REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 2 OF 2019

JMK.....APPELLANT/APPLICANT

VERSUS

KK.....1ST RESPONDENT

LNK.....2ND RESPONDENT

RULING

1. An interlocutory judgment was entered against the Applicant who was the Defendant in **Thika CM's Court Children Case No. 156 of 2018**, which had been brought by the Respondents herein, who are his son and wife, respectively, seeking maintenance for the former Respondent. Formal proof was conducted, but one day before the date set for submissions, an application to set aside the *exparte* judgment was filed by the Applicant. The application was heard *inter partes* and a ruling dismissing it delivered on 17th December,2018. Aggrieved with this outcome, the Applicant appealed to this court.

2. He also filed a motion on 24th January, 2019 expressed to be brought under Order 42 Rule 6 *inter alia* seeking for an order:-

> a) that pending the hearing and determination of this case, the execution of the being executed in the true sense of that word. It seems to me that the proper prayer in the circumstances of the case was one to stay the order of the trial court dismissing the application for setting aside, or to stay further proceedings pending appeal.

3. The application is premised on grounds that the Applicant was not personally served with summons to enter appearance and was not accorded a chance to defend the suit; and that judgment in default of appearance was entered against him, which amounts to being condemned unheard.

4. The Applicant swore an affidavit in support of the motion, deposing therein that he was condemned unheard pursuant to the default judgment. He contended that summons to enter appearance should have been served on him personally and not on an advocate who acted for him in a previous suit; that he was unaware of the suit against him; that upon learning about the suit , he instructed an advocate, who filed an application to set aside the interlocutory judgment and leave to file a defence . That his application was disallowed, hence the instant appeal.

5. The 2nd Respondent filed a replying affidavit on 19th February, 2019 in opposition to the application. She deposed that the 1st Respondent (the Applicant's son) had been granted leave to file a suit for extended parental responsibility in Misc. Application No. 1 of 2014 which was later withdrawn and Children Case No. 156 of 2018 filed by both Respondents. That the summons to enter appearance were served on the advocate representing the Applicant in the former case, who accepted service on behalf of the Applicant herein. She contended that no appearance was entered and judgment in default of appearance was entered; that formal proof proceeded but the Applicant's advocate later filed an application seeking to set aside the interlocutory judgment, which application was dismissed. She urged the court not to grant the order of stay as the 1st Respondent will be highly prejudiced and that in any case, the appeal herein has no merit.

6. The application was canvassed by way of written submissions. The Applicant submitted that the application was filed timeously. He pointed out that that matters touching on financial responsibility are sensitive as a party who is condemned to shoulder financial responsibility might suffer irreparable loss. He also contended that he would be subjected to the hardship of instituting legal proceedings to recover any sums paid out to the Respondents should his appeal succeed. He called to his aid the case of **Ikechukwu Anoke v CFC Stanbic Bank Limited (2018) eKLR.** The court was urged to grant the Applicant an order for stay of execution so that the appeal is not rendered nugatory.

7. He reiterated the depositions in his supporting affidavit and asserted that he was condemned unheard. Lastly, it was stated that the Applicant was willing to provide security.

8. Counsel for the Respondents submitted that the relevant discretionary power of the court must be exercised judicially as stated by the Court of Appeal in **Butt v Rent Restriction Tribunal (1982) KLR 417**. It was Respondents' submissions that the application and the appeal have no merit and lack good faith; that allegations that summons to enter appearance were not properly served are untrue as the said advocate accepted service.

9. The court was urged to do justice to both parties; that the ruling principle is that a successful party is entitled to the fruits of his judgment. The Respondents contend that the Applicant has not shown what substantial loss he is likely to suffer if the application is denied and that in any event, it is the 1st Respondent who is likely to suffer prejudice. It was submitted that the Applicant has failed to establish that he would suffer substantial loss and that the application has not met the prerequisites for the grant of an order for stay and as such should not be allowed.

10. The court has considered the material canvassed by the parties. Although the parties argued the motion as if it was one related to a monetary decree, there is no decree in this matter as yet. As earlier observed the prayer to stay execution of judgment appears inappropriate for the facts of this case, and would not be efficacious, there being no judgment capable of execution. Thus, some of the requirements and principles governing the grant of stay of execution pending appeal may not apply neatly to the peculiar facts of this case.

11. That said, some of the standard principles do apply and in my reading, in Order 42 Rule 6 (1) is wide enough to accommodate the present situation. Under the latter, the court has discretion '"for sufficient" cause to stay execution of a decree or order appealed from and make such order as may seem just. Evidently, the successful applicant must make the application timeously and demonstrate likelihood of suffering substantial loss if the prayers sought are denied.

12. In the famous decision on this aspect cited to this court by the Respondents, namely **Butt v Rent Restriction Tribunal (1979) e KLR, Madan JA** stated that**:**

> **"The litigants and their professional advisors are the best judges of their affairs. If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings.**
>
> **It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church* (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:**
>
> **"I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory."**
>
> **Megarry J, as he then was, followed *Wilson* (supra) in *Erinford Properties Limited v Cheshire County Council* [1974] 2 All ER 448 at p 454 and also held that there was no inconsistency in granting such an injunction after dismissing the motion, for the purpose of the order is to prevent the Court of Appeal's decision being rendered nugatory should that court reverse the judge's decision. The court will grant a stay where special circumstances of the case so require, per Lopes LJ in the *Attorney General v Emerson and Others* 24 QBD (1889) 56 at p 59."**

13. In the case of **Kenya Shell v Kibiru and Another (1986) KLR 410, Platt Ag. JA** (as he then was) observed that:-

> **"It is usually a good rule to see if Order XLI Rule 4 of the civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. <u>Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money</u>."** (emphasis added)

14. Earlier on, **Hancox JA** in his ruling observed that:

> "**It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would… render the appeal nugatory…..**
>
> **As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause."**

15. In this case, the Applicant's appeal will no doubt be rendered nugatory if an order of stay is not granted, as the trial court will proceed to recieve submissions and render its judgment on the basis of the Respondents' evidence alone. The Applicant's defence will not have been heard or considered in such event. In my estimation, that is sufficient cause for granting an order to stay the dismissal order appealed from, pending appeal. At the same time, there being no decree in existence, the Court may craft conditions to ensure that justice is done to both parties. In **Nduhiu Gitahi and Another -Vs- Anna Wambui Warugongo [1988] 2 KAR,** the court**,** citing the decision of **Sir John Donaldson M. R. in Rosengrens -Vs- Safe Deposit Centres Limited [1984] 3 ALLER 198** stated that**:**

> **"We are faced with a situation where a judgment has been given. It may be affirmed, or it may be set aside. We are**

concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage the Defendant while giving no legitimate advantage to the Plaintiff
It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal……"

14. Consequently, the Court hereby grants an order of stay in respect of the order of dismissal of the Applicant's motion in the lower court, pending the hearing and determination of this appeal, on condition that:

a) The Applicant is to file his record of appeal in 45 days, failing which the appeal will stand automatically dismissed and the Respondents at liberty to proceed with the lower court suit.

b) The Applicant is to prosecute his appeal within 12 months of today's date.

c) The Applicant is to pay the costs of this application to the Respondents in any event.

DELIVERED AND SIGNED AT KIAMBU THIS 20TH DAY OF DECEMBER 2019.

C. MEOLI

JUDGE

In the presence of:

Mr. Muthee holding brief for Miss Waithera for Applicant.

2nd Respondent in person

Court Assistant Nancy