REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
Civil Appeal 23 of 2006

ATHMAN OMAR ZUBEIR…..……..…...…....APPELLANT/APPLICANT

-AND-

MAMSON ASOL APINDE…….……..……...……RESPONDENT

RULING

The appellant's interlocutory application was brought by Chamber Summons dated ***5th November, 2010***, based on Orders 1XB [Rule 8] and XLI [Rule 14] of the earlier edition of the Civil Procedure Rules, and ss.1A, 1B and 3A of the Civil Procedure Act (Cap.21, Laws of Kenya). The applicant was seeking Orders as follows:

(a) *that, there be a stay of execution of the Judgment and decree herein dismissing his appeal;*

(b)*that, the Court do set aside the ex parte Judgment of* ***8th October, 2010*** *dismissing his appeal;*

(c) *that, costs be in the cause.*

The application is founded on the following grounds:

(i) on ***26th April, 2010*** *when the appeal was heard, it had not been shown on the cause-listing;*

(ii) the hearing date of ***26th April, 2010*** *had been taken without notice to the appellant;*

(iii) the appellant's Advocate in this matter was on leave on ***16th June, 2010;***

(iv) the appeal is merited, and has a high chance of success;

(v) the principle of natural justice dictates that the appellant be given a chance to prosecute his appeal.

Yusuf M. Aboubakar, an Advocate with the firm of *M/s. Timamy & Company, Advocates* of Mombasa, who has the conduct of this matter on behalf of the appellant, swore a supporting affidavit on ***5th November, 2010*** the content of which may be thus summarized:

(i) on ***3rd November, 2010*** *the deponent was served with a letter by the respondent dated* ***29th October, 2010*** *together with a draft decree filed on* ***3rd November, 2010*** *and a copy of the Judgment of* ***8th***

October, 2010*;*

(ii) on ***26th April, 2010*** *the deponent attended Court for the hearing of the appeal, but the matter was not listed;*

(iii) the deponent proceeded on leave for the month of ***June, 2010*** *before being served with notice of hearing of the appeal, set to take place on* ***16th June, 2010;***

(iv) the deponent is the Advocate in his firm who receives and signs any Court document served upon the firm, and he does not remember signing a hearing notice in this matter with regard to the hearing date, ***16th June, 2010;***

(v) the deponent avers that the appellant has a good appeal, with "a high chance of success and he deserves to be given an opportunity to be heard on merit";

(vi) the deponent avers that the appellant if given a chance, will demonstrate that the defendant, ***Mwanahawa Mira Rajab,*** *died on* ***7th August, 2000*** *and therefore the suit abated thereafter and so, any subsequent proceedings are null and void including the warrants of* ***4th December, 2003*** *which the appellant was seeking to set aside;*

(vii) the deponent avers that "the appellant shall…demonstrate that the alleged Judgment obtained by the Respondent on ***15th March, 1996*** *was set aside by consent of the respondent, the deceased and the appellant on* ***28th September, 1999*** *and, therefore, at the time of the deceased's death there was no Judgment capable of execution";*

(viii) the deponent avers that "it is in the interest of justice that the appeal be heard on its merits, in line with the principle of natural justice";

(ix) the deponent believes to be true the information from the appellant, "that he has invested all his earnings [in] the suit property and he will suffer irreparable loss if he is not given a chance to be heard on merit";

(x) the deponent averred that ***"****the subject-matter being a house, it would be just and fair if the appeal is heard on merit."*

The respondent, in his replying affidavit of ***14th December, 2010*** denied most of the applicant's averments, though without much elaboration of alternative fact; but he made the following averments:

(i) "it is true that the suit abated but it was after a final Judgment in my favour which has never been set aside.";

(ii) "if the appeal was so important and with merit as alleged, the applicant would have prosecuted it at the earliest time possible";

(iii) "I verily believe that I have suffered anxiety and loss all these years when the applicant collected proceeds from the house";

(iv) "I reiterate that service upon M/s Timamy & Co. Advocates [was] effected on ***26th April, 2010";***

(v) "the application has been overtaken by events as a decree has already been issued";

(vi) "I am advised that this application is bad in law and does not lie and should be struck out".

Unlike the supporting affidavit, which has set out a detailed set of factual information, the replying

affidavitis, in its essence, not in keeping with the character and purpose of an *affidavit,* what the *Concise Oxford Dictionary*, 11th ed (2009) defines as "*a written statement confirmed by oath or affirmation, for use as evidence in court."* Rather than lay out specific fact-scenarios that controvert the applicant's case, the respondent has focused his document on *inferences* and *personal concerns*; I would state that such an affidavit is of limited value to the Court as it determines the application in hand.

Learned counsel, ***Mr. Aboubakar*** for the appellant/applicant, sought a discretionary dispensation on the basis of Order XLII, Rule 21 of the earlier edition of the Civil Procedure Rules; he submitted that the rules give the Court "*power to re-admit the appeal where the appellant proves that he was prevented by sufficient cause from appearing when the appeal was called…for hearing."* Counsel submitted that the appeal had not been listed for hearing on ***26th April, 2010*** when the Court gave directions for new dates of hearing.

Counsel relied on the decision of the High Court (***Ringera, J*** – as he then was) in ***Remco Ltd. v. Mistry Jadva Parbat and Co. Ltd & Others*** [2002] 1EA 227 (CAK), in particular the following paragraph (at p.234):

"If the default judgment is a regular one, the court has unfettered discretion to set aside such judgment upon such terms as are just. In exercising the discretion, the court's concern should be to do justice between the parties, avoid hardship resulting from accident, inadvertence, excusable mistake or error and not to assist a person who has deliberately sought, by evasion or otherwise, to obstruct or delay the course of justice…"

Counsel related to the foregoing principles the fact that the dispute herein is in respect of ownership of land, and urged that, "*if judgment is not set aside the applicant shall lose the said house without the appeal being heard on its merits*", and this will constitute a hardship to the applicant.

Even though it is not required under Order XLII, Rule 21 of the Civil Procedure Rules that the lifting of an *ex parte* Judgment is to be preceded by proof of the *probability of success* in later proceedings by the applicant, counsel still found it necessary to make submissions on probability of success. He urged that it emerged from the record, that the defendant had died on ***7th August, 2000***; and so the plaintiff (respondent herein) ought to have applied to continue with the suit against the legal representative; but this was not done and so, the suit abated as against the defendant (deceased). Counsel urged that any further proceedings after the abatement of the suit, were null. The appeal is against the Ruling in respect of the Chamber Summons application of ***19th February, 2004***, which was seeking to strike out the warrants of arrest dated ***4th December, 2003*** which were issued three years after the suit had abated.

Making his response in person, the respondent devoted his attention to defending the original Judgment of the lower Court, in SRMCC No. 4668 of 1995 which lies at the centre of the applicant's prayer for his appeal to be heard on merits. Certainly, such a line of response is misplaced, as different considerations guide the Court in the setting aside of *ex parte* Judgments such as the one of ***8th October, 2010*** which is the subject of the instant application.

The rest of the submissions essentially contest the averments in the supporting affidavit, even though no factual foundation has been laid for the same in the replying affidavit.

On the evidence and the submissions, the applicant's case, and not the respondent's, bears the credibility such as would warrant favourable Orders. But more importantly, this Court has a discretion to vacate an *ex parte* Judgment and to set the stage for *inter partes* hearing on the merits, where the applicant satisfies the Court that the course of justice so dictates. The Judgment of ***8th October, 2010*** was certainly given on the basis of *technicality,* as emerges from the foregoing paragraph therein:

"Whereas the contentions in the said memorandum of appeal were not canvassed in Court, the respondent represented in person to the Court that there is a valid Judgment of the lower Court

[SRMCC No.4668 of 1995], of 15th March, 1996 standing in his favour, and that the ruling appealed against is not inconsistent with the same.

"Since the appellant's contentions have remained at the general level, they have not placed this Court under any obligation to disturb the decisional *status quo* ***set up by the lower Court in 1996, and those contentions have made no*** *prima facie* ***case in favour of the appeal. It must be held, therefore, that the appeal has not succeeded; and consequently the appeal is dismissed, with costs to the respondent."***

I have considered the largely-technical element in the *ex parte* Judgment, in the context of the applicant's evidence, and the submissions of counsel, and in my judgment, this is a case for allowing the appeal to be heard on the merits. Consequently, I will make Orders as follows:

(1)The appellant's application by Chamber Summons dated *5th November, 2010* ***is allowed.***

(2)There shall be a stay of execution of the Judgment and/or decree dismissing the appeal.

(3)The *ex parte* ***Judgment of*** *8th October, 2010* ***is hereby vacated.***

(4)The costs of this application shall be in the appeal.

(5)This matter shall be listed for mention and directions on the appeal within 14 days of the date hereof.

SIGNED at **NAIROBI** ----------
J.B. OJWANG
JUDGE

DATED and **DELIVERED** at **MOMBASA** this 16th day of December, 2011.

H.M. OKWENGU
JUDGE