



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL APPEAL NO 674 OF 2019**

**SAMAR CONSTRUCTION COMPANY LIMITED.....APPELLANT**

**VERSUS**

**DENIS MOKAMBA NYASANI.....RESPONDENT**

**RULING**

1. In its Notice of Motion application dated 18<sup>th</sup> November 2019 and filed on 19<sup>th</sup> November 2019, the Appellant herein sought an order for stay of execution of the decree emanating from the interlocutory judgment that was entered against it in **CMCC No 4345 of 2019 Dennis Makamba Nyasani vs Samar Construction Company Limited** pending the hearing and determination of the Appeal herein. The Appellant's Director, Maingi Wambugu swore an Affidavit in support of the application herein on 18<sup>th</sup> November 2019.

2. The Appellant pointed out that it was never served with any Summons to Enter Appearance and that it only learnt of the entry of the interlocutory judgment when it was served with a Proclamation Notice and Warrants of Attachment. It stated that it filed an application seeking orders for a stay of execution in the lower court but an *inter partes* date was given at a time when execution would have taken place. It was its averment that it stood to suffer substantial loss in the event the order it had sought herein was not granted.

3. It therefore urged this court to allow its application as prayed.

4. In opposition to the said application, on 4<sup>th</sup> December 2019, Roselyn Kihara, the Legal Officer of the Insurer of the Respondent's Motor Vehicle Registration Number KBV 734J (hereinafter referred to as "the subject Motor Vehicle") swore a Replying Affidavit on behalf of the Respondent herein. The same was filed on 10<sup>th</sup> December 2019.

5. The Respondent averred that the present application was based on outright lies and distorted facts that were meant to mislead the court herein. He was emphatic that the Appellant was duly served with the said Summons to Enter Appearance as it acknowledged and stamped the same and that interlocutory judgment was entered after it failed to enter appearance and/or file a defence to his claim. He added that the Appellant was further served with a Notice of Entry of Judgment which it acknowledged by stamping on his copy.

6. He explained that his advocates informed the Appellant's insurer of the decree but there was no response as a result of which he proceeded with execution proceedings. He was categorical that the Appellant had not met the threshold of having the *ex parte* judgment being set aside and contended that the delay in resolving claims like the instant case undermined the proper running of insurance business thus impacting negatively on the rest of the insuring public.

7. It was his averment that litigation had to come to an end and thus urged this court to dismiss the present application.

8. The Appellant placed reliance on the cases of **National Industrial credit Bank Ltd vs Aquinas Francis Wasike & Another [2006] eKLR** and **Antoine Ndiaye vs African Virtual University Nairobi** whose citation was not provided to support its arguments that it ought to be granted an order for stay of execution.

9. On the other hand, the Respondent relied the cases of **Mohamed & Another vs Shoka [1990] KLR 463**, **Raila Odinga & 5 Others vs IEBC & 3 Others SCK [2013] eKLR** and **Benjoh Amalgamated Ltd & Another vs Kenya Commercial Bank Ltd [2014] eKLR** to argue that the Appellant was not entitled to the setting aside the *ex parte* judgment that was entered against it.

10. It was apparent to this court that the Respondent had submitted in respect of the substantial issues to be argued at the time of the appeal. The Appellant's grounds of appeal were on the question of whether or not the Learned Magistrate exercised discretion judiciously in not granting it a stay of execution. Both these positions put this court in a dilemma as there was a risk of it making a determination on the merits or otherwise of the Appeal if it analysed the submissions as had been presented to the court.

11. Having said so, this court considered the circumstances of the case herein *vis a vis* the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 and found that there was a possibility of the Appellant suffering substantial loss in the event its appeal succeeded and it had paid the Respondent the decretal sum. Indeed, it had alluded to this fact.

12. Although it did not demonstrate the substantial loss that it would suffer and the decretal sum standing at Kshs 662,070 was not colossal, it nonetheless found and held that it would suffer substantial loss. 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 determined 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.”**

The condition of suffering substantial loss was demonstrated.

13. As the proclamation was done on 12<sup>th</sup> November 2019 and the present application was filed on 19<sup>th</sup> November 2019, this court was satisfied that the Appellant had met the second condition of being granted an order for stay of execution as the application was filed without any delay.

14. Whereas the Appellant had not offered to provide security for the due performance of such decree or order as may ultimately be binding on it, this court nonetheless determined that it could order that it provides such security as would be binding on it.

15. Notably, Order 42 Rule 6(2) of the Civil Procedure Rules stipulates that:-

**“No order for stay of execution shall (emphasis court) 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.”**

16. Consequently, as the court was satisfied that the Appellant had met the three (3) pre-requisite conditions provided in Order 42 Rule 6(2) of the Civil Procedure Rules before it could be granted an order for stay of execution pending appeal, there was therefore need for it to be granted preservatory orders to give it an opportunity to ventilate its appeal on merit.

## **DISPOSITION**

17. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Notice of Motion application dated 18<sup>th</sup> November 2019 and filed on 19<sup>th</sup> November 2019 was merited and the same be and is hereby allowed in the following terms:-

**1. THAT there shall be an order for stay of execution of the decree emanating from the interlocutory judgment that was entered against it in CMCC No 4345 of 2019 Dennis Makamba Nyasani vs Samar Construction Company Limited pending the hearing and determination of the Appeal herein on condition that the Appellant shall deposit into an interest earning account in the joint names of its advocates and the advocates for the Respondent, the decretal sum of Kshs 662,070/= 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 17(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.**

18. It is so ordered.

**DATED and DELIVERED at NAIROBI this 25<sup>th</sup> day of November 2020**

**J. KAMAU**

**JUDGE**