REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISC APPLICATION NO 422 OF 2018

AUTOSOL (K) LIMITED.....APPELLANT

VERSUS

ANGELA OTIENO ODERA.....1ST RESPONDENT

JOHN NJOROGE.....2ND RESPONDENT

RULING

INTRODUCTION

1. The Applicant's Notice of Motion application dated and filed on 6th August 2018 was filed pursuant to several provisions both under the Constitution of Kenya 2010, Civil Procedure Act Cap 21 (Laws of Kenya) and Civil Procedure Rule 2010. Prayer Nos. (1), (2) and (3) were spent. The remaining prayers were seeking a stay of execution pending the hearing and determination of the intended appeal, leave to file its Memorandum of Appearance out of time, that the Memorandum of Appearance annexed to the application herein be deemed as duly filed and properly. The said application was supported by the Affidavit of its Branch Manager, Fredrick Muriithi, that was sworn on 6th August 2018.

2. The gist of its case was that it was not aware when the Ruling seeking to set aside the exparte judgment was to be delivered because the same was to be delivered on notice. It added that on perusing the court file, it emerged that the Trial Court delivered the judgment instead of a ruling thus condemning it unheard. It was its contention that there was an error apparent on the court record.

3. It averred that since the judgment was delivered without its knowledge, time to appeal against the same had lapsed. It was its submissions that it would suffer substantial loss if it was not granted leave to file an appeal as it was reasonably apprehensive that it would not be able to recover the decretal sum if paid to the Respondent should its Appeal succeed. It also contended that its appeal would be rendered nugatory if the orders it had sought were not granted.

4. It therefore urged this court to exercise its discretionary powers in its power and grant it the orders it had sought.

5. In opposition to the said application, Christine Atieno Otieno, an advocate swore the Replying Affidavit on 26th November, 2018 on behalf of the 1st Respondent herein. She pointed out that her firm filed suit against the Applicant herein having established from a search conducted at the Registrar of Motor Vehicles that the Applicant was the owner of the suit vehicle at the material time of the accident.

6. She also stated that the Insurance company paid the 1st Respondent the entire decretal sum of Kshs 188,695/= in 2014 and that despite asking the Applicant to withdraw its present application, it had declined to do so. She did not see why the Applicant was insisting on the application despite the matter having been settled three (3) years prior.

7. In its Supplementary Affidavit that was also sworn by its Branch Manager, Fredrick Muriithi, on 4th February 2019 and filed on the same date, the Applicant contended its application to have its name struck out from the proceedings in the lower court was never heard on merit and that it had in fact no relation with the insurer who settled the claim in 2014.

LEGAL ANALYSIS

8. The Applicant's Written Submissions were dated and filed on 12th November, 2018. Its Supplementary Written Submissions were dated and filed on 4th February, 2018 and filed on 26th November, 2018.

9. The Applicant rehashed the contentions in its Supporting Affidavit while submitting. It placed reliance on the case of **Edward Njane Ng'ang'a & Another vs Damaris Wanjiku Kamau & Another [2016] eKLR** where the court therein highlighted the relevant guiding principles when determining sufficient reason as laid down in the case of **Stanley Kahoro Mwangi & 2 Others vs Kanyamwi Trading Co Ltd [2015]eKLR.**

10. It pointed out that it was apprehensive that the 1st Respondent would execute against it at any given time because she had always maintained that it was liable to satisfy the judgment that was entered in her favour against it.

11. It added that the 1st Respondent ought to have brought to the attention of the Trial Court that the matter had already been settled but that instead she activated the matter for Pre-trial and its application to regularise the record was never heard.

12. On the other hand, the 1st Respondent relied on the case of **Jaber Mohansen Ali & Another vs Priscilla Boit & Another [2014]eKLR** to support its argument that there had been unreasonable delay by the Applicant in bringing its application. She further argued that the Applicant could not suffer any substantial loss since the claim had been fully settled.

13. Order 42 Rule 6(2) of the Civil Procedure Rule provides that an applicant seeking an order for stay of execution must demonstrate that:-

(a) That he will suffer substantial loss if a stay is not granted; and

(b) That he has fled his application without undue delay; and

(c) That he is willing to provide security

14. Evidently, the three (3) prerequisite conditions must co-exist and cannot be severed. The key word is **"and."** It connects that all the conditions must be met simultaneously.

15. This court carefully perused the documents that were annexed to the 1st Respondent's Replying Affidavit and noted that in the letter dated 5th April, 2014, M/S Directline Assurance Co Ltd wrote to the 1st Respondent's advocates indicating its willingness to negotiate the matter out of court. On 3rd November 2014, it forwarded to the said 1st Respondent's advocates a cheque in the sum of Kshs 188,695/= in full and final settlement of her claim. There was also a consent that was executed by the said advocates only marking the matter as settled but the same was not filed. Notably, these two (2) latter documents were not mentioned in the body of the Replying Affidavit. This court did not therefore attach much weight to the same as it was not clear if the 1st Respondent had intended to use the same in support of her case.

16. Suffice it to state that in Paragraph 7 of the Replying Affidavit, the 1st Respondent had contended that the claim had been fully settled. This assertion was contained in the body of the Replying Affidavit that was duly sworn and consequently this court was satisfied by the 1st Respondent's assertions that her claim had been fully settled in 2014.

17. A further perusal of the documents that were relied upon by the Applicant showed that execution proceedings had been commenced against it in October 2014. It did not furnish this court with any documentation to demonstrate that fresh execution proceedings had commenced after 3rd November 2014 when the claim was settled.

18. Having said so, this court noted that on 8th June 2018, Hon. Orenge K. L. SRM entered judgment in favour of the 1st Respondent against the Applicant herein for the sum of Kshs152,941/=. There was no mention of the sum of Kshs188,695/= that the 1st Respondent has stated was paid in full and final settlement of her claim in 2014.

19. Whereas no execution proceedings had been commended, it was not unreasonable to expect that the same could be commenced any time in view of the judgment that was delivered on 8th June, 2018. On this ground alone, this court was persuaded to find that the Applicant would suffer substantial loss as the claim appeared to have been settled in November 2014. The first condition for suffering of substantial loss was met.

20. Bearing in mind that judgment in the lower court was delivered on 8th June 2018 and the present application was filed on 8th August 2018, the same was filed without undue delay. The second condition set out in Order 42 Rule 6 (2) of Civil Procedure Rule has been met.

21. This is a unique case. This court could not therefore insist on the Applicant depositing security because the claim appeared to have been settled and the funds already with the 1st Respondent. No further security would be payable by the Applicant herein.

22. Having considered the unique circumstances of the case, herein this court was satisfied that the Applicant had made out a good case for being granted an order for stay of execution.

23. In view of the fact that it was not clear how the 1st Respondent intended to proceed with her case after the judgment that was delivered in her favour on 8th June 2018, this court found and held that she did not stand to suffer any prejudice if the Applicant appealed against the said judgment as she was already in possession of the sum of Kshs 188,695/= that was in full and final settlement of the claim.

24. The Applicant was not indolent and infact acted swiftly on learning of the judgment that was delivered on 8th June 2018. In any event, this court did not consider a period of two (2) months from 8th June 2018 to 6th August, 2018 to have been inordinate.

25. Accordingly, having considered the affidavit evidence, written submissions and case law that was relied upon by the parties herein, this court found and held that there would be greater injustice in the Applicant being denied an opportunity to ventilate its case on merit. Indeed its right to have its case determined was enshrined in Article 50 (1) of the Constitution of Kenya.

DISPOSITION

26. For the foregoing reasons, the upshot of this court's ruling was that the Applicant Notice of Motion application dated and field on 6th August 2018 was merited and the same is allowed in terms of Prayers Nos (5) and (6). In this regard, the Applicant is hereby directed to file and serve a Memorandum of Appeal within fourteen (14) days from the date of this Ruling i.e. by 25th June, 2019.

27. Prayer No (4) is hereby allowed in the following terms:

(1) The Appellant is hereby directed to file and serve its Record of Appeal within sixty (60) days from today i.e. by 11th August, 2019.

(2) The Deputy Registrar High Court of Kenya Milimani Law Courts Civil Division is hereby directed to facilitate the placing of the typed proceedings and lower court file to enable the Applicant comply with paragraph 27(1) hereinabove.

(3) Costs of the application shall be in the cause.

(4) Either party is at liberty to apply.

28. It is so ordered.

DATED and DELIVERED at NAIROBI this 11th day of June 2019

J. KAMAU

JUDGE