



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KABARNET**

**CIVIL APPEAL NO. 15 OF 2019**

**JOHN MUGO MATHAI.....APPELLANT**

**VERSUS**

**JOHN KIBICHIL.....RESPONDENT**

**JUDGMENT**

***Introduction***

1. The appellant seeks relief setting aside a decision of the trial court declining to certify urgent for hearing an application dated 2<sup>nd</sup> October 2019 and to grant a stay of execution of Judgment of the trial court of 4<sup>th</sup> July 2019 pending the hearing of the said application of 2<sup>nd</sup> October 2019.

2. By the application of 2<sup>nd</sup> October 2019, the appellant sought orders as follows:

*(a) That the application be certified urgent and be heard on a priority basis.*

*(b) That pending the hearing and determination of this application inter parties this court be pleased to stay further execution of the judgment and decree issued by this court against the defendant/applicant.*

*(c) That the firm of Ahmednasir Abdikadir & Co. be summoned before this court to provide details and or information to court on who instructed them to enter appearance and file a defence on behalf of the defendant in this suit.*

*(d) That this Honourable court be pleased to set aside and or vary the judgment and decree passed against the defendant by this court.*

*(e) That the defendant be allowed to defend the suit upon filing a statement of defence and other documents.*

*(f) That the costs of this application be provided for.*

3. This application of 2<sup>nd</sup> October 2019 has not been heard on its merits by the trial court.

***The appeal***

4. The grounds for the relief are set out in the Memorandum of Appeal as follows:

**“MEMORANDUM OF APPEAL**

*JOHN MUGO MATHAI the Appellant herein being aggrieved by the ruling of HON. J TAMAR P.M in Eldama Ravine CMCC No. 11 of 2017 delivered on 2<sup>nd</sup> October, 2019 appeals against the said ruling on the following grounds among other:-*

*1. The trial Magistrate erred in law and fact by refusing to grant stay of execution of the decree of the Court.*

*2. That the trial magistrate erred in law and fact in refusing to certify that the application dated 2<sup>nd</sup> October, 2019 is urgent and required hearing on priority basis when there was clear evidence that the Appellant’s property was at the verge of been attached and offered for sale in a public auction.*

3. That the trial magistrate erred in law and fact in failing to appreciate the Appellant position that he was not served with summons to enter appearance in the main suit and it would be prejudicial for the appellant if it finally found that he was indeed not served with summons to enter appearance long after execution process was finalized.

4. That the trial magistrate erred in law and fact in refusing to grant the orders of stay sought by the Appellant in a summary manner.

5. That the trial magistrate erred in law and fact in failing to appreciate the arguments tendered by the Appellant to the effect that he did not instruct the counsel on record and thereby issue orders of stay of execution to preserve the status quo pending inter-parties hearing of the motion.

6. That the trial magistrate erred in law and fact in failing to appreciate the weight of the legal issues raised by the Appellant in the application for stay.

7. That the trial magistrate applied wrong principles of law in denying the Applicant stay of execution of the judgment.

**REASONS WHEREFORE**, the Appellant prays that the Court be pleased:-

**i. To set aside the orders issued by the trial magistrate on 2<sup>nd</sup> October, 2019.**

**ii. Grant the Appellant stay of execution of the judgment issued on 4<sup>th</sup> July, 2019 pending the hearing of the application dated 2<sup>nd</sup> October, 2019.**

**iii. Cost of this appeal.**

DATED at NAKURU 4<sup>TH</sup> Day of October, 2019”

#### **Submissions**

5. The parties filed respective written submissions dated 28<sup>th</sup> January 2020 and 13<sup>th</sup> February 2010, respectively.

6. The Appellant faulted the failure of the trial court to certify the application of 2<sup>nd</sup> October 2019 that the appellant’s property was in danger of sale by warrant of sale of property issued by the trial court upon its judgment and that the application had good grounds for stay of the execution as follows:

“13. It is not in dispute that the Appellant’s property was proclaimed on 26<sup>th</sup> September 2019.

14. It is also not in dispute that there was a valid warrant of sale of property issued by the trial court on 26<sup>th</sup> September 2019.

15. The Proclamation notice gave the appellant 7 days notice before removing the said goods to auctioneer’s yard for sale.

16. The appellant filed the application for stay of execution on 2<sup>nd</sup> October 2019 before the expiry of the 7 days notice.

17. On the facts before the trial court the application was extremely urgent and deserved certification.

18. Given that the appellant raised issues of lack of service and non representation on the basis that he did not instruct the advocate who purported to represent him in court, we submit that it was incumbent upon the trial magistrate to issue stay orders pending the hearing of the application inter parties.

19. We submit that the trial court erred in law and in fact when she refused to certify the application urgent and by extension declined to grant stay orders.

20. Such refusal occasioned the appellant great loss and prejudice which would not have been cured if this court had not issued stay orders.

21. We urge the court to allow the appeal and grant stay of execution of the judgment and decree of the trial court pending the hearing of the application dated 2<sup>nd</sup> October 2019.

22. We urge the court to allow this appeal and direct the parties to observe the present status quo until the application dated 2<sup>nd</sup> October 2019 is heard and determined by the trial court”

7. The Respondent urged that the appellant’s application and appeal were incompetent having been brought post judgment by an advocate other than the one who was on record during trial and that the trial court was right in not certifying the application as urgent for hearing in submissions supported by case law authorities as follows:

“We wish to submit that the trial magistrate was right in not certifying the appellant’s application dated 2/10/2019 urgent for the following reasons.

First is because the firm of Waiganjo & Co. Advocates are not properly on record as demonstrated herein above. Second is because the appellant entered appearance in the primary suit and participated during the hearing of the case until the same was concluded and the court delivered a Judgment. **There is no way the firm of Ahmednassir Abdikadir & Company would have entered appearance on behalf of the appellant without his instructions.** The allegation by the appellant that it was not served with summons to enter appearance is an afterthought and aimed at stealing a match from the Respondent. It was not mandatory for the Respondent to file an affidavit of service to confirm service of summons to enter appearance upon the appellant since the firm of Ahmednassir Abdikadir & Company advocates entered appearance on behalf of him within the stipulated period of time upon service....

Third is because the appellant did not demonstrate what prejudice was occasioned to him by the firm of Ahmednassir, Abdikadir & Company coming on record on his behalf. The appellant did not alleged that the aforesaid firm of Ahmednassir, Abdikadir & Company mishandled the case on his behalf hence unfavourable judgment was delivered on his side. Further if the appellant had not instructed the firm of Ahmednassir, Abdikadir & Company Advocates then by now he would have filed a suit against the aforesaid law firm for unprofessionalism but none has been made.

Fourth is that the fact that the appellant’s property was at the verge of being attached and offered for sale in a public auction does not constitute urgency considering the fact that the appellant was the owner of suit motor vehicle herein at the time of the accident as evidence in the police abstract produced as exhibit 4 see page 13 of the record of appeal and the fact that the appellant entered appearance in the primary suit and participated in the hearing until the case was concluded and no appeal or review has been filed.” (sic)

### **Determination**

8. The principles for the appellate interference with the discretion of a trial court are set out in **Mbogo v. Shah & Anor** (1968) EA 93, as follows:

“A Court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and as a result there has been misjustice.”

9. The very issues of competency and merit of the application of 2<sup>nd</sup> October 2019 raised before this court are **live** before the trial court at the *inter parties* hearing and this court cannot properly determine the matter as it would deny the parties a right of appeal from the determination of the trial court. **The trial court will have to determine whether there was service of summons upon the appellant; whether the appellant instructed M/S Ahmednassir Abdikadir & Co Advocates to enter an appearance and file a defence and defend the suit on his behalf; and whether based on its finding thereon, to set aside or vary the judgment of the court as prayed in the application. As that decision may come to this court on appeal, the court cannot discuss the merit thereof beforehand.**

10. The appellate court herein must confine itself to the decision of the trial court in failing to certify the application of 2<sup>nd</sup> October as urgent and to grant a stay of execution pending hearing *inter parties* of the application.

11. The decision subject of this appeal was made on 2<sup>nd</sup> October 2019 and is recorded in the Record of Appeal at p.102, as follows:

“02.01.2019

Coram: Before Hon. J. Tamar – PM

Court Clerk- Nancy

Applicant –

Respondent-

**Court:**

***I have read the Notice of Motion application dated 2<sup>nd</sup> October 2019 together with the supporting affidavit of John Mugo Mathai sworn on 2<sup>nd</sup> October 2019 and the annexures thereto.***

***I do not consider the matter as urgent. The same be served upon the Plaintiff/Respondent for interparties hearing on a date to be fixed at the Registry.***

J. TAMAR

**PRINCIPAL MAGISTRATE”**

12. The trial court did not hear the applicant or his counsel before making the decision not to certify the application of 2<sup>nd</sup> October as urgent, and no reasons are ascribed to the decision.

13. The judicial practice of the High Court where, on perusal of an application, the court at first sight considers unmerited an application filed under Certificate of Urgency proceeds to call on the applicant to urge the application before the judge before making a decision thereon, is commended. In addition, certification of urgency should be given where there is a danger or risk of substantial loss or damage and where the applicant demonstrates an arguable case or serious questions to be put to the court in the application, bearing in mind the principle that an arguable case does not mean one that must eventually succeed.

14. Without deciding the matter, this court found an arguable case in the matter when it ruled on the interlocutory application for stay of execution as follows:

*“18. I consider that the appellant/applicant has an arguable case whether his right to be heard was infringed by want of service of Summons on him as the defendant. Section 20 of the Civil Procedure Act requires service of the suit on the defendant as follows:*

*“20. Where a suit has been duly instituted **the defendant shall be served** in manner prescribed to enter appearance and answer the claim”.*

*If the appellant as defendant was not served with the suit papers and, therefore, could not defend the suit, his right to be heard enshrined in the Constitution under Article 50 (1) of the Constitution shall have been infringed. Courts have held that orders made without hearing a party must be set aside **ex debito justitiae**.*

*19. There is also a question whether, if the Counsel on record for the defendant was not instructed by the defendant, whether he could validly be deemed to have been on record for the defendant to warrant judgment in the matter as a defended case and also require the filing of Notice of Change of Advocates in accordance with the Rules as urged by the Counsel for the Respondent.*

*20. It has been held that the existence of one arguable case is sufficient to justify grant of stay of execution and the arguable case does not mean one that must eventually succeed upon hearing of the appeal. See **Stanley Kangethe Kinyanjui v. Tony Keter & 5 Ors (2013)** eKLR. Civil Appl. No. 31 of 2012.*

*21. I find that the appellant/applicant has arguable case in respect of the twin issue of service on defendant under section 20 of the Civil Procedure Act and representation by Counsel or firm of Advocates that the defendant did not instruct.”*

19. At the hearing of the application Ms. Chelagat for the Respondent pointed out inconsistency that the appellant had in paragraph 5 of the affidavit of the appellant before the trial court stated that he was not the owner of the motor vehicle KAH 941C yet it was asserted in the certificate of urgency dated 2<sup>nd</sup> October that *“the defendant’s property was attached on 26<sup>th</sup> September 2019.”* The said paragraph 5 of the supporting affidavit of the appellant to the application of 2<sup>nd</sup> October 2019, the paragraph which is in the following terms:

*“5. That I am not the owner of motor vehicle Reg. No. KAH 941C and have nothing to do with the said vehicle.”*

20. While that is a matter for the trial court in its hearing of the said application dated 2<sup>nd</sup> October, 2019, the question of substantial loss is not pegged to the named lorry only as the Proclamation Notice dated 26/9/09 was against a wide range of properties as follows:

**“Schedule of Movable Property**

*1. Motor Vehicle Registration No. KAH 941C.*

*2. **Any other movable property belonging to the Defendant ie. Motor Vehicles, Machinery, Stock in trade etc.”***

21. The execution by attachment and sale of the scheduled property even excepting the named motor vehicle would result in substantial loss.

**Conclusion**

22. Had the trial court properly adverted its mind to the serious questions as to the service of summons, instruction of counsel to act for the defendant/appellant and the prospect of substantial loss in the sale of the attached property, whose imminency was demonstrated by the proclamation notice, the trial court would no doubt have certified the application urgent for the hearing and granted an interim stay of execution pending such hearing of the application. I am certain that the trial court erred in its exercise of discretion herein and the appellate court is entitled to interfere on the principle of **Mbogo v. Shah**, supra.

23. There are no demonstrable grounds of likely bias on the trial court, and the request for hearing of the application of 2<sup>nd</sup> October 2019 by a court differently constituted on account of this appeal, is declined.

**Orders**

24. Accordingly, for the reasons set out above, this court allows the appeal and, having previously granted upon terms an order for stay of execution pending hearing of the appeal, directs that the stay of execution shall remain in force pending the hearing **inter parties** by the trial

court of the substantive prayers of the application dated 2<sup>nd</sup> October 2019 filed therein on a date to be fixed by that court.

25. For an expeditious determination of the matter, the trial court shall consistently with the Judiciary's Guidelines for Covid-19 management period fix the matter for early hearing in consultation with the parties, and in any event within 60 days, in default of which the order for stay of execution hearing shall lapse and be of no effect, unless the trial court grants a stay therefor.

26. The parties are not responsible for the exercise of discretion by the trial court, which was the subject of the appeal herein and there shall, therefore, be no order as to costs.

*Order accordingly.*

**DATED AND DELIVERED THIS 21<sup>ST</sup> DAY OF MAY 2020.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

M/S Waiganjo & Co. Advocates for the Appellant.

M/S E.M. Juma & Ombui & Co. Advocates for the Respondent.