



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. 16 OF 2003

BENJAMIN D. MUSAUAPPELLANT

VERSUS

MAGDALENE W. THUMBI (suing as the mother and administratrix of the estate of)

PASCALINE J. WATURI KAMAURESPONDENT

R U L I N G

The appellant herein has come under order 41 rule 4 CPR and all enabling provisions of the law by way of notice of motion seeking stay of execution of decree issued in PMCC no. 455 of 2000 (MKS) issued on 19.6.2000 and all consequential orders emanating there from pending the hearing and determination of an intended appeal.

The grounds in support are set out in the body of the application supporting affidavit and oral submissions in court. The major points are:-

1. That the proceedings arise from an accident involving motor vehicle registration number KWB 284 and KAD 616U on 29.8.97 along Kiima Kiu along Nairobi Mombasa road where by the deceased daughter of the respondent died, that he was not served with summons to enter appearance hence entry of expert judgement against him, that upon learning of the exparte Judgement he instructed a lawyer to apply for the same to be set aside which application was dismissed, that he has become aggrieved of the dismissal order and he wishes to prefer an appeal against that ruling, that if stay is not granted he will suffer damage and loss, that he has a right of appeal which he wishes to exercise and if stay is not granted the same will be rendered nugatory, that he has a good appeal as shown by the grounds of appeal, that he has moved to take action without undue delay, he is ready and willing to abide by any conditions that may be set by the court including the depositing of the Judgement sum of Kshs.385,270.00 or as the court may deem fit to order, that they have complied with the rules as they have shown sufficient cause, came to court without undue delay and offered security, that the loss will occur because the applicant contents that he sold the motor vehicle to 3rd party who refused to register it and they intend to join him as a 3rd party to the proceedings once the exparte Judgement is set aside, that if they are ordered to pay the said amount to the respondent and then thereafter succeed on appeal it is unlikely that the respondent will be able to refund the same as her means have not been shown, they also rely on the authority cited.

The respondent opposed the application on the basis of the grounds of opposition filed and oral submissions in court and the major points relied upon by them are:-

1. There has been undue delay, the ingredients for granting stay pending appeal have not been satisfied, the lower court considered the points raised thoroughly and then dismissed the same, no effort was made to call the process server in an effort to dispute service and the court rightly accepted the return of service to be proper, that a certificate of search exhibited shows that the vehicle belongs to applicant, contention that the vehicle was sold does not hold as the applicant never informed the registrar of motor vehicles that he had sold the vehicle to a 3rd party, that the Judgement was properly obtained and the applicant should be allowed to enjoy the fruits of the same and this court should not exercise its discretion in favour of the applicant, that it is not true that the appeal will be rendered nugatory, as the applicant has not proved that the respondent will not be in a position to refund the decretal sum should the appeal succeed, that if security has to be furnished then it should be the entire decretal sum, it is their stand that sufficient cause has not been shown, that the delay is inordinate and when the file went missing the applicant did nothing about it and it is the respondent who moved the court to reconstruct the same, they maintain that the application for stay was rightly rejected by the lower court.

In reply counsel for the applicant submitted that notice of Judgement was served on 18.10.2001 while the application for setting aside was filed on 20.11.2001 and that cannot be termed as an inordinate delay, that the delay in hearing the application was caused by the disappearance of the file, they content they have triable issues to raise if the matter is reopened for them, that they are opposed to paying half the decretal sum to the respondent.

On the courts assessment of the facts herein it is clear that Judgement was obtained exparte. The applicant moved the lower court to have it set aside and the matter reopened for him but the lower court declined on the reasons given. The applicant, was dissatisfied with the reasons given and that is why he has applied for stay pending appeal to this court.; The appeal has already been filed. The applicant is required to come within the ambit of principles governing the granting of stay pending appeal which are:-

1. Application has to be presented without un due delay.
2. Applicant has to show that he will suffer substantial loss if stay is not granted.
3. There has to be an offer of security for the due performance of the decree should the appeal not succeed.

The court has applied these ingredients to the facts of this application and I find that:-

1. It is agreed by both sides that the original file went missing and a reconstructed one had to be made and so the applicant cannot be penalized for the delay in the disposal of the application for setting aside.
2. It is evident that the applicant was not heard before exparte judge Judgement was entered against him and he wishes to raise the issue of having divested himself of ownership of the accident motor vehicle before the accident and all that remained was change of ownership to be effected in the registrars office. It is therefore proper that applicant be accorded an opportunity to be heard on this matter on appeal before he is made to meet the judgment passed against him. The court agrees that he has an arguable point to be taken up on appeal as it is a cordinal principle of law that to deny a party wishing to be heard a right to be heard is the last thing that a court of law can do to a litigant. It is the finding of this court that the applicant has a right to be heard on his appeal before he can be told to meet the judgment.

However this court has also to consider the fact that the respondent is the successful litigant as at now and she should not be withheld from the enjoyment of the fruits of her Judgement un reasonably. The court also has to consider the accessibility to the decretal sum by either party should the appeal succeed or not succeed. No doubt the applicant had this point in mind when they offered to deposit the Judgement sum as security.

However as submitted by the respondents counsel if any offer of security has to be made then it should be in respect of the entire decretal sum. This court is however alive to the fact that this court has a discretion to order that the entire decretal sum, or the Judgement sum or any part of the same be deposited as security. Herein only the Judgement sum was offered but no reasons were given for inability to deposit the entire decretal sum and for this reason only the court will consider a conditional stay on the ground that the entire decretal sum is deposited in a joint interest earning account in any sound financial institution of the counsels choice in the joint names of counsels for both parties.

2. The said deposit to be made within 60 days from the date of the reading of this ruling.

3. The respondent will have costs of the application.

4. In default of no. 1 and 2 above execution process to proceed.

Dated, read and delivered at Machakos this day of

....., 2003.

R. NAMBUYE

JUDGE