



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL APPEAL 161 OF 2011

MATUNGULU GIRLS SECONDARY SCHOOL (sued through the B.O.G Chairman)
APPELLANT

VERSUS

ALICE KALEKYE NDUNDA

PHILIP KILONZO KINYOWE
RESPONDENTS

(Being an appeal from the ruling of the Honourable Senior Principal Magistrate J.K. Ngeno delivered on 13/10/2011 in Kangundo PMCC No. 232 of 2010)

R U L I N G

Before me is a Notice of Motion dated 27th October 2011 filed by the appellant (who was the defendant in the lower court), Matungulu Girls' Secondary School through the Board of Governors (BOG) Chairman. It was filed under Order 42 Rule 6 of the Civil Procedure Rules and section 1A, 1B, and 3A of the Civil Procedure Act. It was filed under certificate of urgency. It has four (4) prayers, two of which have been spent as follows:-

1. (Spent).
2. (Spent).
3. **That there be a stay of judgment of the lower court in Kangundo SPMCC No. 232 of 2010 and all other subsequent orders issued therein pending the hearing and determination of this appeal.**
4. **That the costs of this application be paid by the respondent.**

The application has grounds on the face of the Notice of Motion. The grounds are in summary that an *ex-parte* judgment was entered against the appellant irregularly before service of summons was effected. That the lower court later stayed execution, but ordered a deposit of Kshs.670,000/= in a joint account. That the appellant was a public institution whose budget was limited and that the conditional stay was harsh and oppressive and may put the institution to financial crisis.

The application was filed with a supporting affidavit sworn by Gedion Kieti, the Chairman of the BOG, on 27th October 2011. The said affidavit gives the factual position of the case. It was deponed *inter alia*, that the memorandum of appearance filed on behalf of the appellant was a forgery.

The appellant also filed written submissions to the application. The counsel for the appellant emphasized that in the circumstances of the case, the *ex-parte* judgment needs to be set aside as a matter of course.

The application is opposed. The 1st respondent Alice Kalekye Ndunda, filed grounds of opposition. The grounds are that the application is frivolous, incompetent and vexatious, incurably defective, an abuse of the court process, an afterthought and brought in bad faith.

The 1st respondent also filed written submissions. She reiterated the points raised in the grounds of opposition. It was contended that the main reason for the appellant now running to court, was to buy time and delay the proceedings of the lower court.

On the hearing date, Mr Onyango, for the appellant and Mrs Nzau, for the 1st respondent relied on submissions filed.

I have considered the application and submissions on both sides. The ruling of the learned magistrate given on 12th October 2011 was short. It reads as follows:-

“I have considered the submissions filed by both sides. I am satisfied that there is merit in setting aside the judgment of the court and I do order so on condition that the whole decretal sum of Kshs.670,000/= be deposited in a joint account between the plaintiff’s and defendants’ counsel within the next 30 days. Parties should then prepare for trial of the suit *inter partes*.”

Without determining the appeal, I must state that the above order meant that there was no judgment or decree of the subordinate court in existence from the date of the ruling. The judgment entered earlier was set aside. The matter was to start afresh for hearing in the subordinate court. Therefore, the orders of depositing an amount arising from a purported judgment or decree has actually emerged into these proceedings from nowhere since there is no judgment on which the deposit could operate as security. On that basis alone, I will allow the application.

Consequently, I allow the Notice of Motion dated 27th October 2011 and grant prayer 3. Costs will follow the determination of the appeal.

It is so ordered.

Dated and delivered this 25th day of **June** 2012.

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George Dulu

Judge

In the presence of:

Counsel for Appellant – Tony Odera holding brief for Mr Mung’ata.

Ms. Manegene holding brief for Mr Mutunga for Respondent

Nyalo – Court clerk.