REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

MISCELLANEOUS CIVIL APPLICATION NO. 10 OF 2019

MURTAZA HASSAN.....1ST APPLICANT

ABUBAKAR CHAKA NDORO.....2ND APPLICANT

VERSUS

AHMED SALAD KULMIYE.....RESPONDENT

Hon. Justice R. Nyakundi

Mr. Kilonzo for the Applicants

Mr. Nyachiro for the Respondent

RULING

Background

The trial court in Kilifi SPMCC No. 218 of 2013 entered an interlocutory judgement in favour of the Respondent herein as against the Applicants to the tune of Ksh. 1,419,856/- on 8th April 2016.

On 1st March 2017, the Respondent sought to arrest the 1st Applicant in execution of a decree in his favour exracted from the judgement delivered on 8th April 2016. Subsequently, on 5th October, 2017, the parties entered into a consent judgment wherein it was agreed that the warrants of arrest be lifted and the 1st Applicant ordered to deposit Ksh. 250,000/- on that day and subsequently satisfy the remainder of the decretal sum in instalments specified therein. The matter did not end there.

By an application dated 6th December 2017, the Applicants sought to have the court set aside the default judgement of 8th April 2016, a stay of execution of the resultant decree dated 1st March 2017 and the Applicants, then the Defendants, be granted leave to defend the suit and their draft Defence be deemed as duly filed. In a Ruling delivered on 9th January 2019, the lower court dismissed the Defendant's application.

Consequently, by a Notice of Motion application dated 9th April 2019, the Applicants/Defendants approached this court pursuant to **Order 42 Rule 6 (2), Order 51 Rule 1 of the Civil Procedure Rules 2010, Section 1A, 1B, 3A, 79G and 95 of the Civil Procedure Act Cap 21 Laws of Kenya, Section 59 of the Interpretation and General Provisions Act Cap 2 Laws of Kenya** and all other enabling provisions of the law for the following Orders:

> ***1. THAT this application be certified as urgent and be dispensed with at the first instance and thereafter be heard on a priority basis***
>
> ***2. THAT pending the hearing and determination of this application an order of stay of execution to issue against the Judgment dated, delivered and issued on the 8th April 2016 together with the decree dated and issued on the 1st March 2017***
>
> ***3. THAT leave be granted to the Applicants to file an appeal against the Judgment dated, delivered and issued on the 8th April 2016 out of time.***
>
> ***4. THAT the annexed memorandum of appeal attached to this application be deemed as having been properly filed and on record upon payment of the requisite court fees.***

5.THAT this Honorable Court be pleased to enlarge time within which the Applicants/Appellants should file the appeal against the Judgment dated, delivered and issued on the 8th April 2016.

6. THAT costs of this application be provided for.

This application, subject of this instant Ruling, was premised on the grounds advanced therein and in the supporting affidavit sworn by Murtaza Hassan on the 9th April 2019.

In vehement opposition of the Application, the Respondent/Plaintiff filed an affidavit in reply sworn on 9th May 2019 by Ahmed Salad Kulmiye.

The Applicants then filed their submissions dated 24th May 2019 and thereafter Respondent filed his submissions dated 6th June 2019.

The Applicant's Case

The 1st Applicant first averred that thought the suit had been instituted against Murtaza Hassan, his name was Murtaza Kurban Hussein. That being said, he averred that the Hon. SPM R.K Ondieki delivered a Ruling on the 9th January 2019 at Kilifi in Civil Suit No. 218 of 2013 Ahmed Salad Kulmiye Vs. Murtaza Hassan and Abubakar Chaka Ndoro where he dismissed the Applicants' application dated 6th December 2017 where the Applicants were the defendants in that matter. This ruling it was averred, was delivered without the issuance of any notice to the applicants' advocates despite the fact that it was to be delivered on notice.

It was averred that the Applicants' application dated 6th December 2017 sought for orders to set aside the default Judgment entered on the 8th April 2016 and its decree dated 1st March 2017 and the suit be ordered to start afresh and they be granted leave to defend the suit.

The Applicants averred that the Ruling dated 9th January 2019 was littered with a lot of irregularities as the learned magistrate misdirected herself on matters of law and fact necessitating an appeal against it. That in pursuit of this endeavour the Applicants' advocates on record by a letter dated 4th February 2019 wrote to the Executive Officer of Kilifi Law Courts to request for certified copies of the Ruling and court proceedings.

It was further averred that the default judgment entered on the 8th April 2016 was issued without the Applicants being heard and given a chance to defend themselves since they were unaware of the institution of Civil Case No. 218 of 2013 as they were never served with summons and any court documents to inform them of the same.

The case was made that the subordinate Court on the 17th March 2014 had made an order allowing the Respondent to serve the Applicants by way of substituted service to the 1st Applicant's last known address which was alleged as 1-LAMU upon an application by the Respondent's advocate dated 28th February 2014. All the court documents and summons were sent to this address. However, it was averred that the Applicants had and have never resided in Lamu. All that time therefore, the summons and Court documents were sent to this wrong address because both Applicants reside in Bondeni in Mombasa.

According to the Applicants, following the delivery of the Judgement dated 8th April 2016 and decree dated 1st March 2017 a Notice to show Cause dated 1st March 2017 was issued against the 1st Applicant to show cause why he should not be committed to civil jail for failing to pay the decretal sums of Ksh. 1,837,710/- pursuant to an application for execution of the decree dated 1st March 2017. It was averred that since it was a default judgment, under Order 21 Rule 6 of the Civil Procedure Rules 2010 the Applicants ought to have been given a ten day notice of entry of the judgment. Failure to that notice, any judgment was un-executable. It was averred that the aforesaid notice was never served on the Applicants but the Respondent herein went ahead to proceed with execution.

The deponent contended that notwithstanding the failure of service of the Court documents and the ten day notice, on the 10th May 2016 the court ordered the OCS Kilifi Police Station to arrest the 1st Applicant as a Judgment debtor whereupon he was subsequently arrested and committed to prison in Kilifi as per the committal warrants dated 4th October 2017.

Next, it was averred that while at Kilifi Police Station, the Respondent's advocates intimidated, harassed and exerted undue pressure on the 1st Applicant while he was in confinement and as a result forced him to appoint the firm of Mwaure and Mwaure Advocates who purported to come on record on his behalf and one Waswa advocate allegedly appeared and recorded a consent judgment on behalf of the Applicant.

It was the Applicants' case that the Judgment delivered on the 8th April 2016 could not be validated by a fraudulent consent entered on the 5th October 2017 through deceit, manipulation, undue influence, coercion and intimidation without the Applicants' instructions and the same was illegal and ought to be set aside because an illegal judgment could not be a basis of any action or enforcement.

A contention was made that according to the alleged consent Judgment dated 5th October 2017, 1st Applicant's family members were forced to pay Ksh. 250,000/ on the 5th October 2017 then further the 1st Applicant was to pay in instalments Ksh. 250,000/- each in the month of November and December 2017. In addition to that he was to make monthly payments of Kshs. 150,000/- till payment in full of the Kshs. 1,857,960 /-. It was averred that it is this consent judgment that the Respondent sought to execute after the Applicants' application dated 6th December 2017 was dismissed.

Regarding the delay in filing the application subject of this ruling, it was averred that this had been occasioned by the fact that the

Applicants' advocates on record were unaware of the delivery of the Ruling delivered on 9th January 2019 until the 23rd January 2019 when they were served with a letter from the Respondent's advocates dated 16th January 2019 informing them of the Ruling. That in any case the Applicants' advocates on record knew that Ruling would be delivered on notice which notice was never given to them. According to the Applicants' therefore, the instant application that also sought to stay execution had been brought without unreasonable delay.

The deponent averred that the Respondent's advocate on record had already taken out warrants of execution against him dated 26th February 2019 and he was apprehensive that he would be arrested at any time to satisfy the alleged decretal amount. That he would suffer immense irreparable loss if the order of stay was not granted by the Court because the Respondent would then be at liberty to execute the decretal sum of Ksh. 1,857,960/- according to the terms of the consent judgment entered on the 5th October 2017. It was contended that the Applicants were not given a chance to defend themselves because the sermons and court pleadings were all sent to a wrong address in Lamu yet they reside in Mombasa making it hard for them to fully and effectively participate in the case. That in any case the consent judgement entered on the 5th October 2017 was entered after the 1st Applicant was coerced and intimidated by the Respondent's advocates who went ahead to bring one Waswa advocate who allegedly recorded the consent judgement alongside the Respondent's advocate.

The 1st Applicant further intimated that he was ready to abide by any conditions and directions that the Court would impose and that the application had been made in the interests of justice.

The Respondent's Case

Ahmed Salad Kulmiye in his response averred that the allegations made by the Applicants were not only frivolous, vexatious, mischievous, outrageous but also an outright abuse of the court process. That the Applicants had brought the instant application to further delay the Respondent/judgment creditor from enjoying the fruits of his judgment after the same was delivered sometimes on 8th April 2016 as well and the decree issued on 1st March 2017.

It was the Respondent's assertion that out of malice the Applicants herein went ahead and filed an application dated 6th December 2017 to set aside the judgment and have the suit start de novo, however the same was dismissed by the Honourable court vide a ruling that was delivered on 9th January 2019. The Respondent charged that the Applicants had always been aware of the existence and progress of the suit, however they decided not to defend the suit since summons were properly served upon them by way of substituted service.

According to the Respondent, the 1st Applicant was lying under oath by stating that he was not aware of the existence of this suit, due to the fact that in his supporting affidavit sworn on the 4th October 2017 in support of the Notice of motion application dated 4th October 2017 filed in court on the same day by his former advocates categorically states that he received the summons which he delivered to his insurer Fidelity Shield Insurance for further action. That it was therefore hypocritical to deny service and also deny giving instructions to the firm of M/s Mwaure & Mwaure Wahiga Advocates and yet the supporting affidavit clearly bears the 1st Applicant's signature and done in the presence of an officer of this court, one Kiprui Ngeno Birir Advocate and Commissioner for Oaths.

It was averred that though he was not a handwriting expert, the signature in the previous applications and the current application were similar same in all respects hence he is bound by his previous pleadings and averments. That it was further bizarre that the 1st Applicant purportedly tried to disown Mr. Waswa Advocate who was holding brief for the firm of M/s Mwaure Advocates and yet he is the one who was spearheading the negotiations together with Mr Nyachiro advocate for the Respondent which yielded to an amicable settlement upon which the 1st Applicant was released. That the applicant herein had approached the court with unclean hands.

The contention was made that when the 1st Applicant was arrested in execution of the court order and decree, he was flanked with his wife, family members and a troop of friends voluntarily agreed to settle the decretal sum whereby he paid a sum of Ksh. 250,000/= deposit and undertook to pay a further sum of Kshs. 250,000/= by December 2017, which he has dishonoured, and further undertook to pay monthly instalments of Ksh. 150,000/= till the full decretal sum is cleared.

Per the Respondent, the consent judgment was openly recorded in open court in the presence of all the parties herein, the applicant's wife, friends from Malindi and Mombasa before Honourable Ondieki and the parties advocates who appended their signatures on the day's proceedings in the court file. That the parties even hugged and laughed together soon after and exchanged phone numbers. It was thus manifest falsehood for the 1st Applicant to insinuate that the applicant was under duress or fraud when the consent was signed. He did not plead the insecurity or discomfort to the independent magistrate or said relatives hence pray this was an afterthought and same was inexcusable.

It was further articulated by the Respondent that the firm of Mwaure & Mwaure Advocates are based in Malindi and not Kilifi. It therefore beat logic that either he or his advocates would retain an advocate for his adversary. He questioned why he would advocate for the 1st Applicant's arrest and then make an application for his release and charged that this was quite absurd and desperate persuasion aimed at seeking sympathy.

The deponent contended that the consent order of the court had not been discharged, reviewed or appealed against to date and was binding on the parties hence the Applicants were in blatant breach of the order thus in contempt.

It was further charged that the instant appeal was irregular, it is intended to set aside the consent judgment and yet it was not one of the prayers sought in the Notice of motion application dated 6th December, 2017

According to the Respondent, the Applicants were served with all mention and hearing notices either by registered post or through a licensed process server. That the address of PO BOX 1 Lamu belongs to the Applicants which they left with traffic police base at Kilifi and the police

abstract.

The Respondent's position was that the Applicants should not use the law to cover up for his mischief. Since they intentionally decided not to come to court hence the ex-parte judgment was entered, the notice of entry of judgment was effectively served upon the Applicants. It was averred that though the court ordered for his committal to civil jail, the 1st Applicant was never taken to prison as alleged. All the deliberations were done at Kilifi Law Courts, where negotiations were done openly and in good faith. Hence the insinuation the Respondent's advocates intimidated, harassed or exerted undue pressure was utter absurd and untrue. The question was put forth as to who paid Mr. Waswa advocate to appear for the applicant.

The question was put forth that assuming that there were vitiating factors and the consent judgment was entered irregularly, why didn't the applicant move the court and/or move to the superior court when his consent was eventually set free? It was now over 1 year six months and nothing had changed.

The contention was further made that soon after delivery of the ruling, the Applicants were duly notified hence the instant application was made with inordinate delay and the appeal is yet to be filed to date and indeed no leave has been sought to file the same, consequently the application herein is a non-starter and out right abuse of the court process.

It was averred that the Applicants had not disputed that they are owners of the motor vehicle hence they should be held liable for the accident that was caused by their vehicle. That this application was an afterthought aimed at delaying justice and by extension denying the Respondent the fruits of their judgment which was long overdue, not forgetting that litigation has an end.

It was further contended that the decree had already been executed in part and since the consent filed on 5th October, 2017 had not been vacated thus the orders sought herein cannot be granted. Consequently, the court was urged to dismiss the application herein with costs.

The Applicants' Submissions

Mr Kilonzo for the Applicants submitted under three heads namely stay of execution, enlargement of time within which to Appeal and the right to be heard. He articulated that from the onset the Applicants' application at the trial Court dated 6th December 2017 and before this Honourable Court dated 9th April 2019 both sought as one of the orders a stay of execution of the Judgment dated, delivered and issued on the 8th April 2016 as well as the decree dated and issued on the 1st March 2017. Counsel made reference to the relevant law on stay of execution, Order 42 Rule 6 (2) of the Civil Procedure Rules 2010 for the submission that unless this Honourable Court granted the order of stay of execution as prayed, the Applicants stood to suffer irreparable loss. He submitted that the Applicants' had already informed this Court that they never got a chance to fully participate in the proceedings at the trial Court. This was due to the fact that they were never served with any Court pleadings to inform them of the pendency of a court case against them because all court pleadings were served on a wrong address which does not belong to the Applicants making it impossible for them to defend themselves.

For the submission that the Order seeking a stay of execution which the Applicants are seeking invoked the discretion of the Court which should be exercised judiciously, reliance was placed on **Amal Hauliers Limited vs Abdulnasir Abubakar Hassan (2017) eKLR** which cited with approval the case of **Butt Vs. Rent Restriction Tribunal (1982)KLR.**

It was submitted that in this matter there were good and sufficient grounds for the grant of the order of stay of execution. The Applicants had informed the court that they were never served with summons to inform them there that was a suit instituted against them hence they never participated as Defendants in the matter. Further, the Ruling dated and delivered on 9th January 2019 was delivered in the absence of the advocates for the Defendants/Applicants for reasons that the Ruling was to be delivered on notice which notice was never given to the advocates or the Defendants.

Counsel intimated that the Applicants were also ready and willing to abide by any conditions provided by the Court for the grant of an order of execution. That failure to grant this order would leave the Respondent at liberty to execute against the Applicants rendering the intended appeal nugatory and an academic exercise.

It was therefore submitted that the Applicants had met the conditions for a grant of an order of stay of execution.

On enlargement of time within which to appeal Counsel relied on Section 79G of the Civil Procedure Act for the submission that there was need that the Court enlarges and or extends time to allow the Applicants to file the Record of Appeal out of time and that the memorandum of appeal annexed be deemed as having been properly filed and on record upon payment of the court fees. Section 95 of the Civil Procedure Act was also cited in this regard.

Mr. Kilonzo explained that the delay in appealing against the Ruling delivered on the 9th January 2019 was due to the fact that the Ruling was delivered in the absence of the advocates for the Applicants who were unaware of the delivery of the Ruling. This was so because the Ruling was to be delivered on notice which notice was never issued to them. It was submitted that the Applicants only became aware of the Ruling upon being served with a letter from the Respondent's advocate on record on the 23rd January 2019 almost a month after the delivery of the subject Ruling threatening to execute the orders from the aforesaid Ruling. Upon being served the Applicants advocates needed to get further instructions from the Applicants who do not reside in Malindi and who were also not aware of the delivery of the Ruling as well. It was submitted that upon getting instructions the Applicants advocates wrote a letter to the Executive Officer Kilifi Law Courts requesting for certified copies of the proceedings and the Ruling for the purposes of appealing dated 4th February 2019 which proceedings and certified copy of the Ruling were delayed causing the Applicants to file this application on the 9th of April 2019 which was barely 3 months from the date the Applicants knew of the delivery of the Ruling. Reliance was place on **Amal Hauliers Limited vs Abdulnasir Abubakar Hassan (2017) eKLR** where the case of **Florence Hare Mkaha vs. Pwani Tawakal Mini Coach & Another (2014)eKLR** had been cited with approval.

It was submitted that the delay in filing the instant application was not unreasonable and the explanation given for the delay was sufficient and satisfactory hence the Applicants' application dated 9th April 2019 should be allowed on the right to be heard, it was submitted that notwithstanding the failure of service on the Applicant's the trial Court went ahead to issue Judgment against them dated 8th April 2016 without being given a chance to defend themselves. It was further submitted that in an attempt to set aside the Judgment as well as the decree extracted from the subject Judgment the Court dismissed the entire application dated 6th December 2017 despite the fact that they had a defence on merit which raised serious triable issues including the fact that the summons were never served upon the Applicants hence they never got an opportunity to enter appearance and full participate in the matter. It was submitted that the trial Court condemned the Applicants unheard contrary to the provisions of Article 50 (1) of the 2010 Constitution and ordered them to pay the cost on the Application as well. Reliance was placed on **David Mwangi Muiruri vs Mirko Blatterman (Suing through his power of Attorney Shabir Hatim Ali) and Another Civil Appeal No. 25 of 2017**

It was submitted that as matters stood, the Respondent wanted to execute the orders from the consent Judgment dated 5th October 2017 which Judgment was tainted with vitiating factors of fraud, coercion and undue influence. That were it not for the Judgment issued on the 8th April 2016 the consent Judgment would not have been entered. That unless the orders were granted the Applicants would suffer undue hardship and the intended appeal would be rendered nugatory. Further reliance was placed on **Amal Hauliers Limited vs Abdulnasir Abubakar Hassan (2017) eKLR** where the case of **House Finance Company Of Kenya vs Sharok Kher Mohamed Ali Hirji & Another (2015)KLR** had been cited with approval.

Mr. Kimanzi submitted that the Applicants had proven all the conditions necessary for the grant of an order of stay of execution of the Judgment dated, delivered and issued on the 8th April 2016 as well as the decree dated and issued on 1st March 2017 hence the court ought to allow the Applicants' application dated 9th April 2019.

Respondent's Submissions

After rehashing the history of the case and highlighting the relevant facts already reproduced in the earlier part of this Ruling, Mr. Nyachiro advocate for the Respondent also submitted on stay of execution, enlargement of time within which to Appeal and the right to be heard.

On the first issue, Counsel referred to the conditions for grant of stay of execution set out in Order 42 Rule 6 of the Civil Procedure Rules. It was submitted that summons to enter appearance was properly served as duly admitted by the 1st Applicant in his first application at Kilifi Law Court. Counsel charged that whether the 1st Applicant's insurer had betrayed him was none of the court's business. It was submitted that the interlocutory judgment was endorsed way back on 4th July 2014 which was 5 years ago. Notice of entry of judgment was duly served and the matter proceeded for formal proof and judgment delivered on 8th April, 2016 and later decree issued accordingly.

It was further submitted that whn the warrant of arrest in execution of the decree issued, the parties recorded a consent on the 5th October, 2017 which was partly executed as the 1st Applicant met the first condition of paying a deposit of Kshs. 250,000/ and was released. It was submitted that the consent judgment therefore superseded any previous agreements or orders of the court. Since the said consent judgment has not been discharged, varied, reviewed and or appealed against, then the respondent was at liberty to rightfully execute for the balance of the decretal sum.

It was submitted that the variation of the consent judgment could only be on grounds that would vitiate a contract such as fraud, illegality, mistake an agreement being contrary to the policy of the court. It was submitted that since the applicant conceded that the consent was done before an independent arbiter, the Kilifi Magistrate and consent recorded by counsel for both parties then there had been free consent.

Mr. Nyachiro submitted that though belatedly the applicant was denying being represented by the firm of Mwaure & Mwaure and one Mr. Waswa, he conceded that his entire family was present and after consulting with them they decided to compromise the case. Hence the order was still binding and more so since its variation is not one of the prayers in the attached memorandum of appeal.

It was submitted that from the foregoing, the Applicants did not deserve the stay orders as there was wilful and inordinate delay by him to seek the stay order. That if the orders sought were granted, substantive injustice shall be occasioned to the Respondent whose motor vehicle was still at the garage since 2012 for the lack of money to repair.

The submission by the Respondent was that the Applicant's deny appointing any advocate to represent them in the suit but they did not take any steps in following up the matter and therefore their indolence together with the inaction on the part of their advocate whom they deny appointing must surely visit upon them. The Applicants chose not to avail themselves in court for purposes of defending the suit therefore they should face the consequences for their actions.

Mr. Nyachiro submitted that it was not enough for a party to simply decide to let a suit proceed undefended then later seek the court's help in setting aside a judgment, the Applicants' acts not only amounted to disregard to the court processes but shows how much they do not respect the courts time. It was urged that the decision whether or not to set aside a judgment was an exercise of judicial discretion and like any other judicial discretion must be exercised upon reason, not like and dislike, caprice or spite.

It was submitted that there was no pending appeal such that if the stay orders are granted the same may be rendered nugatory. It was further submitted that the principles guiding the exercise of the Court's discretion to set aside a default or ex parte judgment or order were now trite and on this limb reliance was placed on **Macharia vs. Macharia (1987) KLR 61.**

It was submitted that there existed a consent judgment that was recorded by parties in open court and the same has yet to be discharged, reviewed or appealed against. Reference was made to Order 25 rule 5 of the Civil Procedure Rules which provides for the compromise of a suit.

It was submitted that the effect of this action was that the consent judgment becomes an order of the court upon being endorsed by the court and that is why the decree was subsequently issued. It was further submitted that under the Civil Procedure Act discharge of a consent could only be by way of appeal from the order. It is in this respect to be noted that under section 67(2) of the Civil Procedure Act that no appeal shall lie from a decree passed by the court with the consent of parties. The only allowed procedure therefore through which a consent order and a decree issue thereof can be discharged is by way of review or by bringing a fresh suit in court. There was no such review sought by the Applicants in the present suit to discharge the Applicants from the consent Judgment.

Counsel submitted that it would be a waste of court's time to set aside the regular judgment herein as it was trite law that justice delayed is justice denied and it is not the duty of court to aid an indolent party.

As for whether the court should enlarge the time within which to appeal it was the Respondent's submission that the Applicants had not made a case to warrant this court to exercise its discretion in the Applicants' favour. The extension of time is not a right of a party, but is only available to a deserving party, and at the discretion of the court.

It was submitted that the delay was unreasonable and no attempt had been made at all, to explain it. The Applicants' advocate had an option of filing a timely memorandum of appeal while waiting to receive instructions from his client. It beats logic for the Applicants' advocate to state that he failed to receive instructions from his client who stays out of Malindi in this day and time of technological advancement where instructions could be effectively conveyed via several modes and forums ranging from telephone conversations.

It was submitted that the applicant had not been candid and honest in his application. He seemed to be blaming the court for delay to release certified proceedings yet he conceded that he knew about the ruling on the 23rd January, 2019 when he was informed by the counsel for the Respondent but took their sweet time and waited until 4th February, 2019 to do a letter requesting for certified proceedings and the ruling. The applicant had not convinced the court why he had to wait until the 6th of March, 2019, a month later to assess for the payment of the proceedings.

It was submitted that the Applicants hadn't shown that finally he paid for the proceedings and or the ruling as no certified copies were annexed as evidence before this honourable court. Further it was submitted that it is trite law and usual that whenever this issue of certified copies of ruling and or proceedings is delayed at the instance of the court, the aggrieved litigant must apply or request for the certificate of delay. In this case therefore no certificate of delay issued and or annexed in the applicant's application. According to counsel therefore, the only logical conclusion the court must arrive at was that the delay was wilful and the Applicants were not entitled to the discretionary order sought herein.

Mr. Nyachiro submitted that the Respondent stood to suffer extreme prejudice if the extension was granted in this otherwise concluded litigation, since his rights which the court below had recognized and protected were likely to be infringed upon if the extension is granted.

It was submitted that it was trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the court.

Turning to the right to be heard, Mr. Nyachiro submitted that the right the right to be heard and have a fair trial under Article 50 of the Constitution also included the right to have the matter concluded without unreasonable delay. It was submitted that the Applicants decided to sleep on their right to be heard when they were served with pleadings but chose not to file any defense or rather defend the suit. That this was a 2013 matter that was heard and determined the Applicant could not now come and purport to have an interest in the matter, litigation must always come to an end.

It was further submitted that the application was frivolous, brought in bad faith and is calculated to stop the Respondent from enjoying the fruits of his judgment; that there was no loss capable of being suffered by the Applicants if the orders sought are not granted.

On the basis of the above it was prayed that the application be dismissed with costs and the Respondent be allowed to proceed and realize the fruits of his judgment.

Analysis and Determinations

As is expected of me, my evaluation of the respective positions taken by the parties has been thorough. I have considered the affidavits, the evidence adduced by the parties, the court proceedings thus far as well as the submissions by both Counsel. The issues that call for the attention of the court, as submitted on by Counsel, are: whether the court ought to grant the stay of execution sought; whether the court ought to enlarge the time within which the Applicants can file their intended appeal; whether the Applicants were denied their right to be heard and finally what orders do the current circumstances call for?

Before getting into the issues of stay of execution and enlargement of time, it is prudent that I dispense with the matter of the right to be heard and the general issues surrounding the manner in which the Applicants have prosecuted the instant application. The Notice of Motion dated 9th April 2019 sought substantively for Orders to stay the judgment and decree dated 8th April 2016 and 1st March 2017 respectively. Be that as it may, in the affidavit sworn by the 1st Applicant as well as the grounds relied upon in the application, certain references were made impugning the lower court Ruling in delivered on 9th January 2019 in Kilifi SPMCC No. 218 of 2013 as well as the consent judgement recorded on the 5th October 2017 in the same matter. However, as was pointed out by the Respondent, the consent judgement in question had neither been appealed against nor set aside and it was on the strength of this judgement that the Respondent sought to execute the Decree he held in his favour. Even more curious is the allusion made by the Applicants that the intended appeal was not only against the execution of the decree dated 1st March 2017 but also against the decision of 9th January 2019. It is for this reason that the Respondent took the view that the intended appeal was irregular. It is further not lost on the court that the Applicants put up a fervent challenge against the validity of the judgement recorded by consent on 5th October 2017 insisting that it was obtained through coercion, intimidation and a host of other

allegations.

The question the foregoing narrative raises is whether in the face of these prevailing circumstances, the court ought to preclude itself from entertaining the instant application or that if in doing so, it should restrict itself to the prayers pleaded specifically in the Notice of Motion dated 9th April 2019.

My answer to the above query lies squarely in the province of the principles of overriding objectives of the court contemplated under Sections 1A and 1B of the Civil Procedure Act as well as read with Sections 3 and 3B of the Act, all provisions upon which the application was founded. My considered view is that it is in the interests of justice that this matter be determined in manner that will accord justice to all parties. For this reason, the Court invokes its residual powers to entertain the application in its current form, all the while tackling the emerging issues alluded to in the pleadings and in the end make orders that will ensure the ends of justice are met while at the same time being keen to prevent any abuse of the process of the court. The extent of inherent powers of the court was eloquently explained by the authors of the **Halsbury's Laws of England, 4th Edn. Vol. 37 Para. 14** as follows:

> ***"The jurisdiction of the court which is comprised within the term "inherent" is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process … In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."***

Article 50 of the Constitution enshrines the right to a fair hearing. While the Respondent vigorously contended that the Applicants slept on their rights and did not respond to and defend the suit against them despite having adequate notice, the Applicants were adamant that as no proper service had been effected, the default judgement delivered on 8th April 2016 was irregular. The Applicants further made it clear that the advocate that entered into the consent judgement of 5th October 2017 on their behalf had not been instructed to do so, or at all by them. These are serious allegations that the court ought to invite the parties to shed some light on. Natural justice demands so. Nothing makes my point clearer than the ruminations of the learned Judges of Appeal in **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another Civil Appeal No. 6 of 2015 [2016] eKLR** which I rely wholly and reproduce below:

> ***"From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See Mbogo & Another v. Shah (supra), Patel v. E.A. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v. Kubende [1986] KLR 492 and CMC Holdings v. Nzioki [2004] 1 KLR 173).***
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> ***In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See Onyango Oloo v. Attorney General [1986-1989] EA 456). The Supreme Court of India forcefully underlined the importance of the right to be heard as follows in Sangram Singh v. Election Tribunal, Koteh, AIR 1955 SC 664, at 711:***
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> ***"[T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them."***

In light of the foregoing therefore, should the court grant a stay of execution as prayed by the Applicants? The law on stay of execution is well developed and its statutory basis is Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 which empowers this court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided by the sub-rule 6(2) as follows:

> ***"No order for stay of execution shall be made under subrule (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."

For a court to be convinced to grant an Order for stay of execution pending appeal there must be sufficient cause shown by the Applicants, a threat of substantial loss if the order is not granted; the application must have been brought without unreasonable delay and there must be security. Even with the foregoing, the grant of stay remains a discretionary order that must also take into account the fact that the Court ought not to make a practice of denying a successful litigant the fruits of their judgement. See **Stephen Wanjohi vs Central Glass Industries Ltd Nairobi HCCC 6726 of 1991; Vishram Ravji Halai vs Thornton and Turpin Nairobi Civil Application No. 15 of 1990 [1991] LLR 7220 CAK KLR 365** and **Siquera vs Siquera [1933] 15 LRK 34.**

Stay of execution remains a matter of discretion, it is therefore incumbent upon the court to consider the conditions upon which such discretion ought to be premised. In doing so, I call to my aid the decision of The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** wherein the court gave guidance on how discretion should be exercised as follows:

1. "The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

3. 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.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."

Employing the principles above, I find that an order of stay in the current instance is appropriate for a number of reasons. Firstly, as is clear from my cogitations on whether the Applicants ought to be accorded an opportunity to be heard, the Applicants have shown sufficient cause. They are yet to be heard on the merits of their case and have cast aspersions as to the circumstances under which the default judgement delivered on 8th April 2016 and consent judgement reached on 5th August 2017 were entered. It behoves this court to listen to their plea. There would be a substantial loss were they to be condemned to pay the decretal sum without the question of the torturous liability being settled. The 1st Applicant also faces imminent arrest as the Respondent seeks to satisfy the decree he holds in his favour. It is also noteworthy that the Applicants have expressed a willingness to abide by any conditions that shall be imposed on them by the court. In closing on this issue, I do not find the delay in bringing the application unreasonable for reasons that I shall articulate when considering whether the court ought to enlarge the time within which to file the intended appeal. It is my finding therefore that the Applicants have met the threshold for the grant of an order of stay of execution.

Regarding the question of whether the court ought to enlarge the time within which the intended appeal should be filed, my point of departure is Section 79G of the Civil Procedure Act which provides that:

"Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having requisite for the preparation and delivery to the appellant of a copy of the decree or order: provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time"

The Civil Procedure Rules, 2010 under Order 50, rule 5 give the court the power to enlarge time in the following terms:

"Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise."

In **Nicholas Kiptoo Arap Korir Salat vs The Independent Electoral And Boundaries Commission & 7 Others [2014] eKLR** it was held:

"..... It is clear that the discretion to extend time is indeed unfettered.

It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. "We derive the following as the underlying principles that a court should consider in exercising such discretion:-Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court; A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court; Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis; Where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court; Whether there would be any prejudice suffered by the respondent, if extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

As far as the delay in bringing the Application goes, the Applicants first sought to have the judgment dated 8th April 2016 and resultant decree set aside. When their application was dismissed vide the 9th January 2019 Ruling, they had 30 days within which to proffer their appeal. These 30 days expired on 9th February 2019. The instant Application was filed on 9th April 2019, two months after the expiry of the time within which the appeal ought to have been filed. The explanation given by the Applicants is that the Ruling of 9th January 2019 was to be delivered on notice which notice was never issued to them. It was submitted that the Applicants only became aware of the Ruling upon being served with a letter from the Respondent's advocate on record on the 23rd January 2019. That upon being served the Applicants advocates needed to get further instructions from the Applicants who do not reside in Malindi and who were also not aware of the delivery of the Ruling as well. It was submitted that upon getting instructions the Applicants advocates wrote a letter to the Executive Officer Kilifi Law Courts requesting for certified copies of the proceedings and the Ruling for the purposes of appealing dated 4th February 2019 which proceedings and certified copy of the Ruling were delayed causing the Applicants to file this application on the 9th of April 2019. This court is willing to take the explanation given by the Applicants and it is my finding therefore that that the delay was not inordinate.

Bearing in mind the foregoing, I find it prudent to allow the prayer for enlargement of time within which to file the appeal. In spite of this, I shall hasten to protect the successful litigant who in this case was the Respondent lest he feels hard done having obtained a judgement and decree in his favour.

In the premises, the following orders commend themselves:

1. THAT pending the hearing and determination of the intended appeal, an order of stay of execution does hereby issue against the Judgment dated, delivered and issued on the 8th April 2016 together with the decree dated and issued on the 1st March 2017.

2. THAT the remainder of the decretal sum Ksh. 1,607,960/-, being security for the performance of the decree, be deposited in a joint interest earning account of both parties advocates; or in the alternative with the deputy registrar of the High Court at Malindi within 30 days from the date of this judgement.

3. THAT in default of depositing security within 30 days, the Order of stay of execution granted in (1) above shall automatically lapse.

4. THAT leave be and is hereby granted to the Applicants to file an appeal against the Judgment dated, delivered and issued on the 8th April 2016 out of time.

5. THAT the Applicants shall pay throw away costs of Ksh. 25, 000/- to the Respondent.

6. THAT the annexed memorandum of appeal attached to this application be deemed as having been properly filed and on record upon payment of the requisite court fees.

7. THAT the Applicants shall have 21 days within which to file and serve the Record of Appeal.

8. THAT there shall be a case conference on directions on 16th September 2019.

9. THAT costs of this application shall abide by the outcome of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF JULY 2019.

……..

R NYAKUNDI

JUDGE