

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC APPLICATION 365 OF 2016

JOHN GATIMU KIRUTHAI APPLICANT

VERSUS

GARETH POWELRESPONDENT

RULING

By a Notice of Motion dated 11th July, 2016 the applicant seeks substantive orders that there be a stay of execution of the lower court judgment delivered on 22nd November, 2013 and that leave be granted to file appeal out of time. It is supported by an affidavit sworn by an advocate by the name Kariuki Kagunda alongside grounds set out on the face of the application.

The application is opposed and there is a replying affidavit sworn by Mutundu W. Chege also an advocate of the High Court followed by a supplementary affidavit sworn by the applicant. There is also a further affidavit sworn by the same advocate.

I must observe at this stage that the issues herein relate to a relationship between the applicant and the respondent, which both advocates may not have had personal knowledge of. Both parties have filed submissions in addressing the application. For them to swear affidavits in support of or in opposition to the application amounted to delving into the arena of conflict and addressed issues that were not of personal knowledge. This should be discouraged. Both parties have filed submissions in addressing the application.

This application relates to case No. CMCC 5622 of 2013 where the respondent had sued the applicant for recovery of some money amounting to Kshs. 1,900,000/= . The record shows that after service of summons the applicant did not enter appearance and interlocutory judgment was entered against him followed by warrants of attachments.

An application to set aside the said *ex parte* judgment in the lower court failed hence the filing of this application. The main contention is that the applicant was never served with summons to enter appearance and file a defence.

Having read the record, I believe the ends of justice will be met if all applications following the said *ex parte* judgment are addressed together with the view to advancing disposal of the disputes. I therefore shall not address the merits or otherwise of the application before me. Instead, applying Sections 1A, 1B and 3A of the Civil Procedure Act, I set aside all proceedings following the filing of the suit by the respondent herein.

The net effect is that the plaintiff in the lower court shall extract summons to enter appearance for service upon the defendant who shall enter an appearance and file a statement of defence within 15 days from the date of service of the summons. In default of filing the appearance and defence as directed above, the plaintiff shall be at liberty to apply for summary judgment. Each party shall bear their own costs occasioned by this application.

Orders accordingly.

Dated, signed and delivered at Nairobi this 15th Day of November, 2017

A. MBOGHOLI MSAGHA

JUDGE