



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 47 OF 2017**

**TAHMED COACH..... APPELLANT/APPLICANT**

**VERSUS**

**PAUL WATHIRU.....RESPONDENT**

**RULING**

1. The application dated 6<sup>th</sup> of March, 2017 is premised on the provisions of Section 3A of the Civil Procedure Act. It seeks the following orders:-

(i) Spent

(ii) Spent:

(iii) That there be a stay of execution orders of Honourable Kagoni E.M., SRM, in Mombasa CMCC No. 375 of 2015 requiring the appellant/ defendant herein to deposit Kshs. 1,824,400/= in a joint earning account (sic) of his Advocate and the respondent/plaintiff advocate (sic) pending the hearing and determination of this appeal; and

(iv) That costs of this application be provided for.

2. The application is supported by the affidavit of Swallah Abdalla Omar sworn on 6th March, 2017. The respondents filed grounds of opposition dated 14<sup>th</sup> March, 2017. Mr. Otwere, Learned Counsel for the applicant submitted that an application was made for setting aside the *ex parte* judgment in Mombasa CMCC No. 375 of 2015, wherein the court granted the orders on the condition that the applicant deposits security in the sum of Kshs. 1,824,400/=. Counsel submitted that the police abstract relied on in the said court did not have the applicant's motor vehicle registration number and that there was no proper service of summons to enter appearance.

3. It was submitted for the applicant that the law firm of Sherman Nyongesa & Co. Advocates filed an application in which they were given a conditional order. Counsel stated that the applicant had filed a defence in the lower court case. He indicated that the deposit of security in the sum of Kshs. 1,824,400/= became difficult for the applicant to effect.

4. Counsel for the applicant further indicated that a notice of change of Advocates was filed on 7<sup>th</sup> March, 2017 and served upon the respondent on 8<sup>th</sup> March, 2017. He stated that Order 9 rule 9 of the Civil Procedure Rules guards the Advocate where a litigant may not pay costs. In his view, the argument that the applicant's Advocate is not on record is out of context. He added that the applicant was willing to pay costs for the court to grant orders for the matter to be heard afresh. He prayed for the application to be allowed.

5. Mr. Gachiri Kariuki, Learned Counsel for the respondent opposed the application. He informed the court that Hon. Kagoni granted the applicant leave to defend the suit subject to them depositing the sum of Kshs. 1,824,400/=. He further submitted that the memorandum of appeal is a duplicity of the application before this court, hence an abuse of the court process.

6. It was submitted for the respondent that the law firm of Sherman Nyongesa obtained orders for setting aside the *ex parte* judgment in the lower court. He stated that Narangwi and Associates came into this matter without leave of the court thus without complying with the provisions of Order 9 rule 9 of the Civil Procedure Rules, as the matter had gone to Judgment stage which called for the applicant to seek leave of the court to come on record.

7. Mr. Kariuki opined that the applicant should have gone to the lower court to seek variation of the conditional order.

## ANALYSIS AND DETERMINATION

The issue for determination is if this court should stay execution of the orders dated 16th February, 2017.

8. An application such as the one before me calls for the court to exercise its discretion in considering whether to grant it or not. More so, for the reason that in the present matter, the lower court set aside the *ex parte* judgment and ordered that the applicant herein deposits the sum of Kshs. 1,824,400/= in an interest earning joint bank account in the names of the Advocates representing the parties herein. The Hon. Magistrate thus gave the applicant conditional leave to defend the suit as he was not convinced that service of the summons and plaint had not been effected on the respondent.

9. The applicant argued that it is difficult for it to raise the sum of Kshs. 1,824,400/= to deposit in a joint interest earning bank account in the name of its Advocate and that of the respondent's Advocate. Reliance was made on the documents attached to the applicant's affidavit. One of the documents in the bundle marked as exhibit SAO-02 is a statement of defence filed on 22<sup>nd</sup> November, 2016 in Mombasa SRMCC No. 375 of 2015. The said defence was availed with the sole aim of showing that it raises triable issues. The applicant also attached a memorandum of appeal filed on 7th March, 2017. In the interim, pending the hearing of the appeal, the applicant seeks orders to stay the implementation of the orders made on 16<sup>th</sup> February, 2017.

10. One of the arguments raised by Counsel for the respondent is that the applicant's Counsel is not properly on record as he came on record after Judgment had been entered against the applicant. It was argued that the proper procedure was not followed by the said Advocate. Order 9 rule 9 of the Civil Procedure Rules provides that:-

***"Where there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-***

***(a) upon an application with notice to all parties; or***

***(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.*** (emphasis added).

11. I have perused the lower court file. It shows that the law firm of Narangwi and Associates Advocates filed a notice of change of advocates and a statement of defence on 7th March, 2017. As at the time the said documents were filed, the Hon. Magistrate had set aside the *ex parte* judgment. It therefore follows that there was no judgment in existence as at 7<sup>th</sup> March, 2017. The notice of change of Advocates was therefore properly filed and the provisions of Order 9 rule 9 of the Civil Procedure Rules were not applicable.

12. On the issue of stay of execution, the principles for grant of such orders are provided under the provisions of Order 42 rule 6 of the Civil Procedure Rules, which sets down the following principles for consideration before granting of the orders:-

(i) The application must be made without undue delay;

(ii) That applicant must demonstrate that he will suffer substantial loss unless the order sought is granted; and

(iii) 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.

13. On the issue of the application having been made without unreasonable delay, the ruling the subject of this application was delivered on 16<sup>th</sup> February, 2017. The application herein was filed on 6<sup>th</sup> March, 2017 which was 20 days after the delivery of the ruling. It is thus evident that the application was filed without undue delay.

14. On the issue of substantial loss, the amount of Kshs. 1,824,400/= as per the ruling of 16th February, 2017 was to be deposited in an interest earning joint bank account in the names of the Advocates on record. The said money was not to be paid to the respondent. It is however apparent that the applicant will be deprived of the said amount of money for a considerable duration of time pending the hearing of the appeal herein. This court notes that there is no standard measure on what constitutes substantial loss as the same varies from case to case.

15. The issue of security being offered by the applicant does not arise in this case as the orders of the subordinate court require the applicant to deposit the sum of Kshs. 1,824,400/= as a condition of defending the suit. There is therefore no judgment that has been entered against it that would require deposit of security in order for this court to grant orders for stay of execution.

16. In **Absalom Dova vs Tarbo Transporters Ltd.**, [2013] eKLR the court stated as follows:-

***"The discretionary relief of stay of execution pending appeal is designated on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice the case deserves. This is in recognition that both parties have rights; the appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on reconciliation which is not a question of discrimination."*** (emphasis added).

17. The matter before the lower court is still pending hearing and therefore there are no fruits of judgment to be enjoyed by the respondent as

the *ex parte* judgment was set aside. The issue is that the applicant is aggrieved of the conditional leave that was granted to defend the suit by the Hon. Magistrate and his reference in the ruling of 16th February, 2017 to the amount of Kshs. 1,824,400/=, as a decretal amount yet according to him, the said sum does not constitute a decretal amount.

18. In **Butt vs Rent Restriction Tribunal** (1982) KLR 417 at 419 and 420, Madan JA as he then was held as follows:-

***“It is 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.”*** (emphasis added).

19. Having perused the memorandum of appeal filed on 7th March, 2017 and taking into account the fact that the case in the subordinate court is yet to be heard, I am of the considered view that the applicant is deserving of the orders sought. The application is therefore allowed. Costs of the application will abide the outcome of the appeal.

**DELIVERED, DATED and SIGNED at MOMBASA on this 9th day of March, 2018.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Mr. Githinji holding brief for Mr. Narangwi for the appellant/applicant

Mr. Mathare holding brief for Mr. Gachiri Kariuki for the respondent

Mr. Oliver Musundi - Court Assistant