



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. EO30 OF 2021

ST. AUGUSTINE PREPARATORY SCHOOL.....APPELLANT

VERSUS

MANAGEMENT BOARD. ST. AUGUSTINE

PREPARATORY SCHOOL.....RESPONDENT

(Being an appeal of the Ruling of Hon. N.C.Adalo, SRM, delivered on the 26th day of February, 2021 in Mariakani SRMCC No. 14 of 2019)

CORAM: Hon. Justice R. Nyakundi

Attorney General for the Appellant

Munyithia Mutugi Umara & Muzina Advocates

For the Respondent

RULING

This is an appellant's Notice of Motion filed in Court on 21st April, 2021 for an order staying execution of the ruling of the Court delivered on 13th April, 2021 in favor of the Respondents. In support of the Motion expressed to be brought under Order 40 Rule (1), 4 (10), Order 7 Rule (1), Order 5, 22 Rule 8 order 42 Rule 6 (1), of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act is grounded on the following reasons; -

- 1. That the Honourable Court in Mariakani in Civil suit Number 14 of 2019 delivered a ruling on the 26th February, 2021 allowing the Appellant's application to set aside the ex parte judgement dated 24th June, 2020 entering judgement against the Appellant's in the sum of Kshs.6,021,625/-.***
- 2. That the Honourable Court granted time for the Appellant to file a defence and pay throw away costs of kshs.20,000/-.***
- 3. That the said throw away costs were paid on the 11th March, 2021.***
- 4. That the defence was filed on 13th April, 2021 owing to Counsel's difficulty in accessing the registry.***
- 5. That despite the defence filed on 13th April, 2021, the Respondents were privy to the said defence as it was an annexure in the application to set aside the ruling.***
- 6. That filing the defence on 13th April, 2021 was not prejudicial to the Respondents as they were aware of the same.***
- 7. That the dismissal of the said application defeats justice and fails to consider the overriding objectives of the Civil Procedure Act.***
- 8. That further the dismissal of the said application is against the spirit of justice and the Constitutional principal of allowing for substantive justice not to be overshadowed by procedural technicalities.***

9. *That it is in interest of justice, that the application should be allowed as prayed since the applicant has an arguable defence and the respondent will have an opportunity to be heard on merit.*

10. *That this application is made in the interest of justice hence it is only fair just and in the interest of the overriding objective that his honourable court exercises its discretion and grants the orders sought herein.*

To this end was also an affidavit sworn by Jane Mkoba filed in Court on the same date with the motion on 21.4.2021. The Respondent opposed the Notice of Motion and grant of any reliefs vide a replying affidavit filed in Court on 4th June, 2021. To buttress their respective arguments both Counsels relied on their written submissions which I purpose not to reproduce verbatim in this discourse. All in all, they will form part of the consideration that impact the final determination on the issues raised in the Notice of Motion.

Determination

The legal principles to be adopted at this stage would be as set out under Order 42 Rule 6 (1) of the Civil Procedure Rules; -

- a) *That the application has been filed without undue delay.*
- b) *That the applicant would suffer substantial loss not remediable by way of damages.*
- c) *That the applicant demonstrates capacity to offer security for due performance of the decree.*

The ultimate question on stay of execution is approached from the jurisprudential direction taken by the superior courts in their precedent setting decisions. As the Court in *Singh V Runda Estates Ltd[1960] EA 263* stated;-

“The High Court has the power to order stay of execution pending appeal either in its inherent jurisdiction or under order 42 Rule (6) of the Civil Procedure Rules. “It is not normal for a Court to grant stay of execution in monetary decrees but where there are special features such as the issue of regularity of the judgement, the fact that the amount payable under the decree being substantial and the fact that the Plaintiff has no known assets within the jurisdiction from which the applicant can recoup in the event that its appeal is successful. Further, in Consolidated Marine V Nampijaa & another CA No.93 of 1989 the Court of Appeal weighed in and stated that; -“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory on the same breadth in George Oraro V Kenya Television Network Nairobi CA No. 151 of 1992 it was observed inter alia; -“That the Court does not make a practice of depriving the successful litigant of the fruits of his litigation and locking up the fruits to which prima facie he is entitled pending an appeal. However, the Court must find out whether the purported appeal would be rendered nugatory....”(See also Odungas Digest on Civil Case Law and Procedure Vol 4 2nd Edition page 3749 paragraph 8080,8081 and 8083).

The other aspect to be considered by the Court in granting or declining stay of execution is evidence on existence of special circumstances necessitating the impugned judgement should not be executed. There is also need to evaluate the gravity of the prejudice rise and the interest of justice of the matter as a whole. Given the above principles and their application to the facts of this case, its discretionary from the material facts; First, the applicant had earlier on been granted leave to ventilate its defence to the claim in the plaint filed by the Respondent on 13.5.2015. Apparently, from the record an Exparte judgement was pronounced by the trial court on the material facts by the respondent without the participation of the applicant. The applicant on review against the Exparte-judgement convinced the trial magistrate to exercise her discretion which she did persuasively granted and justifiably granted though with conditions precedent for filing the defence to the claim.

The record shows that the appellant blundered in failing to file the defence within the limitation period set by the Court. The result is that the discretion of the Court to the appellant to have its defence heard on the merits was brought to an emphatic end whilst it is true that the appellant had complied with the condition on throw away costs. The entitlement to challenge the claim at the trial had been taken away by the same Court. That is the grievance which triggered an appeal and the present interlocutory application for stay of execution.

I have perused the record, the affidavits and skeletal arguments filed by both Counsels in my view the applicant has discharged the burden of proof that there are special circumstances which favor the grant of stay of execution. It is not disputed that the decretal sum in the impugned judgement is colossal and the fears of the applicant that it would suffer loss which could not be compensated in damages has not been controverted by the respondent. The issues such as the balance of convenience and the appellant demonstrating existence of an arguable appeal justify an exercise of discretion in this matter. The grounds advanced by the appellant on high chances of an appeal succeeding can be re-read alongside the ruling of the trial magistrate dated 26.2.2021 in which she granted leave to the appellant to file and serve the statement of defence to the respondents.

The obvious temptation of a session judge in my position is not to suppress the would be trial on the merits of the appeal. Admittedly, one of the condition precedent on throw away costs had already been complied with by the appellant save for the late filing of the defence. Therefore, even if the Court was to find there was no proper defence, it would still have the liberty to enlarge time to the offending party to file a proper defence as ordered by the Court. This could have finally allowed the parties to be heard on the merits. This approach has the high authority of the Supreme Law of the land under Article 159 (2) (d) and (e) of the Constitution which stresses *inter alia* ***“that justice shall be administered without undue regard to procedural technicalities.”*** Despite the delay in filing the defence within the stipulated 21 days as ordered in the ruling of 26.2.2021 the Court should not have hesitated to adopt measures that are;- fair and expedient not to occasion further delay of the due administration of justice. One such measure was to admit the defence as duly filed within time to give effect to the overriding objective as a whole to secure the ends of justice. The Court therefore in normal circumstances should not have dismissed the defence to occasion prejudice and a failure of justice to the applicant.

In a nutshell with that one action, this Court resources are being expended to hear an appeal necessitated by that decision of driving the appellant from the seat of justice on the merits. It is the position of this Court that there exist special circumstances bringing into play Order 42 Rule (6) of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act to grant stay of execution of the original judgement of the trial court to allow for the canvassing of the intended appeal. In the opinion of the Court the substratum of the judgement had been set aside; the respondent is appealing on an interlocutory ruling. I consider it prudent not to invoke the condition on deposit of security for the due performance of the decree. For those reasons the motion dated 15th day of April, 2021 is hereby allowed with costs. It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 13TH DAY OF JULY, 2021.

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R. NYAKUNDI

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

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