REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL APPEALS

CIVIL APPEAL NO. 4 OF 2016

ESEURI OLE KATULELE.....APPELLANT

Versus

SHANKWA NKAI LEMOMO.....RESPONDENT

RULING

This is an application by the Applicant dated 31st July 2014 seeking the following orders. **That there be a stay of execution of the decree dated 23rd April 2013.** In support of the application is the affidavit by one Eseuri Ole Katulele.

According to the averments in the affidavit the applicant deposes the suit filed by the respondent proceeded exparte without being served. That on the basis of the request for judgement liquidated a quantum of Kshs. 220,850/= plus costs and interest was awarded. Being dissatisfied with the decree he seeks to appeal on both liability and quantum.

The respondent filed a notice of preliminary objection under Order9 Rule 9 and 10 of the Civil Procedure Rules.

Both counsels filed submissions on the preliminary objection and the substantive motion on stay of execution pending the outcome of the appeal. I therefore have two issues to determine.

The 1st issue is whether the applicant offences order 9 rule 9 and 10 of the Civil Procedure Rules, under order 9 rule 9 it stipulates as follows.

When there is a change of advocate or when a party decides to act in person having previously engaged an advocate, after judgement had been passed such change or intention to act in person shall not be effected without an order of the court.

(a) Upon an application with notice to all parties or

(b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

In the instant case the trial court judgement delivered on 16th October 2013 proceeded exparte. The appellant who was the defendant in CMCC 87 of 2012 did not participate in the proceedings culminating in the exparte judgement.

On 25th July 2014 the Learned Trial Magistrate delivered a ruling pursuant to order 9 Rules 9 and 10 of the Civil Procedure Rules. That the firm of Madhana & Co. advocates was not properly on record after judgement for failure to seek leave of the court. In this respect the orders sought in that application dated 28th May 2014 was dismissed with costs.

My take is that the issue that the applicant's Counsel not properly on record does not arise. The impugned judgement proceeded exparte without the defendant participating in any either way. It is true there was judgement on record but the same was obtained exparte. The preliminary objection under order 9 rule 9 & 10 is therefore misplaced. I dismiss it for want of merit.

The second issue falls under order 42 rule 6 (2) of the civil Procedure Rules. The order provides as follows:

(a) No order for stay of execution shall be made under sub-rule 1 unless: the court is satisfied that substantial loss may result to the applicant unless the order is meant and that the application has been made without unreasonable delay and

(b) Such security as the court orders for due the performance of such decree or order as may ultimately be binding on him has been given by the applicant.

In the present case the decree being challenged involves a money decree. On perusal of the record the applicant learnt of the judgement during the execution process. That is the aim he applied for stay of execution which was dismissed in view of the provisions of order 9 rule 9 and 10 of the Civil Procedure Rules.

In my view Learned Magistrate erred in law in dismissing the applicant's application for stay of execution on grounds that Ms Madhana was not properly on record. Upon reliance of the legal proposition in the case of **Kenya Shell Limited Versus Kibiru 1986 KLR** I am satisfied that substantial loss will result if stay of execution is not granted. There is no evidence that the applicant would recover the money in the event the appeal or review succeeds.

Based on the submissions and material filed before this court the applicant sought the application without unreasonable delay. It is clear from the record that the ruling being challenged was delivered on 25th July 2014. The current application was filed on 31st July 2014 approximately five days after the decision. The applicant has satisfied the test of bringing the application without undue delay.

The second test is on substantial loss

As regards this ground the applicant contended that the appeal lodged in this case has merit. In support of the argument is the affidavit evidence that the lower court judgement upon which the decree is based was obtained exparte. I note that the respondent's submissions advanced on his behalf by counsel has not disputed this fact on exparte judgement the applicant is therefore challenging the property of the court decision which gave rise to execution process.

Following the decision in the case of **Andrew Kuria Njuguna Versus Rose Kuria NBI Civil Case No. 2 of 2001** the court held:

> ***"Coming to the substantial loss likely to be suffered by the applicant if the stay order is not granted, she was bound to place before the court such material and information that should lead this court to conclude that surely she stood a risk of suffering substantial loss, money wise or other and thereafter grant the stay".***

In the case of **Kenya shell Ltd Versus Benjamin Karuga Kigibu & Ruta Wairimu Karuga 1982-1988 KAR 1018.** It was stated by the court of Appeal in the following passage:

> ***"It is usually a good rule to see if order 41 Rule 4 of the Civil Procedure Rules can be substantiated if there is no evidence of substantial loss for the applicant it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdiction for granting stay."***

What the above authorities emphasize is the fact that substantial loss need not be equated with monetary value. I have in mind substantive rights like access to courts as one such loss which cannot be compensated by way of tangible damages.

In the instant case the applicant has argued that his substantive rights have been violated due to procedural errors of litigation and further he contends that the requirement of the constitution on fair play and due process was negated by virtue of the fact that the plaintiff obtained an exparte judgement. This to the applicant if allowed to stand will occasion prejudice and an injustice both under the constitutional and procedural law.

In my view order 9 Rule 9 & 10 of the Civil Procedure Rules should not extinguish rights to a fair hearing of a party who desires to approach the court on appeal or review. I am aware of the provisions of Order 9 but my interpretation of the rule it should not apply in the circumstances of this case. The matters highlighted in the affidavit evidence and submissions in the favour of the applicant are tantamount to substantial loss. I therefore find that the applicant has established irreparable harm to be suffered if denied access to the courts on purely a procedural issue.

The cornerstone in our administration of justice is the Republic Constitution 2010. The thread that runs through our system of justice is the doctrine of equality and non-discrimination under Article 27 (1), Article 47 on fair administrative action, Article 50 on the right to a fair hearing. In this cluster of rights, the ultimate goal is to ensure that justice shall be administered without undue regard to procedural technicalities and the purpose and principles of this constitution shall be protected and promoted. ***[See Article 159 (d) and (e)].***

When considering circumstances requiring discretion like the application before the Learned Magistrate in one way or the other a litigant constitutional right should not be extinguished. The onus is on the court to judicially and judiciously decide the case and chart the court to a level which serves a higher hierarchy of justice.

On what constitutes interest of justice on stay applications pending appeal or review. I find the principles in the persuasive case of **Connes (Singapore) PTL Limited Versus Ramnath Sriram and Another 1997 EWCA 2164** applicable:

> ***"In my judgement the proper approach must be to make that order which best accords with the interest of justice. If there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similar detriment to the defendant if it is not, then a stay should not normally be ordered. Equally, if there is a risk that irremediable harm may be caused to the defendant if a stay is not ordered but no similar detriment to the plaintiff if a stay is ordered, then a stay should normally be ordered. This assumes of course that the court concludes that there may be some merit in the appeal. If it does not then no stay of execution should be ordered. But where there is a risk of harm to one party or another, whichever order is made, the court has to balance***

the alternatives in order to decide which of them is less likely to produce injustice."

In the instant case, Counsel representing the applicant was pursuing a remedy under review of the exparte judgement of the lower court to give him an opportunity for the issues to be ventilated inter-partes with the defendans. In making a decision under Order 9 Rule 9, of the Civil Procedure Rules the trial Magistrate denied the applicant right of access to the court. It is not the question whether the circumstances of the case were sufficient enough to set aside the exparte judgement but it is an exercise of discretion to allow the aggrieved party to have his day in court. It is obvious that the application to review the judgement more specifically the one which has been obtained through an exparte process the court could have seen that it will result to an injustice if left to stand.

I must therefore, in this regard interfere with the discretion of the Learned Magistrate on such a question of denying the applicant to pursue the remedy on review and stay of execution. This is in line with the whole duty of the court as defined in the constitution to do justice between the parties without being prevented by technical objections.

Going by these principles, I am satisfied that the orders of the trial Magistrate in her ruling dated 25th July 2014 are hereby set aside in their entirety. As to the application dated 31st July 2014 the same is allowed in the following terms.

(1) That there be stay of execution of the judgement of the lower court pending the hearing and determination of the intended appeal or review.

(2) That the applicant do file and serve the record of appeal within thirty days from today's date.

(3) That in view of the nature of the judgement being challenged by the applicant I order the applicant to deposit Kshs. 50,000/= as security for costs pending the judgment of the appeal or review by the court below.

(4) That the matter be mentioned for compliance on 12th April 2018.

(5) That each party may be at liberty to apply

(6) The costs of this application to await the outcome of the review or appeal.

Dated, delivered and signed in open court at Kajiado on 7th March 2018.

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R. NYAKUNDI

JUDGE

Representation:

Mr. Agina for Respondent

Ms. Madhana for Applicant

Applicant – present

Mr. Itaya holding brief for Mr. Agina.

Mr. Mateli Court Assistant