

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 446 OF 2019

ROSELINE MBUGI.....1ST APPLICANT/DEFENDANT

BEVAJ FURNITURE LIMITED....2ND APPLICANT/DEFENDANT

VERSUS

IRON ART LIMITED.....RESPONDENT/PLAINTIFF

RULING

This is an application by way of Notice of Motion under Sections 1A, 1B, 3, 3A and 63E of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules for orders that there be a stay of execution pending appeal, following attachment of the movable property and warrants of sale issued against the applicants on 21st May, 2019 by the lower court.

There is also a prayer that there be extension of time to file an appeal against the decision of the lower court. The reasons for seeking the said orders are set out on the face of the application alongside a supporting affidavit sworn by the 1st applicant. The application is opposed and there is a replying affidavit sworn by an accountant of the respondent herein. Both parties have filed submissions to address the application.

The respondent filed a suit against the applicants herein. The record shows that the applicants were served with summons to enter appearance but did not comply. The respondent then applied and obtained *ex parte* judgment which became a subject of an application dated 16th November, 2017 seeking a stay of execution in the lower court.

In a ruling delivered on 17th August 2018 the applicant's application was dismissed. Both the advocates for the applicants and respondent were absent. There is a Notice in this record signed by the Presiding Magistrate dated 16th August, 2018 with a title "**To our esteemed advocates/litigants**" giving notice that Judgments and Rulings would be delivered on 17th August, 2018. The present case appears as No. 5 in that Notice. The applicants have submitted that they were not aware of that date because notice was never served. It is more probable than not that this is true. There was only one day notice in between the posting of the notice and the delivery of the ruling. The notice was placed on the door of the court. It cannot be concluded that the parties read that notice. Notices should be served upon the parties or their advocates. This was not the case.

On whether or not applicants are properly before this court Order 42 Rule 6(1) is clear in that regard. It matters not that they approached the lower court which dismissed their application. Under the said Rule 6(1) this court has jurisdiction to hear this application.

The applicants in the lower court disputed service of summons to enter appearance. They filed a notice to cross-examine the process server under Order 5 Rule 16 of the Civil Procedure Rules on 6th December, 2017. The respondent failed to avail the process server. Service of summons therefore remains a triable issue in this case. For the applicants to justify the orders sought they must show substantial loss may result if execution proceeds. They must also demonstrate the application was filed timeously and that the intended appeal is arguable.

The notice of attachment was brought to the applicant's attention on 7th June, 2019. This application is dated 16th and filed on 12th June, 2019 which was 4 days thereafter. It was therefore filed timeously. The applicants contend that they have a defence to the respondent's claim which raises triable issues and if stay is not granted, substantial loss will follow. They base their argument on the fact that, they are strangers to the respondent's claim and are being made to pay a debt they do not owe. On that basis, they fault the lower court for not appreciating that their defence had triable issues.

I have considered the respective positions of the parties herein. The applicants have offered to post security which may guarantee the respondent of payment in the event the appeal fails. No serious prejudice has been alleged shall befall the respondent if the orders sought are granted. In upholding the principle of fair hearing, there is merit in this application.

Accordingly, there shall be a stay of execution of the lower court ruling pending the determination of the applicants' intended appeal. Time to file the appeal against the court ruling is extended by 30 days from the date of this ruling. The warrants of attachment are hereby recalled unconditionally. The costs shall be on appeal.

Dated, signed and delivered at Nairobi this 19th day of December, 2019.

A. MBOGHOLI MSAGHA

JUDGE