



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CIVIL APPEAL NO. E014 OF 2021

AHMED SWALEH HEMED....APPELLANT

VERSUS

ALI SWALEH HEMED.....RESPONDENT

RULING

1. Before the court for determination are two applications filed by the Appellant and Respondent, both brought by way of **Notice of Motion** dated **10th February, 2021** and **3rd March, 2021** respectively.

2. The Application dated **10th February, 2021** by the Appellant is brought under **Sections 1A, 1B and 3A** all of the **Civil Procedure Act; Order 22 Rule 22 and Order 42 Rule 6** both of the **Civil Procedure Rules** and all the enabling provisions of the law. It seeks the following orders: -

1. Spent;

2. Spent;

3. THAT there be stay of execution of the ruling and/or order made on the 5th February 2021 in Mombasa CMCC No. 328 of 2020 pending the hearing and determination of this Appeal;

4. THAT this Honorable Court be pleased to issue any other order it deems fit in the circumstance of this case;

5. THAT costs of this Application be provided for.

3. The application is premised on the grounds set out on the face of it and it is supported by the annexed **affidavit** sworn on **10th February, 2021** by **Ahmed Swaleh Hemed** the Appellant herein.

4. Mr. Ahmed, has deponed that his moveable properties were proclaimed on the **19th November, 2020** by **M/s Makuri Auctioneers** on the instructions of the Respondent. He has deponed that he was not aware that any suit had been filed against him and thus he instructed his Advocates on record to peruse the court file in **Mombasa CMCC No.328 of 2020** before the trial court and found that there was a judgment delivered on the **10th June, 2020** as against him and a decree issued on **14th October, 2020**.

5. He thus instructed his advocates on record to seek to set aside the Judgment delivered on the **10th June, 2020**, which application was filed on the **24th November, 2020**. The application was argued before the trial court and a Ruling delivered on **5th February, 2021**.

6. It has been averred that the Ruling delivered on the **5th February, 2021** **dismissed** the Appellant's application that required the judgment delivered on the **10th June, 2020** set aside and he be granted leave to file his statement of defence.

7. The Appellant has stated that being aggrieved by the said Ruling delivered on the **5th February, 2021**, he decided to Appeal, since he believes that the Appeal has a high chance of success and should be heard on merits. Further, according to the Appellant, if the orders sought are not granted the Appeal will be rendered nugatory.

8. It has also been deponed that the Appellant was never served with summons to enter appearance nor did he instruct anyone to receive summons to enter appearance on his behalf, hence the Judgment entered was irregular and if the same is not set aside, he will have been

condemned unheard.

9. He has further indicated that he stands to suffer substantial loss if the orders are not granted as he is not certain that he will be able to recover the decretal amount from the Respondent whose financial status is unknown.

10. The Appellant has added that the instant application has been filed timely as the Ruling by the trial court was delivered on the **5th February, 2021** and the instant application was filed on the **10th February, 2021**.

11. Lastly, the Appellant urged the court to allow his application in the interest of justice to enable him ventilate his appeal on its merits.

12. Regarding the Notice of Motion dated **3rd March, 2021** and filed by the Respondent, the same is brought under **Articles 2, 3, 10, 12, 19, 20, 21, 22, 23, 24, 25, 27, 28, 39, 40, 43, 47, 48, 50, 60, 66, 73, 75, 159, 162 and 165** all of the **Constitution of Kenya, Sections 1A, 1B, 3A, 3B, 5, 63(e) and 79B**, all of the **Civil Procedure Act, Cap 21, Order 13 Rule 2 and Order 51 Rule 1** both of the **Civil Procedure Rules** and all the enabling provisions of the law. The Application seeks the following orders: -

1. Spent;

2. Spent;

3. THAT the Honourable Court be pleased to set aside *ex debito justitiae*, the Orders given herein on 10th February, 2021 allowing the Appellant's Notice of Motion Application dated 10th February, 2021 at the Ex Parte stage;

4. THAT the Honourable Court be pleased to summarily reject/disallow the Appeal subject hereof, with costs to the Respondent;

5. THAT costs of this Application and the Rejected/Disallowed Appeal be provided for.

13. The application is premised on the grounds set out on the face of it and on the annexed affidavit sworn on **1st March, 2021** by **Ali Swaleh Hemed**, the Respondent herein.

14. It has been deponed therein that on **9th March, 2020** the Respondent filed a suit as against the Appellant for **Kshs.1,850,000/=** plus costs and interest. That the Plaintiff was accompanied by a Notice of Motion Application that sought for a judgment to be entered as against the Respondent on his own admission.

15. It has been averred that the Appellant was served but he neither entered appearance and/nor filed a Defence. Thus on **8th June, 2020**, the Respondent requested for a Judgment against the Appellant on the liquated sum as was subject of the suit. The trial court consequently entered Judgment on the **10th June, 2020** as requested by the Respondent.

16. The Respondent has stated that the Appellant filed an application dated **24th November, 2020** and sought for a stay of execution and an order to set aside the Judgment issued on **10th June, 2020**.

17. It has also been stated that the parties herein were heard on the **Notice of Motion** application dated **24th November, 2020** and a Ruling was delivered on **5th February, 2021**, which is the subject of the Appeal herein.

18. That after the delivery of the Ruling on the **5th February, 2021**, the parties herein being brothers resolved to try and resolve the dispute amicably but the Respondent has been surprised that instead of resolving the issue herein, the Appellant filed the Appeal herein.

19. According to the Respondent, the Appeal herein has been filed to frustrate his attempts to recover the funds from the Appellant and forestall his right to enjoy the fruits of the Judgment as delivered on the **10th June, 2020**.

20. This Court has been urged to reject the Appellant's Appeal for seeking untenable orders as being vexatious and otiose as it is not supported by any grounds of facts. That further, the Appeal is fatally defective and absolute waste of the court's time and resources and should be dismissed.

21. In response to the application dated **3rd March, 2021**, the Appellant filed Grounds of Opposition and stated as follows: -

1. THAT the Notice of Motion is incurably defective, bad in law and therefore an abuse of the process of Court.

2. THAT the Notice of Motion is unmerited and the orders sought cannot be granted.

3. THAT the Notice of Motion is vexatious, frivolous and only calculated to condemn the Appellant unheard.

4. THAT in the foregoing the Notice of Motion should be dismissed with costs to the Appellant.

22. Directions were then given on **10th March 2021** that the application be canvassed by way of written submissions. Accordingly, parties complied and filed their respective submissions. The Appellant filed submissions on the **13th May 2021** while the Respondent filed on the **21st April 2021**.

23. Parties opted to rely on their written submissions.

The Appellant's submissions

24. The Appellant has submitted that he was not aware of the suit at the Magistrate's Court vide **Mombasa CMCC No.328 of 2020** and thus was shocked to be served with a proclamation Notice dated the **19th November 2020**. He has stated that his Appeal has a high chance of success and the same will be rendered nugatory if stay is not granted.

25. With regard to the Respondent's application **3rd March, 2021**, it has been submitted by the Appellant that the Respondent has failed to place any material before the court to show why the Appeal should be dismissed and/or rejected.

26. The Appellant has submitted that any aggrieved party including the Appellant, has all the rights to prefer an appeal if unsatisfied with a decision of the court.

27. Further, it is submitted that this Appeal cannot be dismissed as it has not been admitted and neither have directions been given to warrant the making of such vexatious application.

The Respondent's Submissions

28. The Respondent has submitted that for the Appellant to be granted the orders of stay of execution, he must show that he will suffer substantial loss; that the application must have been made without undue delay and that the Appellant must provide security. It was stated that the Appellant has not satisfied any of the conditions set hereinabove in this case.

29. On the issue of setting aside of the orders as issued by the court on **11th February, 2021**, the Respondent has submitted that the Court has discretion to set aside orders issued ex parte at any stage. However, relying on the provisions of **Section 79 B of the Civil Procedure Act**, the Respondent has urged this court to reject the Appellant's Appeal as there are no sufficient grounds that have been shown to this court to warrant interference with the whole or part of the Decree of the subordinate court.

30. The Respondent has further urged the court to dismiss the Appellant's application dated **10th February, 2021** and allow their application dated **3rd March, 2021**.

Analysis and determination

31. I have considered all the pleadings and issues raised by both parties. I have also considered the statute and case law cited in their submissions. In my view, the following are the issues for determination: -

i. Whether the court can grant an order of stay of execution pending the hearing and determination of the Appeal;

ii. Whether the court can summarily reject the Appeal herein

i. Whether the court can grant an order of stay of execution pending the hearing and determination of the Appeal.

32. It is trite that **Order 42 Rule 6** of the **Civil Procedure Rules, 2010** specifies the circumstances under which the court may order Stay of Execution of a Decree or Order pending an Appeal. It provides that an Applicant must demonstrate the following: -

a. Substantial loss may result to the applicant unless the order was made;

b. The application was made without unreasonable delay; and

c. 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.

33. Further, it is also trite law and as evidenced by precedents that an application for stay of execution pending appeal requires that there be a positive requirement/or order that is capable of being stayed.

34. In the case of **Co-operative Bank of Kenya Limited –vs- Banking Insurance & Finance Union (Kenya) [2015] eKLR**, the Court of Appeal (Kantai J.A) held as follows: -

“...An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence

of a situation to stay – called a “positive order” – either an order that has not been complied with or has partly been complied with. See, for this general proposition, the holding of the Court of Appeal of Uganda in Mugenyi & Co. Advocates v National Insurance Corporation (Civil Appeal No.13 of 1984) where it was stated:

‘..... an order for stay of execution must be intended to serve a purpose’

35. The Application as filed by the Appellant requires this court to stay the Ruling delivered on **5th February, 2021**. I have looked at the said Ruling and find that there is nothing that the Magistrates Court has ordered to be done or restrained from being done. The Magistrate’s Court in this case only dismissed an application dated **24th November, 2020** that required it to set aside the Judgment as was entered on the **10th June, 2020** and a decree issued on **14th October, 2020** in favour of the Respondent. That further, the Magistrate’s Court refused to grant the Appellant leave to file their Defence on claims that it does not raise any triable issue.

36. The Appellant herein has not brought before this court an order that this court can grant stay of execution pending the hearing and determination of the Appeal. The Ruling delivered on the **5th February, 2021** is a negative order that is not capable of being stayed.

ii. Whether the court can summarily reject the Appeal herein

37. In this case, the Respondent has asked the court to summarily reject the Appeal herein for the reasons that the orders sought are untenable in the circumstance of the case herein, that it is vexatious, it is otiose, bad in law, it bears grounds not supported by any facts, it is fatally defective and is an abuse of the court process.

38. The **Civil Procedure Act** provides the court with the procedure to summarily dismiss or reject an Appeal under **Section 79B** of the **Civil Procedure Act**, which states that:-

“Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily”.

39. From the reading of **Section 79B** of the **Civil Procedure Act**, the decision to summarily reject an Appeal from the subordinate court is a discretion that is vested with this court.

40. In the Court of Appeal case of **Michael A O Mashere –vs- Rotas Makokha Walusala [1987]eKLR**, the Court held: -

“... But the essence of the observations is that the power to summarily reject appeals must be sparingly used and only in the clearest cases. A sparing use can indeed only refer to rejection in the clearest cases of fact or law. So the spectrum is narrow. In this case, during an interlocutory ruling, this court said that the power to reject is a power which should be sparingly exercised. That then is the basis on which this court has already approached this problem, and it would be invidious now to depart from that standard...”

41. Further, under **Section 79B** of the **Civil Procedure Act**, the High Court can only summarily reject an Appeal after the judge has perused it and finds that there are no ample reasons to interfere with the decision of the subordinate court.

42. In the case herein, I have perused the Memorandum of Appeal dated **9th February 2021** and find that it has triable issues. I therefore see no reason to summarily reject the same. The Grounds of Appeal with regard to service and rejection of the Appellant’s Defence are triable issues. Further this court is enjoined to ensure equity and allow the Appellant to exercise his undoubted right of Appeal.

43. The upshot of all these is that the Appellant’s application dated **10th February, 2021** and that of the Respondent dated **3rd March, 2021** lack merit and are hereby dismissed respectively.

44. Each party to bear their own costs.

It is so ordered.

DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF AUGUST, 2021

D. O. CHEPKWONY

JUDGE

DELIVERED VIRTUALLY AT MOMBASA THIS 2ND DAY OF SEPTEMBER, 2021.

J. N. ONYIEGO

JUDGE