



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION- MILIMANI

CIVIL CASE NO. 211 OF 2010

RONALD NDIRANGU NDEGWA.....1ST PLAINTIFF

EUNICE MURINGO MUTAHI.....2ND PLAINTIFF

VERSUS

WILFRED KASHINGA SARONI.....1ST DEFENDANT

LIBERTY GRAPHICS (K) LTD.....2ND DEFENDANT

RULING

BACKGROUND OF THE APPLICATION

The Plaintiffs approached the court by a notice of motion dated 25th October 2018 under **Article 159(2)(a) and (b)** of the **Constitution of Kenya, sections 1A,1B and 3A of the Civil Procedure Act and Order 51 Rule 15** of the Civil Procedure Rules for orders that **the court be pleased to set aside the orders made on 23rd October 2018 granting stay of execution pending appeal**. The application was based on the grounds that;

a. The said orders were obtained fraudulently by making a misrepresentation to the court that the application of stay of execution was unopposed while the Plaintiffs had filed both grounds of opposition and submissions to that application and that there was a pending appeal against the ruling of the court made on 30th April 2018 while there was no such appeal.

The application was supported by a supporting affidavit of **Judith Nzula Mbindyo** who stated that the Defendants filed the application of stay of execution on 9th May 2013 where the Plaintiffs then filed their grounds of opposition on 18th July 2018 and served the same upon the Defendants advocates. The court had directed that both parties file submissions on the stay which the Applicants complied with and filed their submissions on 17th October 2018. However, on 23rd October 2018, the advocate of the plaintiffs did not make it to court in good time due to unusual traffic. Upon the advocate's perusal of the file, he was shocked to see that the Defendants advocate had asked the court to allow their application as it was unopposed.

The Applicant claimed that the Defendants had not provided any evidence as to prove there was an appeal which they claimed to have filed as the same had not been reflected in the Court of Appeals registry. She further claimed that the notice of appeal attached to the defendant's application was filed only for the purpose of deceiving the court to believing that there was an appeal.

PLAINTIFFS SUBMISSIONS

The Applicants filed their submissions in support of their above application on 30th January 2019. In their submissions, the Plaintiffs gave a brief summary of proceedings that had been taken in the matter as follows;

That judgment of this suit had been entered 28th May 2010 after the defendants entered appearance but failed to file a defence where the defendants sought to set aside the judgment but the court upheld it.

The court later on had listed the matter for dismissal for want of prosecution when parties did not appear for bankruptcy proceedings that had been stayed by the 1st Defendants who had petitioned for bankruptcy orders. The Plaintiffs then applied for a review of the order of dismissal

on the basis that it was an error apparent on the face of the record which the court agreed that there was indeed an error apparent on the face of the record. It was upon the reinstatement of the suit that the Defendants sought to file the application dated 8th May 2018 for stay of execution pending the appeal.

The Plaintiffs consequently filed their grounds of opposition dated 17th July 2018 but the court allowed the application without taking into consideration the Plaintiffs grounds of opposition and submissions.

The Plaintiff further submitted that there is no appeal pending before the court of appeal. They referred to **Rule 82** which required a memorandum and record of appeal to be filed within 60 days from the date when the notice of appeal was lodged. **Rule 83 of the Court of Appeal Rules which** gives the effect of default in instituting an appeal and provides that;

“If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order. The party in default shall be liable to pay the costs arising there from of any persons on whom the notice of appeal was served.”

The Plaintiffs submitted that the notice of appeal was filed on 8th May 2018. Upon the Plaintiffs perusal of the Court of appeal register on 24th October 2018 no Memorandum or Record of appeal had been filed by the Defendants and neither is there a certificate of delay in respect of proceedings.

DEFENDANTS SUBMISSIONS

In the 2nd Defendant’s skeleton submissions dated 13th February 2019, the 2nd Defendant stated that it lodged an appeal on the 8th of May 2018 against the court’s ruling on the 30th April 2018 which reinstated the Plaintiffs suit after it had been dismissed. The 2nd Defendant submitted on four issues as follows;

a. The application for stay was unopposed.

The 2nd Defendants submitted that there was absence of a court issued receipt to the said grounds of opposition claimed to have been filed by the Plaintiff. They relied on the case of *Dinit Virchand Malde vs Spire Bank Ltd*[2018]eKLR where Justice Rachel Ngetich held that,

“...To ascertain the correct date, the most reliable document would be the filing receipt. A document cannot be deemed as filed before it is paid for.... A document is deemed to have been filed on the date of payment....”

The 2nd Defendant also submitted that neither the 2nd Defendants nor their advocate was served with the said grounds of opposition as per **Order 5 Rule 8 of the Civil Procedure Rules, 2010.**

b. The grounds of opposition do not affect the merits of the stay of execution pending appeal

The 2nd Defendant relied on **section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules** which allows appeals from orders and rulings of a court by an aggrieved party hence claiming that they had a statutory right to appeal.

c. The 2nd Defendant at the time of grant of stay of execution pending appeal had effectively lodged an appeal

The 2nd Defendants submitted that once a notice of appeal has been filed, an appeal is deemed to include an intended appeal as per **Rule 2** of the Court of Appeal rules where they relied on the case of *Equity Bank Limited vs West Link MBO Limited* [2013]eKLR.

d. The court has power to order stay of execution pending appeal

The 2nd Defendant relied on **Order 42 Rule 6 of Civil Procedure Rules** which gives the court the mandate to order stay of execution pending the determination of the Appeal. They therefore submitted that the court cannot be said to have abused its powers to grant stay pending appeal.

The 2nd Defendants submitted that the Plaintiff had made application seeking to remove from the court a bankruptcy order against it. They relied on **Section 48(1)(a) of the Insolvency Act** which provides that when a bankruptcy order is commenced, all other proceedings to recover the bankrupts debts are stayed as was affirmed in *In Re Akbarali Karim Kurji*[2017]eKLR.

DETERMINATION

The court has considered the submissions by the parties and the issues for determination are;

1. Whether the Plaintiff had filed their grounds of opposition by the time of grant of stay of execution pending appeal.
2. Whether the 2nd Defendants had effectively lodged an appeal at the time of stay of execution pending appeal

Whether the Plaintiff had filed their grounds of opposition by the time of grant of stay of execution pending appeal

The court confirms that the Plaintiffs filed their grounds of opposition dated 17th of July 2018 and filed on 18th July 2018 as per the courts record.

However there is no proof of service of grounds of opposition to the Defendants.

Whether the 2nd Defendants had effectively lodged an appeal at the time of stay of execution pending appeal

The 2nd Defendants submitted that once a notice of appeal has been filed, an appeal is deemed to include an intended appeal as per Rule 2 of the Court of Appeal rules where they relied on the case of Equity Bank Limited vs West Link MBO Limited [2013]eKLR.

In the same case, the court is guided by the decision of Judge D.K. MUSINGA in Equity Bank Limited vs West Link MBO Limited [2013]eKLR; who stated that

“ In determining whether this Court has jurisdiction to grant stay of execution pending appeal, one must therefore read Article 164 (3) of the Constitution together with Section 5 of the Appellate Jurisdiction Act as well as rule 5 (2) (b) of the Court of Appeal Rules. The Court must also interpret Article 164 (3) purposively so as to give it effect, bearing in mind the Constitutional mandate of the Judiciary.”

As submitted by the Plaintiffs, **Rule 82 of the Court of Appeal Rules** provides that a memorandum and record of appeal is to be filed within 60 days from the date when the notice of appeal was lodged. **Rule 83** of the Court of Appeal Rules gives the effect of default in instituting an appeal and provides that;

“If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order. The party in default shall be liable to pay the costs arising there from of any persons on whom the notice of appeal was served.”

From the evidence presented to the court, the 2nd Defendant indeed filed a notice of appeal within 30 days as per **Rule 82**. However, a memorandum and record of appeal was not filed within 60 days from the date of filing of the notice of appeal dated 8th May 2018 as per **section 83 of the Court of Appeal Rules**. The court is inclined to agree with the Plaintiff that there was no appeal instituted and hence there was an error in granting orders for stay of execution pending appeal.

The court hereby orders that the Plaintiffs application to set aside the orders made on 23rd October 2018 granting stay of execution is allowed, upholding the default judgment.

DISPOSITION

- 1. The application to set aside the orders of 23rd October 2018 granting stay of execution pending appeal is granted as there is no evidence of an appeal filed as required as per the statutory requirements at this stage.**
- 2. The Application to set aside the orders of 23rd October 2018 is granted.**
- 3. The matter be placed for process of execution of the judgment and/or bankruptcy proceedings as the Court shall be moved by parties to the matter.**
- 4. Each party shall bear own costs.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 22ND JULY 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

N/A FOR APPLICANT

MS NYANGENA FOR 2ND RESPONDENT

MR SORE FOR 1ST RESPONDENT

COURT ASSISTANT - OTIENO