



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL APPEAL NO. 86 OF 2013

EQUITY BANK LTDAPPELLANT

Versus

ANDREW KARIUKI t/a

ANDREW KARIUKI (A.K.) & Co. ADVOCATESRESPONDENTS

(Appeal arising from the ruling and orders of Hon. A.W Juma

Chief Magistrate Nyeri in Civil Case No. 171 of 2013)

RULING

1. By a Notice of Motion dated 30th September 2013 under order L Rule 1 order 42 rules g CPA Cap 21 Laws of Kenya the appellant sought an order of staying any further proceedings in Nyeri CMCC No. 171 of 2013 including further hearing and in execution of any subsequent decree extracted pending the hearing of the appeal.
2. It was supported by the affidavit of Patrick Ngunjiri Maina in which he deponed that the appellant has satisfied the criteria for grant of the orders sought in that the appeal herein is plausible and has high chances of success the appeal is filed without undue delay and the same is willing to provide security. It was further deponed that the appellant will suffer substantial loss since the respondent is a man of straw and may not be able to refund the decretal amount if paid.
3. It was further deponed that the judgment appeal appealed against was not on merit and the appellant was condemned unheard.
4. In response to the said application the respondent filed a replying affidavit in which he deponed that the judgment of the lower court was properly obtained. He further deponed that the courts will not usually set aside exparte judgment unless there is a defence on merit and that the appellants intended defence is a sham and mere denial which does not raise triable issues.
5. It was deponed that should the court allow the application then the same should be on condition that the decretal sum is paid to the respondent which he undertakes to refund if the appellant subsequently succeed since he is a man of means an advocate of longstanding qualified to be appointed a judge of the High Court.
6. By leave of this court the appellant filed a supplementary affidavit in which it was deponed that service of the summons to enter appearance upon the appellant branch at Nyeri was contrary to the mandatory provisions of order 5 rule 3. It was further deponed that this is an interlocutory appeal and therefore there is no provision for security of performance of hate decree and or payment of the decretal sum to the respondent.
7. It was further deponed that the appellant was willing to pay through away cost and that an employee of the respondent has been charged in Nyeri CM CR. No. 86 of 2013 R. v Ruth Muthoni in respect of the same subject matter.

SUBMISSIONS

8. Directions were given that the appeal be determined by way of written submission which have been filed. On behalf of the appellant it was submitted that the appeal had met all the conditions under order 42 rule 6 (2) for grant of stay of execution pending appeal. It was submitted that the appellant stand to suffer loss should the decretal sum be paid to the respondent and that as was held by JUSTICE MSAGHA MBOGOLI in TOBIAS ONGANG AUMA & 5 OTHERS V KRC LTD (2001) eKLR an order for stay of execution does not deprive a decree holder of the fruits of the decree but delays the execution.
9. It was submitted that the ruling of the subordinate court was delivered on 28th October 2013 and the current application filed on 30th October 2013. It was submitted that there was no proper service of summons upon the appellant since it is a corporation which should have been served upon the secretary, director or other principal officer, leaving it at the registered office or sending it by registered post as per the case of KENGA MWADUNA MWAMBIRE & ANOTHER V NATIONAL BANK OF KENYA LTD (2006) eKLR and that where the service was not proper courts have no discretion.
10. It was further submitted that the defendant's defence raises triable issues which ought to be heard and determined on merit so that justice can be served. It was submitted that in setting aside the ex parte judgment the main concern of the court should be to do justice. In support thereof reliance was made on the cases of MAINA V MUCIRA CIVIL APPEAL NO. 272 OF 1982, PATEL V EA CARGO HANDLING SERVICES LTD (1974) EA SHAR V MBOGO (1986) EA AND BETHWEL MUTAI V CHINA FORD & BRIDGE COR. [2005] e KLR.
11. It was submitted that the respondent in his pleading did not disclose that his employee was charged with criminal offence in CMCR NO. 86 OF 2013 and therefore the respondent ought to have disclosed all the material information available to him to enable the appellant prepare its defence appropriately and the cases of IBRAHIM MWANGI ATHUMANI V MINISTER FOR INFORMATION AND COMMUNICATION MISC. CIVIL APPL. NO. 137 OF 2011 and UHURU HIGHWAY DEVELOPMENT LTD v CBK 2 OTHERS EA 140 OF 1995 was used.
12. On behalf of the Respondent it was submitted that the ruling by the Chief Magistrate that the ex parte judgment was properly obtained was judicious and sound in law, it was submitted that the appellant's defence was bare of merit and not accompanied with list of documents. It was submitted that the appellant failed to demonstrate that the trial court's discretion was exercised arbitrarily and idiosyncratically.
13. It was submitted that the respondent was a man of means with a flourishing legal practice and that the appellant is a large corporate entity that will not feel the pinch and the balance of convenience leans in favour of the respondent a sole proprietor of a private firm and who has ended a crippling dent on his personal finance for the last eight (8) years when the first unauthorized payment was made by the appellant. An order to furnish security by depositing the money which only prolong the respondent's agony and deny him badly needed working capital for expending and running his practice (emphasis added).
14. I must point out at the onset that the appellant did not supply the court with copies of proceedings and ruling appealed against from the lower court and therefore this court is not in a position to determine whether the appeal herein has merit or not.
15. The conditions for the grant of stay pending appeal can now be summarized as follows:
 - a. ***A party seeking stay must demonstrate to court that they are not using the appeal to delay justice.***
 - b. ***They must show that they have an arguable appeal.***
 - c. ***They have come to court without undue delay.***
 - d. ***The appellant may suffer substantial loss.***
 - e. ***the appellant is willing to provide security as imposed by court.***

16. In the case of ***Kenya Shell Ltd v Benjamin Kibiku & another civil application No. Nairobi 97 of 1966*** the Court of Appeal held that stay of execution on a money decree can only be stayed under special circumstances. I have looked at the submission by the respondent as stated in paragraph 13 herein and is of the view that the decretal sum ought not to be released to the respondent at this stage.
17. Further if it is true that the appellants principal officers were not served with summons to enter appearance as required by law then the appeal raised arguable issues.
18. I would therefore grant orders of stay of execution dependancy the hearing and determination of the appeal herein on the following conditions.

a. The appellant to pay the respondent cost of the lower court.

b. Cost of this application to be in the cause.

Dated, signed and delivered at Nyeri this 23rd day of May 2014.

J. WAKIAGA

JUDGE

Mr. Njuguna for A Kariuki for Respondent.

Miss Mumbi for the appellant.

J. WAKIAGA

JUDGE

Court: Ruling read in open court in the presence of the above named.

J. WAKIAGA

JUDGE