

ADAN ISAACK IBRAHIM.....RESPONDENT

RULING

1. The application dated 27th December, 2019 seeks orders that:

1. Spent.

2. That the firm of Onyango & Away be granted leave to come on record for the Defendant/Appellant.

3. That honourable court be pleased to issue temporary stay of execution of the default judgment, decree and all consequential orders delivered against the Appellant on 9th April, 2019 by the honourable trial court pending the hearing and final determination of this application.

4. That the honourable court be pleased to call and examine the process server, one Bethwel N. Ndwiga on the contents of his affidavit sworn on 22nd January 2018.

5. That the honourable court be pleased to summon and cross examine the former advocates, Julius Nyakiangana on the contents of his affidavit sworn on 13th November, 2019.

6. That this honourable court be pleased to set aside and/or vary the default judgment entered against the Defendant/Appellant on 9th April, 2019 and the subsequent orders issued by the trial court.

7. That this honourable court be pleased to set aside and/or vary the ruling dated 2nd December 2019 and grant the Appellant leave to defend the suit.

8. That this honourable court do grant the Defendant leave to defend the primary suit.

9. That the costs of the application be provided for.

2. It is stated in the grounds in the body of the application and the affidavit in support and further affidavit that the suit in the lower court proceeded *ex parte* and judgment was entered against the Applicant and a decree issued for the sum of Ksh.3,868,775.09. The Applicant blames the failure to attend court on his then advocates who he states filed an application to cease acting which was allowed by the court. The Applicant's contention is that he was not served with the said application.

3. The Applicant also disputes that he was served with the hearing notice when the case proceeded to hearing. That the Applicant subsequently instructed a new advocate who applied for orders to set aside the judgment but the application was dismissed, hence the Appeal herein. It is further averred that the Appeal herein has merits and the Applicant ought to be given an opportunity to ventilate the same.

4. The application is opposed. It is stated in the replying affidavit that the Applicant was personally served with the hearing notice but failed

to turn up for the hearing. That no application was made before the lower court for the cross examination of the Applicant's former advocates and the process server. It is further averred that the application herein is an afterthought and that the Applicant applied to set aside the judgment after the execution process commenced.

5. I have considered the application, the response to the same and the submissions filed by the respective counsel for the parties.

6. Under Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 the conditions for stay of execution are as follows:

“No order for stay of execution shall be made under sub-rule (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.”

7. The judgment of the lower court was delivered on 2nd December, 2019. The application at hand was filed on 30th December, 2019. The application was filed timeously.

8. There are no allegations that the Respondent is not capable of refunding the decretal sum. No offer of security for the due performance of the decree has been made. There was also no service of the application on the former advocate on record. No consent between the current and the former advocate is on record.

9. The Appeal herein is yet to be heard. Some of the prayers in the application are the subject of the Appeal and this court will not delve into the same at this stage.

10. To balance the interests of the parties, I allow the application in terms of prayer No. 3 pending the hearing and determination of the Appeal on condition that the decretal sum is deposited in court within 30 days from the date hereof. The Applicant's counsel to regularize his being on record. Orders accordingly.

Dated, signed and delivered in Nairobi this 18th day of June, 2020

B. THURANIRA JADEN

JUDGE