



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO.152 OF 2011

PILOT TECHNICAL SERVICES LTD.....
APPELLANT

VERSUS

AMENAN ELECTRICAL SERVICES LTD.....
.....RESPONDENT

(Being an appeal form part of the ruling and order dated 25th March 2011 issued in Nairobi CMCC NO.1915 of 2007 by Hon. A. K. Ndungu, the Senior Principal Magistrate)

RULING

(Application to stay orders of the subordinate court imposing condition of depositing decretal sum to court, if exparte judgment is set aside 6 April 2011)

I. INTRODUCTION

1. The application/appellant, M/s Pilot Technical Services Ltd was sued in the subordinate court at Milimani Commercial Law courts. An exparte judgment was entered for failing to attend court in the sum of kshs.1,674,225/= and cost of kshs.130,647/= for goods sold and delivered by the respondent M/s Amenan Electricals Supplies Ltd.

2. The applicants successfully applied to that subordinate court for the setting aside of the exparte judgment and prayed that they be heard interparte on the suit. This application was allowed by the trial magistrate but a condition was imposed being:-

“...the decretal sum herein [be] deposited in a joint interest earning account in the names of the advocates for the respective parties herein within 45 days hereof in default of which orders shall lapse....”.

3. The applicant filed appeal to this court on 6 April 2011. They applied for stay of the orders requiring “the deposit of the decretal sum and in default the orders lapse” until the hearing of an application of the same date and further if granted of the appeal.

4. What is before this court is the interparte hearing of the application of 6 April 2011 pending the appeal.

II. APPLICATION 6 APRIL 2011

a. Arguments by the Applicant

5. The subordinate court has discretion to give orders. Unfortunately, in this case, it was used injudiciously.

6. The trial magistrate erred in imposing the conditions. The case of **Mbogo v Shah (1968) EA 94** and the case of **Mulju Jetha v Singh (1931) EA** dealing with the courts discretion refers: Prayed condition should be stayed.

b. Arguments by the Respondent

7. The trial magistrate rightly exercised their discretion

III. OPINION

8. The trial magistrate allowed an application to set aside the exparte judgment. Once this order is given, the status of a civil suit is to go back to the beginning as if there never was a trial that had been taken or heard. This means the matter begins *De nova* or from the start.

9. The issue of a decretal sum does not therefore arise as it the case has to be proved afresh. This sum may change.

10.I wish further to point out that the effect of setting aside an exparte judgment is to be *functus officio* on the issue of any decree that may have arisen within the exparte judgment.

11.I would therefore agree that the said orders requiring the deposit of the decretal sum into court be stayed. Those conditions imposed being done when the same decree had been set aside.

12.The application dated 6 April 2011 be and is hereby allowed. There be stay of the condition imposed by the subordinate court in this order of 25 March 2011 pending the hearing and determination of this appeal.

13.Costs to the applicant/appellant.

RULING DATED THIS 13TH DAY OF MAY, 2011 AT NAIROBI

**M. ANG'AWA
JUDGE**

Advocates:

- i. P. Mungla instructed by the firm of Mungla Paul Mungla & co.
Advocates for the appellant - present
- ii. B. Kimani instructed by the firm of M/S Ndumu Kimani & Co. Advocates for
the respondent - absent