



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 65 OF 2013

ARTHUR MUNYAO & OTHERSPLAINTIFFS

-VERSUS-

ROSEMARY WANGUI KIMAKU & OTHERS.....DEFENDANTS

RULING

1. The 1st defendant **Rosemary Wangui Kimaku**, had an interlocutory judgment entered against her alongside her co-defendants on **26th April 2013**. It was entered in default of defence. The 1st defendant applied for the setting aside of that judgment by her application dated **20th September 2016**. This court by its ruling of **22nd January 2018** set aside that judgment on condition. The condition was for the 1st defendant to provide, within 30 days, USD 15,375.00 to be deposited in a joint interest earning account operated by the advocates for the plaintiffs and the 1st defendant. Failure to so provide that amount, the order of setting aside the interlocutory judgment would be vacated.

2. The 1st defendant filed a notice of motion dated **13th February, 2018** which is the subject of this ruling. By that application the 1st defendant seeks the order:

“that this honourable court be pleased to stay the ruling of this honourable court passed on **22nd January 2018** pending hearing and determination of the appeal”.

3. The only basis for seeking that order, which is apparent on the 1st defendant’s affidavit in support of that application, is that the 1st defendant was dissatisfied with the ruling of **22nd January 2018**. That unless stay is granted the 1st defendant will suffer substantial loss because, if money is paid to the plaintiffs it will not be recoverable.

4. The plaintiff filed a replying affidavit which was done by **Arthur Munyau Muuo** the 1st plaintiff. That affidavit was not executed by the 1st plaintiff although strangely its commissioned by a commissioner of oaths. Since it was not executed by the deponent, it will not be considered in this ruling.

5. The prayer sought by the 1st defendant is not at all straight forward. I say so because the 1st defendant seeks to stay the order of the ruling of **22nd January 2018**. That ruling ordered the 1st defendant to deposit money into a joint account of the advocates as a condition of setting aside the interlocutory judgment entered against the 1st defendant. It will become obvious that there are two limbs of the orders from that ruling. The 1st limb is that interlocutory judgment against the 1st defendant was set aside. The 2nd limb is that the 1st defendant was to deposit USD 15,375.00 within 30 days of **22nd January 2018** in a joint account of the advocates.

6. If the 1st defendant’s order seeking the stay of the ruling of **22nd January 2018** is granted, it will mean that the interlocutory judgment against the 1st defendant will remain in place. Is that what the 1st defendant sought? Am not sure. It does seem to me that staying the ruling of **22nd January 2018** will mean that the status prior to that ruling date will revert. That is the interlocutory judgment against the 1st defendant will be restored. When one considers it that way, it then becomes clear that it is futile to grant a stay of that order because in the absence of granting the stay, the interlocutory judgment against the 1st defendant will be restored.

7. The orders of the ruling although on the face of it, it looks as though the order is positive, it is indeed negative order. It is negative and therefore a stay cannot be granted. This has been the jurisprudence of the court in respect to stay orders. There are two cases cited in the case of **Catherine Njeri Maranqa vs Serah Chege & Anor [2017] eKLR** which I will also cite here because of their relevance to this matter:

“In **Western College of Arts and Applied Sciences v Oranga & Others (1976-80) 1 KLR**, the Court of Appeal for East Africa stated in respect of stay of execution, stated as follows:

“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In *Wilson v Church* the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case the High Court has not ordered any parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court Judgment for this Court, in and application for stay, it is so ordered”

“In *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* [2015] e KLR the Court of Appeal (Kantai J.A) held as follows:

‘An order for stay of execution[pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a “positive order” – either an order that has not been complied with or has partly been complied with. See, for this general proposition, the holding of the Court of Appeal of Uganda in *Mugenyi & Co. Advocates v National Insurance Corporation* (Civil Appeal No. 13 of 1984) where it was stated:

‘..... an order for stay of execution must be intended to serve a purpose”

8. In view of the fact that no purpose will be served by granting the order sought in the notice of motion of **13th February 2018**, that application is found without merit. Since the plaintiff did not participate in the hearing of this matter and since the plaintiff’s replying affidavit was unexecuted, no costs will be awarded to the plaintiff in respect to the notice of motion.

9. In the end the order of this court is that the notice of motion dated **13th February 2018** is dismissed with no orders as to costs.

DATED and SIGNED at NAIROBI this 24TH day of JULY, 2019.

MARY KASANGO

JUDGE

Ruling Read in Open Court in the presence of:

Sophie..... COURT ASSISTANT

..... FOR THE PLAINTIFFS

..... FOR THE DEFENDANTS