



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CIVIL APPEAL NO. E042 OF 2020

BETWEEN

CHRISTOPHER ORINA KENYARIRI.....APPELLANT/APPLICANT

AND

TOYOTSU AUTO MART KENYA LIMITED.....RESPONDENT

(Being appeal from the entire Ruling and Order of the Chief Magistrate's Court at Milimani Commercial Courts in CMCC No. 9289 of 2019 delivered by Hon. P. Muholi on 9th September, 2020).

RULING

1. The application for consideration is the Appellant's Notice of Motion dated 16th September, 2020 brought under **Order 42 Rule 6** and **Order 43 Rue 1 (g)** of the **Civil Procedure Rules, Section 1A, 1B** and **3A** of the **Civil Procedure Act** and all other enabling provisions of the law. The application seeks orders THAT:

i. Spent

ii. Spent

iii. There be a stay of further proceedings in CMCC No. 9289 of 2019 pursuant to the Order/Ruling of the Chief Magistrate's Court at Milimani Commercial Courts made on 9th September, 2020, pending the hearing and determination of the Appeal herein.

iv. The costs of this application be provided for.

v. Such other and/or further relief be granted as the Court may deem fit and just to grant in the circumstances of this case.

2. The application is premised on the grounds on the face of it as well as the Supporting Affidavit sworn by the Appellant on even date. He deposed that on 9th September, 2020, Hon. P. Muholi delivered a ruling in *CMCC No. 9289 of 2019* setting aside an interlocutory judgment that had been entered in his favour. It was his contention that the said Ruling is unfair to him and he wishes to appeal against the whole of it. He deposed that immediately after the ruling was delivered, he applied for certified copies of the same as well as proceedings in respect thereto. He contended that the whole Ruling is unreasoned and erroneous and argued that if the order of stay sought is not granted, he will be subjected to unnecessary hardship and the same will also amount to a waste of judicial time. On the other hand, he argued that the Respondent does not stand to suffer any prejudice, loss or damage if stay is granted as it illegally enriched itself at his expense.

3. The application is opposed through Grounds of Opposition dated 5th October, 2020 and a Replying Affidavit sworn on 5th October, 2020 by **VIVIENNE WANJIRU**, the Defendant's legal officer. The grounds of opposition are replicated in the averments made in the Replying Affidavit to the effect that the Application is bad in law, lacks merit, is mischievous and cannot stand. Counsel averred that in the impugned Ruling, the trial court allowed the Respondent's application seeking orders to set aside the interlocutory judgment entered against it on certain conditions which have all been met so far. According to counsel, of particular importance is the fact that the Respondent already paid throw away costs of Kshs. 15,000/= as ordered by the trial court to Ongegu & Associates who are the Appellant's advocates on record in the trial court.

4. She avers that the Appellant has concealed material facts in his application as he has failed to disclose the receipt of the above monies as well the Respondent's pleadings which were filed in compliance with the trial court's orders. Further, she deposes that the Appellant has also failed to disclose the fact that his cause of action in the trial court arises from a concluded sale transaction between himself and the Respondent regarding a motor vehicle registration number vehicle registration KCX 300B whose possession he still enjoys to date.

5. It is also averred by counsel that the Appellant's intended appeal lacks basis and does not exclusively detail in what manner he will be prejudiced or subjected to hardship. She states that it is clear that the Appellant is determined to unfairly enrich himself by creating obstacles such as his intended appeal so as to prevent the Respondent's defence from being heard. Further, counsel has taken issue with the Appellant's insinuation that the Respondent illegally enriched himself with monies obtained from him and avers that there is no criminal charge or any evidence whatsoever in support of such allegation.

6. She also states that **Order 10 Rule 11** of the **Civil Procedure Rules, 2010** bestows upon the courts unfettered and unlimited discretion to set aside a default judgment subject to the satisfaction of certain conditions which the Respondent fulfilled according to the Ruling of the trial court. In her view, the impugned ruling was sound and fair as it granted both parties an opportunity to prosecute and defend their cases as the case may be. It was further deposed that the Appellant is intentionally delaying the progress of his own suit in the trial court so as to ensure that the Respondent is not heard but is frustrated into paying the monies awarded to him in an interlocutory judgment which has already been set aside.

7. Further, counsel averred that the Appellant has not expounded on the probable success of his intended appeal or the possible loss that he may suffer if the present application is not allowed. In her view, the application is a sham and a waste of this court's time. She therefore urged the court to dismiss the application to allow parties an opportunity to ventilate their issues in the trial court during the hearing of the main suit.

8. In rebuttal, the Appellant filed a Further Affidavit sworn on 12th October, 2020 seeking to demonstrate that his intended appeal is arguable. In support, he stated that: the Respondent's defence never addressed paragraphs 9 and 10 of his annexed Complaint with particulars or at all; there is an issue as to how much was paid for the motor vehicle in his possession and whether it is the same vehicle that was to be delivered to him by the Respondent; there are issues surrounding the contents of the agreement that he signed; the trial court granted orders not sought by the Respondent to his detriment which orders are ordinarily sought at the high court; and finally, that the trial magistrate delivered a ruling as if he was reinstating a struck out defence whereas there was never a defence in the first place.

Submissions

9. The Application was canvassed by way of written submissions. In the Applicant's written submissions dated 12th October, 2020, he reiterated that arguability of his appeal can be gleaned from his further affidavit. In addition, he took issue with the trial magistrate's application of **Order 10 Rule 11** of the **Civil Procedure Rules** which the Respondent never invoked. Moreover, he argued that in seeking to set aside the interlocutory judgment, the Respondent invoked a law that is only applicable at the High Court meaning therefore that the learned magistrate sat on his own appeal.

10. He also claimed that in the impugned ruling, the trial magistrate granted orders that had not been sought. He submitted that the magistrate misapplied the principle set out in the case of **Patel v East Africa Cargo Service Ltd (1974) E.A 75** as the same is only applicable when there is an existing defence. He argued that the magistrate misdirected himself into finding that there was an annexed draft defence when there was none on record.

11. Further, he submitted that the fact that the trial magistrate found that the interlocutory judgment was properly entered then went ahead to set it aside further shows that his appeal is arguable. It was also his contention that the arguability of his appeal can be gleaned from the fact that the defence filed by the Defendant is a sham for failure to address the main issue as to how monies entrusted with the Defendant was utilized to source the subject Motor Vehicle.

12. As to whether the appeal will be rendered nugatory if the stay sought is not granted, the Appellant submitted that if his intended appeal succeeds and the matter in the trial court gives a contrary finding, he will be prejudiced by being required to appeal again against the subordinate court decision thereby making it very unbearable for him and resulting in a mere waste of precious judicial time. He therefore urged that his application be allowed arguing that it is his statutory right to prefer an appeal when aggrieved.

13. In its written submissions dated 29th October, 2020 the Respondent framed two issues for determination namely: whether the Appellant's appeal is arguable and if it should be allowed and whether the setting aside of the interlocutory judgment in the lower court was rightful and justifiable.

14. On the first issue, the Respondent relied on the conditions for the grant of stay of proceedings as set out in the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others** quoted in **Lemanken Aramat v Harun Meitamei Lempanka & 2 others [2014] eKLR** namely:

“(i) The Appeal or intended Appeal is arguable and not frivolous;

(ii) Unless the order of stay sought is granted,

(iii) The Appeal or intended Appeal, were it eventually to succeed, would be rendered nugatory; and

(iv) That it is in the public interest that the order of stay be granted”

15. It was submitted that the Appellant's application is mischievous because the same was filed on 18th September, 2020, just a day after the Appellant had been served with the Respondent's pleadings and possibly after it was clear to the Appellant that the Respondent's defence was not only impregnable but also raised triable issues.

16. The Respondent reiterated that the Appellant has not demonstrated that his intended appeal is arguable. It was submitted that the Appellant's intended appeal raises no points of law or facts but only mere innuendos. Further, it was argued that the said appeal is frivolous as the issues raised therein may well be determined in the trial court and not via an appeal. In support of this, the Respondent relied on several cases including the case of *Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008 in which the court stated that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court and/or one which is not frivolous. The other cases cited are: *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. 345 of 2004; *Kenya Tea Growers Association & Another vs Kenya Planters & Agricultural Workers Union Civil Application Nai. No. 72 of 2001*; *Rashid K Too v Fred Ilmbatu [2019] eKLR*; and *Sangram Singh v. Election Tribunal, Kotah, AIR 1955 SC 664, at 711*.

17. The Respondent further submitted that the Appellant has failed to demonstrate the loss that he is bound to suffer which cannot be recompensed by an award of money, if this application is not allowed. It was argued that the fact the Appellant has since been paid throwaway costs of Kshs. 15,000/= in respect of the trial court is proof that whatever loss the Appellant suffered can and has indeed been compensated by way of damages. The Respondent argued that in view of the said compensation, the Appellant's intended Appeal is already nugatory and as such there is no reason to grant the stay order sought in his application herein. In support of the nugatory aspect, the Respondent placed reliance on several cases highlighting situations where courts have considered whether or not an appeal will be rendered nugatory. These were: *David Morton Silverstein v Atsango Chesoni, Civil Application No. Nai 189 of 2001*; *Reliance Bank Ltd v Norlake Investments Ltd [2002] 1 EA*; and *International Laboratory for Research on Animal Diseases v Kinyua, [1990] KLR 403*.

18. Further, the Respondent submitted that the trial magistrate indeed had the jurisdiction and powers to set aside the interlocutory judgment. It was argued that the Appellant should not be apprehensive of prosecuting his claim in the trial court during the hearing of the main suit if at all he is convinced that he has a solid case. In totality, the Respondent urged that the application and the draft memorandum of appeal annexed thereto are frivolous and should both be dismissed.

Analysis and Determination

19. I have carefully considered the application and the supporting Affidavit, the Respondent's Replying Affidavit as well as the respective written submissions of the parties herein. I find that the only issue for determination is whether the Appellant has satisfied the conditions necessary for the grant of stay of proceedings in the trial court pending appeal.

20. There is no doubt that this Court has powers to stay proceedings pending appeal which jurisdiction is derived from both **Order 42 Rule 6** of the **Civil Procedure Rules** as well as the inherent jurisdiction reserved in **Section 3A** of the **Civil Procedure Act**. (See *Ezekiel Mule Musembi v H. Young & Company (E.A) Limited [2019] eKLR*)

21. Stay of proceedings should not be confused with stay of execution pending appeal. It is a serious judicial action as it seriously interferes with the right of a litigant to conduct his litigation. It affects a party's right of access to justice, right to be heard without delay and overall, right to fair trial. It should only be granted in the clearest of cases or where there is abuse of process of court, that is, where the likelihood of embarrassment of the court will occur as in two courts of similar jurisdiction arriving at different results on same facts and law. Therefore, the test for stay of proceedings is very high.

22. In *Halsbury's Law of England, 4th Edition. Vol. 37 page 330 and 332*, it is stated that:

"The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue."

"This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases."

"It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case."

23. In the case of *Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000* Ringera, J (as he then was) stated as follows;

"As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously" (emphasis added)

24. In the instant case, it is my considered view that the interest of justice do not lean towards exercising this court's discretion to grant a stay

of proceedings in the trial court. Without saying more, I do not think that the Appellant has demonstrated that he has an arguable appeal because the setting aside of an interlocutory judgment was well within the trial court's jurisdiction and is also sanctioned by law. I find that granting a stay of proceedings will only delay the matter pending in the trial court whereas both parties have since filed and exchanged their respective pleadings.

25. Further, the Appellant has not demonstrated with exactitude the hardship he stands to suffer should the orders not be granted. He has admitted that he is in possession of the subject motor vehicle and therefore he stands to lose nothing by allowing the trial court an opportunity to determine his suit.

26. Accordingly, I find that the Appellant's application is devoid of merits and is dismissed with costs to the Respondent. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 10TH MARCH, 2021.

G.W.NGENYE-MACHARIA

JUDGE

DELIVERED THIS 10TH MARCH, 2021 BY:

A. MABEYA

JUDGE

In the presence of:

1. *for the Appellant/Applicant.*

2. *for the Respondent.*