

THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 753 OF 016

PHILIP BARNARD ILAKO.....APPELLANT

VERSUS

EXPORT HYDRO PUMP & SERVICE

(AFRICA) LIMITED.....RESPONDENT

RULING

This is an application by way of Notice of Motion under Order 50 Rule 6, Order 42 rule 6 of the Civil Procedure Rules, Sections 3 and 3A of the Civil Procedure Act seeking an order that there be a stay of execution of the ruling of the lower court delivered on 9th December, 2016 and that Mambu Auctioneers be barred from attaching the appellant's property pending the determination of the appeal.

The application is supported by an affidavit sworn by the appellant. Both parties have filed submissions and cited some authorities. The ruling which prompted this appeal followed an application lodged by the appellant to set aside an *ex parte* judgment which had been entered against him for failure to enter appearance and file defence. He had denied service upon him and sought leave to defend the suit. The lower court was persuaded that summons had been served and that the judgment was regular. The appellant was also faulted for not annexing draft defence when making that application.

The ruling of the lower court was delivered on 9th December, 2016 and this application was filed on 14th December, 2016 alongside the Memorandum of Appeal. It is clear therefore that the application was filed timeously. It further enhances the determination on the part of the appellant to have his day in court.

The order sought is discretionary taking into consideration the interests of the parties before the court. Unless it is alleged to be prejudicial to the respondent, the order sought should generally be granted so as to accord the applicant an opportunity to ventilate his part of the dispute before the court. Indeed, that is the objective of Sections 1 and 1A of the Civil Procedure Act.

Guided by the provisions of law and the authorities cited, I see no prejudice that shall befall the respondent if the order sought is granted. I observe at this point that whereas it is true the appellant did not annex draft defence to guide the court on whether or not there are triable issues, that omission is not fatal and should not have been made a foundation to deny him leave to defend the suit. Further, where the only evidence available is by way of affidavits, courts should be cautious to rely entirely on such evidence because it presents a case of one party against the other which has not been tested by way of cross-examination.

In the interest of justice therefore, there shall be a stay of execution of any orders flowing from the ruling delivered on 9th December, 2016 until this appeal is heard and determined. The applicant shall however deposit into the court a sum of Kshs. 20,000/= being the security for costs within 30 days from the date of this ruling.

Dated, signed and delivered at Nairobi this 27th day of November, 2018.

A. MBOGHOLI MSAGHA

JUDGE