



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 102 OF 2017**

**SHEILA WAMBUI MUTURI.....APPELLANT**

**VERSUS**

**PETER MACHARIA MUIRU.....RESPONDENT**

**RULING**

There is an ongoing Civil Case No. 4698 of 2014 in the lower court. The plaintiff filed the case against the defendant vide a plaint dated 10<sup>th</sup> August and filed on 13<sup>th</sup> August, 2014 for general damages and other costs following a road traffic accident. Upon service of summons to enter appearance, the defendant is said to have delayed in filing defence. The plaintiff applied for and obtained an interlocutory judgment against the defendant.

The defendant then moved the court to set aside the said interlocutory judgment which application was heard by the trial magistrate. The learned trial magistrate then made the final determination which in part reads as follows,

**“The ex parte judgment against the defendant is set aside and given that a defence was filed on 1<sup>st</sup> December, 2014, there is no need of filing a 2<sup>nd</sup> draft defence filed together with this application. I am satisfied that the ex-parte judgment was regular and proper in law. The plaintiff is awarded the costs of this application. The plaintiff is also awarded throw away costs of Kshs. 100,000. The proceedings of 22<sup>nd</sup> September, 2016 are not set aside as the defendant was duly represented and counsel for the defendant cross-examined the plaintiff. The case to proceed from where it had reached.”**

The defendant was aggrieved by that ruling and filed a Memorandum of Appeal on 9<sup>th</sup> March, 2017.

There is now before me an application by way of Notice of Motion dated 7<sup>th</sup> and filed on 8<sup>th</sup> September, 2017 for the substantive order that there be a stay of proceedings in the lower court pending the hearing and determination of the appeal. The grounds upon which the order is sought are set out on the face of the application and there is a supporting affidavit sworn by the advocate for the defendant.

The application is opposed and there is a replying affidavit sworn by the plaintiff/respondent. Both counsel have filed submissions to address the application. The application to set aside the interlocutory judgment which had been entered in the lower court was determined in the exercise of the discretion of the trial court.

The present application is premised among other provisions on Order 42 Rule 6 (1) and Order 43 Rule 2 of the Civil Procedure Rules and under Article 159 (2) of the Constitution.

I have considered all the material presented before me. It is true that the applicant may have an arguable appeal especially on the ground that no reasons were assigned to the award of thrown away costs. There is also the subject of access to justice that may be compromised if a stay is not granted. The lower court case is relatively new and I believe that no prejudice shall be occasioned in the event stay is granted in the circumstances of this case.

Without saying more therefore, the application is allowed and there shall be a stay of the lower court proceedings until the appeal is heard and determined. I direct that the record of appeal shall be filed and served within 30 days from the date of this ruling so that directions are given for the hearing. The costs of this application shall be on appeal.

**Dated, signed and delivered at Nairobi this 20<sup>th</sup> Day of March, 2018.**

**A. MBOGHOLI MSAGHA**

**JUDGE**