

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MILIMANI

CIVIL APPEAL NO. E177 OF 2020

PAUL HILLARY ADAWO.....APPELLANT/APPLICANT

VERSUS

ERICK OMONDI OMBEWA (Suing as the legal Representative of the

estate of JOYCE AGNES EPRONG (Deceased).....RESPONDENT

RULING

This is an application by way of Notice of Motion dated 5th March 2020 for stay of execution of the judgment of the lower court delivered on 14th February, 2020 and the decree issued on 19th February, 2020. It is brought under Order 10 rule 11, Order 22 rule 22 of the Civil Procedure Rules, Sections 1A, 1B, 3 and 3A of the Civil Procedure Act.

The applicant was named as the defendant in the lower court. From the record it is admitted that summons to enter appearance and file a defence was served upon the defendant who submitted the same to his insurer. However, no appearance was entered and no defence was filed whereupon an interlocutory judgment was entered and the final judgment subsequently granted.

An application to set aside the *ex parte* judgment was dismissed by the lower court. It is that dismissal that prompted this appeal. In this application, the applicant is ready to post any security that may be ordered by the court. The application is opposed and there is a replying affidavit sworn by the advocate for the respondent.

The right to a fair hearing is recognized in the Constitution and any party expressing the desire to be heard should be given that opportunity, provided the court is satisfied the ends of justice shall be met and no prejudice may be occasioned to the other party. From the record before the court, the lower court ruling was given on 14th August, 2020 dismissing the applicant's application to set aside the *ex parte* judgment. This application was filed 10 days thereafter, that is 24th August, 2020. I find there was no delay in lodging the application.

I have looked at paragraphs 7 to 10 of the supporting affidavit of the application in the lower court where the capacity of the respondent to sue has been questioned. I have also looked at the draft statement of defence presented before the lower court which in my view presents triable issues which should have been subjected to trial. There is therefore an arguable appeal before this court.

The admission that summons were served but misplaced before adverse action was taken against the applicant is in my view, an honest demonstration of the quest to be heard.

I am persuaded the application should be allowed on condition that the respondent shall deposit a sum of Kshs. 2 Million in an interest earning joint account, in the names of the advocates on record within 30 days pending the hearing of the appeal, the record of which should also be filed within 30 days from the date of this ruling. The costs shall abide by the decision of the appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH, 2021.

A. MBOGHOLI MSAGHA

JUDGE