



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 538 OF 2016

GUYO GALGALO.....APPELLANT

- V E R S U S -

VERONICAH KAVINDU MUVIKU.....RESPONDENT

RULING

1) Guyo Galgalo, the appellant/applicant herein, took out the motion dated 17.8.2016 in which he sought for the following orders *inter alia*:

1. THAT upon hearing this application ex parte, this honourable court be and is hereby pleased to order stay of execution of the decree and/or order of the lower court issued on the 4th December, 2015, pending the hearing and determination of the instant application inter parties.

2. THAT upon hearing this application exparte, this honourable court be and is hereby pleased to set aside the decree and/or order of the lower court issued on the 4th of December, 2015 together with all consequential orders entered against the appellant/applicant and the file in respect of CMCC No. 656 of 2013 be remitted back to the lower court for hearing on merits.

3. THAT the costs of this application be provided for.

2) The motion is supported by two affidavits of the appellant/applicant. When the motion was served upon Veronicah Kavindu Muviku, the respondent herein, she filed grounds of opposition to oppose the motion. When the motion came up for interpartes hearing, this court gave directions to have the same disposed of by written submissions.

3) I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavits filed in support and the grounds of opposition filed by the respondent to resist the motion. I have also taken into account the rival written submissions. The history behind the motion is brief and straightforward. The respondent filed an action before the Chief Magistrate's Court, Milimani Commercial Court, Nairobi, in which she sought for judgment in the sum of ksh.250,000/= with interest at the rate of 25% p.a. plus costs. Pleadings were served upon Guyo Galgalo, the appellant, through the firm of Wangechi Munene & Co. Advocates. The aforesaid firm of advocates filed an appearance and a defence. When the suit came up for hearing, the appellant and his counsels failed to turn up, prompting the court to permit the respondent to prosecute the suit exparte giving rise to the judgment /decree issued on 4th December 2014 in the sum of ksh.338,227/19. When the appellant learnt of the existence of the judgment, he moved to the trial court and took out the motion dated 11th February 2016 whereof he sought for *inter alia* an order for stay of execution of the judgment/decree and for the setting aside of the decree. The application was heard and dismissed by Hon. Kabaria vide her ruling delivered on 5th

August 2016. Being aggrieved by the aforesaid decision, the appellant preferred this appeal. On appeal the appellant put forward the following grounds in his memorandum:

1. THAT the learned trial magistrate misdirected herself on both law and facts by finding that there was advanced no good justification as to why the Notice of Motion application dated 11th February 2016 should succeed, notwithstanding the weight of reasons, arguments and evidence adduced.

2. THAT the learned trial magistrate misdirected herself on both law and facts by finding that there was no justified reason advanced to explain the failure of the appellant herein to have participated in the defence of the respondent's claim against him before the lower court, notwithstanding the reasons and evidence adduced to explain the delay.

3. THAT the learned trial magistrate misdirected herself on both law and facts by dismissing the appellant's application dated 11th February 2013 yet there was ample evidence that it was merited and had met the requisite threshold to warrant it's being allowed as prayed for.

4. THAT the learned trial magistrate misdirected herself on both law and facts by failing to find that the plaintiff (now respondent) did not stand to suffer any prejudice in the event that the defendant (now appellant) was given a chance to defend the case on merits by being afforded an opportunity to defend the case against him.

5. THAT the learned trial magistrate misdirected herself on both law and facts by failing to consider the totality of the evidence tendered and thus subsequently arrived at an erroneous decision.

6. THAT the learned trial magistrate misdirected herself on both law and facts by considering extraneous matters and failed to exercise her discretion judiciously to ensure that the ends of justice are well served.

4) The appellant is now before this court seeking for an order for stay pending the hearing and determination of the appeal. It is the submission of the appellant/applicant that unless the order for stay of execution of the exparte judgment is given the appeal will be rendered nugatory. The appellant further argued that the appeal has very high chances of success. It is also pointed out that the respondent will not suffer any prejudice if the order is given. The appellant/applicant stated that he is willing to comply with any condition that may be imposed by this court.

5) The respondent on the other hand beseeched this court to dismiss the applicant's motion because the applicant had exhibited disinterest in pursuing the suit. The respondent contended that the appellant/applicant did not have a good defence with triable issues but the same is full of mere denials. It is argued that the motion was filed in bad faith with the intention to deny the respondent from enjoying the fruits of her judgment. The respondent accused the appellant/applicant of being reckless for his failure to contact his advocate while he was in and out of the country to get briefing on the progress of his case.

6) Having considered the arguments of the parties and having taken into account the material placed before this court, I have formed the following view of this matter. To begin with, the principles to be considered in an application for stay pending appeal are well settled. A reading of the provisions of Order 42 rule 6(1) and (2) of the Civil Procedure Rules, 2010 will reveal that there are three essential principles which the court should take into account when dealing with such an application. First, an applicant must show the substantial loss the applicant would suffer if the order is denied. Secondly, the application for stay must be filed without unreasonable delay. Thirdly, that the court should consider the appropriate form of security for the due performance of the decree.

7) The decision sought to be impugned on appeal was made on 5th August 2016. The appellant filed the appeal contemporaneously with the motion for stay of execution on 17.8.2016. There is no doubt the

motion was timeously filed. The next question is whether the appellant has shown the substantial loss he would suffer if the order for stay is denied. The appellant has stated that if the order for stay is denied, the respondent will seek to execute the exparte judgment thus rendering the appeal nugatory. The respondent does not deny the fact that she has taken steps to have the decree executed. If the decree is executed then the appeal will be rendered superfluous. The appellant has stated that he was not given a chance to defend the suit before the trial court. He has given two reasons which made him not to attend court. First, he has stated that his erstwhile advocate one **Wangechi Munene** relocated from Nairobi to Kerugoya without informing him. He has also stated that the advocate who took over the matter from Wangechi Munene, a Mr. Okindo also passed on before concluding the case.

8) Secondly, the applicant avers that he works with Kenya Defence Forces and at the material time he was out of the country serving the country in peace keeping mission. The respondent is of the view that the reasons advanced by the applicant do not add up but instead creates an impression that the applicant has lost interest to pursue his case. In my humble view, the grounds raised and argued by the appellant are arguable points on appeal. The question is whether or not the learned magistrate gave serious attention to those grounds when the application for stay was placed before her for determination. Can it be said that substantial loss will occur in the circumstances? In my humble view, I think if the order for stay is denied, the respondent will obviously execute the decree arising from the exparte judgement. The applicant will have been denied forever the right of hearing over the main suit. This in my view is a substantial loss.

90 The last issue which this court must grapple with is the nature of security it should order to be given for the due performance of the decree. The appellant/applicant is saying it is ready to provide any form of security as ordered by court. I think it will be to the benefit of both parties to have the decretal sum deposited in an interest earning account.

10) In the end, I allow the motion dated 17.8.2016 in the following terms inter alia:

- i. There be a stay of execution of the decree issued by the trial court on 4.12.2015 pending appeal on condition that the appellant deposits the decretal sum of ksh.338,227/19 in an interest earning account in the joint names of the advocates or firms of advocates within a period of 30 days. In default the motion will be treated as having been dismissed.
- ii. The appeal herein to be fixed for hearing on priority basis after the prerequisite directions have been taken.
- iii. Costs of the motion to await the outcome of the appeal.

Dated, Signed and Delivered in open court this 27th day of January, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent