



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HIGH COURT CIVIL APPEAL NO. 154 OF 2018

STANLEY MANG'ELI.....APPELLANT/APPLICANT

-VERSUS-

PHOENIX OF E.A ASSURANCE CO. LTD.....RESPONDENT

RULING

1. This is the application dated 16th November, 2018 in which the Applicant seeks the following orders:

a) and (b) spent

b) That there be a stay of execution of the judgment in Kilungu SPMCC No. 144 of 2015 delivered on 22nd June, 2018 and all consequential orders pending the hearing and determination of the appeal herein.

c) That, the judgment delivered on 22nd June, 2018 and all consequential orders be set aside.

d) That, the Applicant be given unconditional leave to defend Civil Suit No. 144 of 2014.

e) That, costs be provided for.

2. The application is premised on the grounds on its face and the supporting affidavit of Stanely Mangeli the Appellant/Applicant. His main ground is that an exparte judgment was issued in Kilungu SPMCC No. 144 of 2014. On 22nd June 2018, he filed an application dated 11th September, 2018 seeking to have the judgment set aside but the same was declined vide the ruling of 19th October, 2018. It's the said ruling that is the subject of the present appeal.

3. The Applicant denies ever being served with the summons to enter appearance and states that he has a good defence. The decree in the said matter is for Kshs.1,373,473/= which the trial court directed should be paid within 30 days. It's on this ground that he prays for stay of execution pending the hearing of the pending appeal.

4. The Respondent filed a replying affidavit through his advocate Kelvin Gitonga Mutegi. He has deponed that the Applicant together with his co-defendant were served. That he never entered appearance nor filed a defence but his co-defendant (Family bank) did. A default judgment was therefore entered against him on 28th April 2015 upon the Respondent's request (KGM2).

5. Family bank regularized its position and the case was heard and determined. The Applicant was on 16th June 2018 served with a notice of entry of judgment which notice was sent via his registered post office box number 91 – 0131. A decree was also sent to him by use of the same registered post (KGM3 & KGM4).

6. Thereafter, the execution process commenced and a proclamation was done through Zasha auctioneers (KGM 5,6&7). It was after this that the Applicant entered appearance and filed the application seeking to set aside the intercultury judgment. He interprets this to be a bid to avoid execution. He avers that the Applicant was well aware of the suit having been served with the summons to enter appearance. That the application challenging the regularly entered judgment was unmerited hence its dismissal. He asks the court to dismiss the appeal.

7. The parties agreed to canvass the application by way of written submissions which both of them filed. I have had the opportunity of reading the submissions filed and I find both of them to be out of focus. Both counsel have addressed themselves on issues to do with the setting aside of the exparte judgment, whether the draft defence raises triable issues; whether the Applicant entered appearance or not etc.

8. I find the submissions to be addressing the appeal itself and not the application before me. Secondly, prayers No. 4 and 5 which form the bulk of the submissions can only be addressed in the appeal. If they were to be dealt with at this point, then the court will have determined

the appeal.

9. For that reason, I will confine myself to the prayer seeking stay of execution and consider the affidavits. The main issue for consideration which is also at the centre of the appeal is whether the Applicant was served with the summons to enter appearance or not.

10. It is clear from the record that there is a judgment against the Applicant which may be executed if there is no stay. At the same time the Applicant is seeking to set aside the ruling disallowing his application to set aside the exparte judgment so that he can defend himself, before the trial court.

11. It is therefore only proper that all these issues be dealt with in the appeal.

12. I have also noted from the record that the Applicant herein was granted temporary stay of execution on 16th November, 2018 yet there is no progress in the admission of this appeal. I am however satisfied that the appeal if successful will be rendered nugatory if stay of execution is not granted. The decretal sum is close to Kshs.1.4 million.

13. I am therefore satisfied that a case warranting stay of execution pending appeal has been made out. I therefore grant stay of execution in terms of prayer **No.3** of the application dated 16th November, 2018 on condition that the appeal is fast tracked for purposes of admission and taking directions for hearing within **sixty (60)** days. Mention on the **11th February, 2020**, to confirm the progress. Both parties must be in attendance. Costs in cause.

Orders accordingly.

Delivered, signed & dated this 3rd day of December 2019, in open court at Makeni.

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H. I. Ong'udi

Judge