REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO.102 OF 2019

KARISA NZAI MUNYIKA ....APPELLANT

VERSUS

ANNE WANJIKU RUGIRI...RESPONDENT

RULING

1. The application pending before this court for determination is a **Notice of Motion** application dated **3rd June, 2021** taken out by the Appellant/Applicant under the provisions of **Sections 1A, 1B, 3A,** and **63(e**), all of the **Civil Procedure Act, Order 22 Rule 22(1), Order 42 Rule 6** and **Order 51 Rule 1** all of the **Civil Procedure Rules, 2010**; and all other enabling provision of the law. The application seeks the following orders :-

a) Spent;

b) Spent;

c) That the Honourable Court be pleased to set aside its orders issued on 20th April, 2021 dismissing the Appellants appeal for want of prosecution and substitute it with an order reinstating the appeal for hearing forthwith;

d) That there be a stay of execution off the Judgment, decree and all consequential orders until the full hearing and final determination of the appeal same being Mombasa HCCA No.102 of 2019;

e) That the cost of this application and other costs incurred herein to follow (abide by) the events.

2. The application is based on the grounds on its face and the affidavit of the Appellant/Applicant sworn on **3rd June, 2021**. His case is that Judgment was entered against him in **Mombasa CMCC No.2066 of 2016** on **10th May, 2019** for the sum of Kshs.2,400,000/=. Aggrieved by that Judgment, he filed the instant appeal simultaneously with an application **dated 17th July, 2016** seeking orders for stay of execution pending the determination of the appeal.

3. It is averred that directions were issued on **7th November, 2019** that the application for stay of execution be canvassed by way of written submissions and a date to confirm compliance set for **2nd December, 2019**. However, on **2nd December, 2019** the court was not sitting and the Appellant/Applicant avers that the application had been pending before court since then until on **10th March, 2021** when he learned that the Respondent had filed an application for dismissal of the appeal. He adds that the application by the Respondent was served upon his erstwhile advocates but they failed to file a response, consequence of which the Respondent's application was allowed on **20th April, 2021** and the appeal herein dismissed.

4. Now, the Applicant avers that he was condemned unheard and the appeal herein which is highly arguable should be reinstated for hearing so that his right of appeal is not defeated. According to him, the appeal was not yet ripe for dismissal given that directions had not been issued. Lastly, the Applicant has urged the court to allow the prayer for stay of execution given that the Respondent has now proclaimed his personal belongings and if execution proceeds, then the intended appeal will be rendered nugatory.

5. The Respondent has opposed the application vide the **Replying Affidavit** she swore on **14th June 2021** and filed on **15th June, 2021**. She describes the present application as vexatious and brought in bad faith. She says so, because the Applicant had filed an application dated **17th July, 2019** seeking for orders for stay of execution. That the said application was allowed on condition that the Applicant deposits the decretal sum in court but this was never done.

6. In any event, the Respondent is of the view that the Appellant/Applicant has no intention of prosecuting the appeal given that he filed it two years ago and no other action has been undertaken since then, even to the least filing a response to the application seeking dismissal of the appeal. That not withstanding, the Appellant has not given any explanation for the delay and on that basis the court is invited to appreciate that there must always be an end to litigation.

7. Directions were then issued that the application be canvassed by way of written submissions and the record shows that both sides dutifully obliged with the Appellant/Applicant filing theirs on **2nd July, 2021** while those of the Respondent were filed on **5th July, 2021**.

8. For the Appellant/Applicant, it is submitted that failure to respond the application for dismissal of the application was mistake of his former counsel and the same should not be visited upon him. He pleads with the court to set aside the dismissal order adducing **Order 42 Rule 35(1)** of the **Civil Procedure Rules** which makes it paramount for directions to first issue in an appeal before an application for its dismissal can be made. Since that was not the case in the present appeal, the applicant submits that the application for dismissal of the appeal was premature. In support of that line of thought, reliance has been placed on the cases of **Moris Njagi & Another –vs- Mary Wanjiku Kiura [2017] eKLR.**

9. As regards the issue of stay, it is submitted that no stay orders were granted in this case or any conditions imposed thereon as averred by the Respondent. In addition to that, it is submitted that the Respondent has availed no document to show that stay was granted in the manner she has alleged thus her averments are mere imaginations.

10. Nonetheless, the Appellant/applicant submits that he has satisfied the three conditions for stay as provided for under **Order 42 Rule 6** of the **Civil Procedure Rules, 2010**. The first being that he is likely to suffer substantial loss given that the amount claimed by the Respondent as per the proclamation dated **1st June, 2021** is Kshs.6,159,079.25 and it is unknown whether the Respondent can repay the same in the event of a successful appeal. Secondly, that the instant application has been filed timeously given that he learnt of the dismissal of the appeal whenhe was served with the Proclamation Notice dated **1st June, 2021** and he moved to file the instant application on **4th June, 2021**. Lastly, on the issue of security, it is submitted that the Applicant is willing to provide security as may be directed by the court although it is argued that such security should not be construed to include the entire decretal sum but instead should be sufficient costs for the appeal.

11. The Respondent on the other hand has eiterated the grounds adduced in her **Replying Affidavit** with the argument that the Appellant/Applicant has not tendered any explanation for the delay exhibited and no firm grounds have been adduced to support the prayer for stay of execution as provided for under **Order 42 Rule 6** of the **Civil Procedure Rules.**

Analysis and Determination

12. Having read through the application, the affidavits, both in support and response thereof and the submissions filed on behalf of the parties, my finding is that the evidence adduced by both parties confirms that the Appellant/ Applicant was previously represented by a different firm of advocates whom the Applicant finds fault with for failing to file a response to the Respondent's application dated **10th March, 2021** seeking to dismiss his appeal. It is for that reason that the appeal was dismissed. Clearly what the Applicant is saying is that the appeal was dismissed entirely on mistakes of his erstwhile advocate and he should not be let to suffer for mistakes of his former advocate. He is also of the view that had a response been filed to the dismissal application, the appeal could not have been dismissed as it is prerequisite under **Order 42 Rule 35** of the **Civil Procedure Rules** that before an application for dismissal of an appeal is made, directions ought to have been issued on the appeal.

13. In my view, where there is a regular decision by a court the same cannot be set aside simply because the Applicant thinks that it could have reached a different conclusion on questions of fact or on both fact and law. Even where a court has made a wrong decision based on a wrong interpretation of the law, the court should guard itself from sitting on its own appeal if invited to set aside its decision on the basis of wrongful interpretation of the law. If the Applicant feels that there is a better interpretation of a certain provision of the law other than the one adopted by the court, then the relief would be on appeal but not seeking to set aside the decision. Similarly, in this particular case, if the Appellant /Applicant thinks that the court should not have dismissed the appeal before it had issued the directions, then the Applicant should take that issue for appeal since this court cannot change the substance of the ruling it delivered on **20th April, 2021** lest be seen to be sitting on its own appeal.

14. That notwithstanding, the objectivity of this court demands that where the interests of justice are such that the defaulting party with sound reasons should be heard, then that party should indeed be given a hearing. The test in this case would therefore be whether the Appellant/Applicant honestly and sincerely intended to prosecute his appeal and whether the reason advanced would suffice so as not to cast blame on the Applicant. Here, the key reason that has been advanced is that the former advocate failed to act diligently by filing a response to the application for dismissal of the Appeal by the Respondent or an anyway update the Appellant of the progress of the Appeal.

15. On the foregoing, I do agree that the Appellant/Application cannot be blamed for the mistakes of his previous advocate and the eventual outcome of his appeal as he expected his advocate to keep him posted on the progress of the appeal. I refer to the case of **Mbogo and Another –vs-**

Shah [1968] EA 93, where the court observed that:-

> ***"Applying the principles that the court's discretion to set aside an ex parte Judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice."***

16. It follows that to set aside an ex-parte order of the nature of a dismissal order is an exercise of court's discretion intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error. Having further observed that the primary duty of

the court is to do justice to the parties and having found that the mistakes of the Appellant/Applicant's Counsel then on record cannot be visited upon the Applicant, it behoves this court to exercise its discretion to avoid injustice that would occur to the Applicant if the orders sought are not granted. Mistakes of an advocate on whose counsel the client acts on would in this court's view be a plausible reason to warrant thee setting aside of the orders issued by this court on **20th April, 2021** dismissing the Applicant's appeal for want of persecution. In the upshot, the ruling delivered by this court on **20th April, 2021** dismissing the instant appeal is hereby set aside and the appeal is reinstated for hearing.

17. The next issue for consideration is whether the Applicant deserves the orders of stay of execution of the Judgment issued on **10th May, 2019** and the conse0quential decree pending the hearing and determination of the appeal. Both parties are agreeable that the applicable provision of the law is **Order 42 Rule 6(2)** of the **Civil Procedure Rules, 2010** which states as follows:-

> ***(2) No order for stay of execution shall be made under sub-rule (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.***

18. Undoubtedly, an application for stay of execution of an order pending appeal is obliged to satisfy the conditions set out in **Order 42 Rule 6(2)** of the **Civil Procedure Rules** aforementioned, namely; (a) *that substantial loss may result to the Applicant unless the order is made*, (b) *that the application has been made without unreasonable delay, and* (c) *that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the Applicant has been given*.

19. In explaining those grounds further, the court in the case of **Butt -vs- Rent Restriction Tribunal [1979]** stated that the power of a court to grant or refuse an application for stay of execution is discretionary, and the discretion should be exercised in such a way as not to prevent an appeal. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings. Finally, that the court in exercising its discretion on whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

20. In the present case, the Respondent has cast aspersions on the Appellant/Applicant claiming that orders for stay of execution were granted on condition that the decretal sum be deposited in court. The Respondent did not state when those orders were granted neither did she annex a copy of that order. Eventually I have read through the court record and I have not seen such orders and clearly the issue on whether the Appellant should be granted stay of execution was never considered on merit. That being the case, it is the Appellant's case that the amount being claimed is substantial and the Respondent is unlikely to repay the same in the event of a successful appeal. This would in his view occasion him substantial loss. He has also stated at **paragraph sixteen (16)** of his **affidavit** that he is willing to provide security if so directed by the court.

21. Given the above averments, as to substantial loss, where the Appellant/ Applicant expresses fears in the Respondent's ability to repay the decretal sum, it is for the Respondent to allay such fears by stating her ability to refund. Having not done so, I hold the view that the Appellant's fears are not idle and need to be taken into account in considering the prayer for stay. In the decision in **Kenya Shell Ltd –vs- Kibiru [1956] KLR 410,** the Court of Appeal pointed out that if an applicant alleges difficulties in recovery of decretal sum it rests on the Respondent to show that he would be able to effect a refund. Therefore in my view, the Applicant has established he is likely to suffer substantial loss if stay is not granted.

22. The other condition or granting stay orders is on the security to be offered and the law as I understand is that a party seeking stay must offer such security for the due performance of the orders as may ultimately be binding on the Appellant. This is so because in civil process a Judgment is like a debt owing and due to be paid to the successful Respondent. It should also be noted that the issue of depositing security for due performance of decree is not a matter based on the willingness by the Applicant but for the court to determine. The pass mark is for the Applicant to show the willingness to provide security. The Applicant herein has offered to provide security as may be directed by the court and has in my view satisfied this ground for stay.

23. Lastly, the application should be made without undue delay. In this case, I have taken into account that the Applicant had filed an application for stay on the **17th July, 2019**. As the parties have submitted and as the record shows, the said application was lastly heard on **7th July, 2019** when the directions or its disposal were issued. No other action was undertaken by the Appellant and he appears to have gone to a slumber only to be awakened by the Proclamation Notice dated **31st May, 2021**. In as much as the Appellant blames his former advocates for inaction it was upon him to follow up on the progress of his appeal with his then Counsel since the case belongs to him and not his advocates. His reason for delay was therefore not satisfactorily explained and I should remind him that appeals are not taken up just for the sake of filing. To maintain it, he must show interest on it since the court will not hesitate to dismiss frivolous appeals taken up merely to defeat the Respondent's right to enjoy fruits of the Judgment.

24. Nevertheless, the court is enjoined to allow an application if despite the delay justice can still be done without prejudicing the adverse party and in case of an application for stay of execution the court must balance the interests of the Appellant with those of the Respondent while preserving the subject of the appeal. While taking reference to **Butt-vs-Rent Restriction Tribunal Case (supra)** and in line with my discussion as above, I do not see overwhelming hindrance so as to refuse the orders for stay of execution.

Disposition

25. In the end, the following orders do and hereby issue as follows:-.

> ***a) The Ruling of this court dated 20th April, 2021, is hereby set aside and the appeal herein is reinstated for hearing.***
>
> ***b) The Appellant to file and serve the Record of Appeal within 30 days from the date hereof and thereafter, mention for purposes of confirming whether the Record of Appeal is ready on a date to be fixed in the Registry.***
>
> ***c) Stay of execution of the Judgment dated 10th May, 2019 in Mombasa C.M.C.C No.2066 of 2016 and the consequential decree thereof be and is hereby stayed pending the hearing and determination of the appeal hearing on condition that the Appellant/Applicant deposits the sum of Kshs.2,400,000.00 awarded in the said Judgment in an escrow joint interest earning account in the names of the advocates on record for the parties within 30 days from the date hereof.***
>
> ***d) Failure to comply with the conditions set out in (b) and (c) above, the stay order issued herein will stand vacated and the Respondent will be at liberty to initiate the process of execution.***
>
> ***e) Costs of the application shall follow the cause of the appeal.***

It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF NOVEMBER 2021.

D. O. CHEPKWONY

JUDGE

IN THE PRESENCE OF:

NO APPEARANCE FOR AND BY APPLICANT

MR. MAGOT PAUL COUNSEL FOR RESPONDENT

COURT ASSISTANT - GITONGA