



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL APPEAL NO. 54 of 2016

(From the Original Civil Suit Nairobi CMCC No. 3318 of 2015)

- 1. WILLIAM KAMUNGE.....1ST APPELLANT**
- 2. ALICE KAMUNGE.....2ND APPELLANT**
- 3. SAMUEL NDERITU MAIRO.....3RD APPELLANT**

VERSUS

MURIUKI MBITHI.....RESPONDENT

RULING

The application at hand is by way of Notice of Motion dated 14th March 2016 in which the Appellants mainly seek an order of stay of proceedings in *NAIROBI C.M.C.C No. 3318 of 2015* pending the hearing and determination of an appeal filed against the ruling delivered by the Chief Magistrate Honourable Rachel Ng'etich on 5th February, 2016.

The application is premised on the grounds stated on the body of the motion and is supported by an affidavit of the 1st Appellant.

The facts leading to this application are undisputed. The Appellants sued the Respondent in the Nairobi Chief Magistrate's Court seeking a liquidated sum based on alleged breach of contract.

After the suit in the lower court was filed, summons were issued and served on the Respondent. The Respondent did not however enter appearance or file a defence and consequently, interlocutory judgement was entered in the appellants' favour. When the Respondent was subsequently notified of entry of judgment against him, he moved the lower court seeking to set aside the said judgment and leave to defend the suit. The learned magistrate allowed the application.

Aggrieved by that decision, the Appellants filed a memorandum of appeal on 18th February 2016 challenging the learned magistrate's exercise of discretion as having found that the Respondent was served with summons to enter appearance, she went on to set aside the regular judgment against him. They also contend that the learned Magistrate erred by failing to order the Respondent to deposit the entire decretal sum in court as a condition for setting aside the default judgment. The learned Magistrate was also criticized for failing to find that the Respondent's proposed defence did not raise any triable

issues at all and did not answer the 2nd and 3rd Appellants' claim. The appellants prayed that the ruling and order of the honourable Magistrate dated 5th February 2016 be set aside.

The application was canvassed by way of written submissions.

The appellants' case as can be discerned from the depositions in the affidavits sworn in support of the application and the submissions filed on their behalf is that they have an arguable appeal which has high chances of success as in their view, the learned magistrate erred in law and fact in finding in disregarding the principles of setting aside interlocutory judgment.

The court was urged to exercise its discretion in favour of the appellants by granting the prayers sought as they had demonstrated that their appeal had high chances of success and the application had been filed without delay.

The Respondent opposed the application through his Replying Affidavit sworn on 11th May, 2016. He claimed that the Appellants had not satisfied the conditions for grant of an order of stay. He also maintained that the lower court exercised its discretion which is unlimited in setting aside interlocutory judgment; that she condemned the Respondent to pay costs amounting to Kshs. 20,000/- which amount was accepted by the Appellants.

The Respondent disputed the appellants' claim that their appeal had high chances of success and contended that in determining the application to set aside judgment entered against the appellant, the Magistrate examined the documents in the Appellants' possession vis-à-vis the claim and came to a decision that the money owed did not reconcile with the documentation provided, and therefore decided to give each party an opportunity to ventilate their respective cases in a full trial.

It has been contended for the Respondent that the application if allowed was likely to delay the trial process in the suit filed in the lower court. That he would suffer prejudice as were he to be found liable he would pay heavily in terms of interest.

I have considered the application, the affidavits on record, the written submissions made by Counsel for both parties as well as the authorities cited.

This application is premised on **Order 42 rule 6** of the **Civil Procedure Rules (the Rules)** which specifies the circumstances under which either the trial court or an appellate court may order stay of execution or proceedings under a decree or order pending an appeal.

Order 42 Rule 6(2) lays down the conditions which an applicant must satisfy in order to deserve orders of stay of execution pending appeal. These conditions serve as a guide to the Court in exercising its unfettered discretion in deciding whether or not to grant stay of execution pending appeal depending on the circumstances of each case. The applicant must satisfy the court that he/she stands to suffer substantial loss if stay is not granted and that the application had been filed without unreasonable delay. The applicant must also show that he was willing to offer such security as may be ordered by the court.

Having scrutinized the provisions of **Order 42 rule 6** of the **Rules**, it is clear that the said provisions only apply to applications for stay of execution of a decree or order issued by a court pending hearing of an appeal. They seemingly do not apply to applications for stay of proceedings. The court must be guided by other considerations in making its decision whether or not to grant stay of proceedings as sought herein.

Ringera J in the case of **Nairobi High Court Winding Up Cause No. 43 of 2000 Global Tours & Travels Limited** while faced with a similar application espoused -

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay,

the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”

Looking at the instant application from this perspective, It is obvious from the onset that the application was filed expeditiously given that the Memorandum of Appeal was lodged on the 18th February 2016 and the application was filed the following month on 15th March 2016 a period of 26 days.

What is in contention however is whether the appellants have an arguable appeal and whether it would be in the interest of justice to order stay of proceedings of the suit in the lower court pending the hearing of the appeal.

At this interlocutory stage, it is not possible for the court to make any finding on the merits of the appeal, but based on the material placed before me, the appeal does not seem frivolous as an arguable appeal is not one that will necessarily succeed but one which raises triable issues.

However, the most important consideration that this court should bear in mind is whether the appellants have demonstrated that they are likely to suffer prejudice which is likely to expose them to injustice if the court were to decline granting orders of stay as sought.

To address this question, the court needs to consider the prayer in the memorandum of appeal which is to set aside the ruling and order of 5th February 2016. It then goes without saying that whether the appeal eventually succeeds or fails, its outcome will have an obvious effect on the hearing of the parties’ suit on the merits considering that the decision to set aside the judgment in default of appearance and granting the Respondent leave to defend the suit is what has been challenged. This issue clearly has a bearing on the merits of the lower court case and the result in the appeal will certainly affect the merits of the suit as parties on both sides will be heard in a full trial despite the fact that a regular interlocutory judgment had been entered in the Appellants’ favour.

I find that staying of the proceedings in the lower court is necessary in this case since the Respondent has been granted leave to defend the suit and the intended appeal touches on the merits of the grant of that leave. The continued hearing of the lower court suit will thus render the intended appeal nugatory as it is the hearing of that suit that is questioned in this appeal.

In view of the foregoing reasons, I am satisfied that the application dated 14th March 2016 is meritorious. Pending the hearing and determination of this appeal the proceedings in Nairobi CMCC No. 3318 of 2015 are hereby stayed. Costs shall abide the outcome of the appeal.

Dated, signed and delivered at Nairobi this 13th Day of October, 2016.

A. MBOGHOLI MSAGHA

JUDGE