



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. E384 OF 2020

AFRI ROYAL (K) LIMITED.....1ST APPLICANT

FREDRICK MUGO MUTUA2ND APPLICANT

VERSUS

SIMON MBOGO KIRIBARESPONDENT

RULING

1. The Application dated 15/12/2020 seeks orders that:

1. Spent

2. The honorable court be pleased to grant leave to the defendant/applicant to appeal against the Honorable Court's ruling delivered on 10th December, 2020 dismissing the applicant/appellant application seeking to set aside ex-parte judgment in Milimani CMCC. 6412 of 2014.

3. Spent

4. The honorable court be pleased to issue an order of stay of proceedings in Milimani CMCC 6412 OF 2014 AND ANY OTHER CONSEQUENTIAL ORDERS thereto pending the hearing and determination of the appeal.

5. The honorable court be pleased to set aside the trial court ruling and order in Milimani CMNCC 6412 of 2014 for 10th December, 2020 dismissing the applicant/appellant's application dated 29th September, 2020 seeking to set aside ex-parte judgment.

6. This honorable court be please to set aside ex-parte judgment in Milimani CMCC 6412 delivered on 14th February,2019 and allow the applicant to enter appearance and order the suit to be heard *de novo* and allow defendants to call their witnesses and ventilate their defence.

7. Costs of the suit be provided for.

2. The application is premised on the grounds set out in the application and the affidavit in support. It is stated that by a ruling delivered on 10/12/2020, the Lower Court dismissed the Applicants' application dated 29/9/2020 seeking to set *aside ex-parte* Judgment. The Applicants are dissatisfied with the said ruling and intend to file an Appeal. It is averred that the intended Appeal has high chances of success but stands to be rendered nugatory if the orders sought are not granted. That the application has been brought without unreasonable delay to ensure justice for both parties. It is further stated that the Applicants stand to suffer irreparable loss and prejudice as they are exposed to execution.

3. The application is opposed. It is stated in the replying affidavit that the *ex-parte* Judgment was entered regularly and that the instant application is aimed at causing delay and to deny the Respondent the fruits of the Judgment. The Respondent's view is that the Applicants slept on their rights and are misleading the court. That in the event that the application is allowed half of the decretal sum be deposited in an interest earning bank account of the Advocates for the parties and the other half be paid to the Respondent.

4. I have considered the application, the response to the same and the rival submissions filed.

5. The well settled principles guiding the grant of a stay of execution pending appeal are provided under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides as follows:

No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

6. The ruling the subject matter of the Appeal herein was delivered on 10/12/2020. The application at hand was filed on 4/1/2021. There was no unreasonable delay.

7. The Applicants are apprehensive that if the orders they seek are not granted they will have been condemned unheard and their Appeal rendered nugatory. There are however no allegations made that the Respondent is not able to refund the decretal sum in the event that the Appeal is successful. However, the intended Appeal is on the whole of the ruling delivered on 10/12/2020. This encompasses both the issue of liability and quantum. It would therefore not be prudent to pay out part of the decretal sum at this stage.

8. The Applicants have prayed for the setting aside of the orders that are the subject of the Appeal. These prayers are premature as the Appeal is yet to be heard. The Applicants have also sought stay of proceedings in the Lower Court. The *Ex-parte* Judgment has already been entered following Formal Proof. There are therefore no further proceedings expected in the trial court save for execution proceedings. The order for stay of proceedings is therefore not necessary.

9. Order 10 Rule 11 of the Civil Procedure Rules provides for the setting aside of Judgment entered in default of appearance. Under Order 43 of the Civil Procedure Rules, Appeals from such orders lie as a matter of right. Consequently, the Applicants had a direct right of Appeal particularly taking into account that they filed their application and “Draft Memorandum of Appeal” within the 30 days right of Appeal window. The “Draft Memorandum of Appeal” was received in court on 30/12/2020 when this Appeal file was opened.

10. To balance the competing interests of the parties herein, I allow stay of execution in terms of Prayer No. 4 on condition that the decretal sum is deposited in a joint interest earning bank account of the Advocates for the parties or in court within 30 days from the date herein. The Memorandum of Appeal to be filed within 14 days of the date hereof. Costs in cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 1ST DAY OF JULY, 2021

B.THURANIRA JADEN

JUDGE