



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 148 OF 2017

RANDOLPH TINDIKA T/A TINDIKA &

CO. ADVOCATES.....APPELLANT

VERSUS

LUKA MWAMBANGA MSAGHA.....RESPONDENT

RULING

1. The application dated 4th August, 2017 is predicated on the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act, Order 42 rule 6 of the Civil Procedure Rules and other enabling provisions of the Law. It seeks the following orders:-

(i) Spent;

(ii) Spent;

(iii) That this Honourable Court be pleased to order stay of execution of the orders made by the Honourable Ruling and order (sic) of the Honourable Evans Makori, Chief Magistrate on the 12th July, 2017 to the effect that the appellant/applicant do deposit the sum of Kshs. 5,680,879.04 in the joint (sic) interest earning account operated by the two Advocates herein within 21 days from the said date pending the hearing and determination of this appeal herein (sic); and

(iv) That costs of this application be provided for.

2. The application is supported by the affidavit of Randolph Tindika Advocate, and the applicant herein, sworn on 5th August, 2017. The applicant filed a supplementary affidavit on 5th September, 2017. The respondent filed a replying affidavit on 22nd August, 2017 and a further replying affidavit on 27th September, 2017 to oppose the application.

3. The applicant filed his written submissions on 20th September, 2017. Counsel for the respondent filed his on 27th September, 2017. In highlighting his submissions, Mr. Tindika indicated that he sought stay of execution of the orders issued by Hon. Makori, Chief Magistrate on 12th July, 2017 as the issue of fees between the applicant and the respondent has not been determined as yet as there is an application for extension of time to file a reference pending in the High Court. He submitted that he had been instructed to act for the respondent wherein Kshs. 13.5 Million was paid to his law firm. He paid the respondent Kshs. 11,475,000/= and retained Kshs. 3,525,000/= as his fees and disbursements which included payment of *ex gratia* to squatters to vacate the land. He stated that there was a dispute however over the fees payable.

4. He submitted that he filed a bill of costs that was taxed at Kshs. 1,731,935/= but in his view, taxation was not done properly as he was claiming Kshs. 3,524,135.00. He therefore filed a reference which was struck out for being filed late.

5. The applicant stated that while the reference was pending, the respondent filed Mombasa CMCC No. 201 of 2017 wherein the applicant filed a memorandum of appearance under protest. He submitted that the statement of defence was due on 4th March, 2017 which was during Easter holiday, thus under the provisions of Order 50 rule 5, time stopped to run. He further stated that the defence was due for filing on 6th March, 2017 but they filed it on 7th March, 2017 which was late. He added that the request for Judgment was made on 6th March, 2017, which was the last day for them to file his defence, thus the request for Judgment was *void ab initio*. He further stated that his statement of defence was filed in the morning of 7th March, 2017 and taken to the Hon. Magistrate on the same day. It was therefore argued that the *ex parte* Judgment was entered when their statement of defence was in the court file.

6. Mr. Tindika, argued that the Hon. Magistrate had no jurisdiction to preside over a dispute between an Advocate and a client. He cited the

case of **Interfreight East African Ltd. v African Liner Agencies and Another** [2012] eKLR where the court stated that the memorandum of appearance or defence on record should not be overlooked. He also relied on the case of **James Kanyiita Nderitu and Another vs Marios Philotas Ghikas and Another** [2016] eKLR, to show that the Hon. Magistrate should not have entered an *ex parte* judgment. He contended that the applicant's defence was filed before the request for Judgment was endorsed, thus the Judgment was irregular. In his view, the amount in issue is Kshs. 1,700,000/= and he has not exhausted his legal rights. He prayed for his application to be allowed.

7. On the other part, Mr. Mwaniki, Learned Counsel for the respondent took the position that the issue of a reference was determined by this court on 27th January, 2017 when it delivered a ruling in Mombasa High Court Miscellaneous Application No. 201 of 2012 whereby the reference was struck out. In the said Counsel's view, the issue of a reference was dealt with conclusively by the High Court. As such, the applicant should not have continued holding funds belonging to the respondent.

8. It was submitted that the respondent filed a plaint to claim the outstanding payment for his land and that he was not paid Kshs. 11,000,000/= as per bank transfers made.

9. Counsel for the respondent stated that the lower court case was filed on 10th February, 2017 and on 16th February, 2017 the applicant filed his memorandum of appearance. It was submitted that under Order 8 rule 2, Civil Procedure Rules, where a defendant has been served with summons, and entered appearance, he has to file his defence within 15 days and that for the applicant, time started running on 16th February, 2017, when he entered appearance. It was further submitted that the day he ought to have served his defence was on 4th March, 2017 which he failed to do as he had no plausible claim. Counsel for the respondent further stated that 4th of March, 2017 was on a Saturday and so the applicant ought to have filed his defence on Monday 6th March, 2017 which he failed to do. A request for Judgment was made on 6th March, 2017 and it was endorsed on 7th March, 2017. Mr. Mwaniki submitted that the Judgment was regular as it was obtained properly. It was further submitted that the lower court ordered the applicant to deposit security and defend the suit.

10. In response to the foregoing submissions, Mr. Tindika submitted that the court struck out the reference for being filed 8 days late and that he had since filed an application for extension of time to file a reference, which was filed prior to the case in the lower court. He stated that where proceedings are struck out, a party can still approach the same court for relief. He indicated that the authorities cited by Mr. Mwaniki are of persuasive value.

ANALYSIS AND DETERMINATION

The issue for determination is if this court should stay execution of the orders made by the lower court on 12th July, 2017.

11. It is not in dispute that the applicant failed to file his statement of defence within the timelines stipulated under the provisions of Order 7 rule 1 of the Civil Procedure Rules. The last date for filing of the defence was on 6th of March, 2017 but it was filed on 7th March, 2017. On the said date, Hon. Makori, Chief Magistrate entered an *ex parte* Judgment against the applicant on an application filed on 6th March, 2017. The applicant takes issue with the fact that the application was filed prematurely on 6th March, 2017.

12. The applicant stated that he filed his statement of defence on the morning of the 7th of March, 2017 and therefore the Hon. Magistrate must have seen that the said defence was on record as at the time he entered an *ex parte* Judgment and should therefore not have proceeded to do so. I have perused the ruling the subject of this application, the said Magistrate at page 4 stated as follows; "*On 7th March, 2017 the court after scrutiny of documents on record regularly entered interlocutory judgment there was no defence on record as at the time this judgment was entered as shown in the Coram of 7th March, 2017 (E.K. Makori CM Coram). It will seem on the same day or any other time thereafter defence was filed after entry to the interlocutory judgment according to order VIII rule (2) (CRPRs (sic) after service of summons to enter appearance a party is supposed to file defence within 15 days on filing appearance in the suit.*"

13. The Hon. Magistrate therefore held that the Judgment was regular but in the interest of justice he deemed the defence filed to be regularly on record. He ordered the applicant to deposit the sum of Kshs. 5,680,879.04 as reflected in the decree with costs and interest, in an interest earning bank account operated by the two Advocates in the lower court case, within 21 days of the ruling. It is the said order that has vexed the applicant who now seeks stay of execution of the same.

14. In paragraph 6 of his supporting affidavit, the applicant stated that he filed an application dated 22nd February, 2017, seeking leave to file a reference out of time. For the said reason, he submitted that the Mombasa CMCC No. 201 of 2017 is sub-judice as there is an application pending before this court on the same matter.

15. The written submissions by the respondent indicate that the plaint in the case before the lower court was filed on 10th February, 2017. The Hon. Magistrate in his ruling however indicates that the plaint was filed on 8th February, 2017. Irrespective of whether the plaint was filed on 8th February, 2017 or 10th February, 2017, it is apparent that the case before the lower court was filed before the application by the applicant seeking leave to file a reference out of time. It was within the respondent's rights to file a case as there were no court orders barring him from doing so. On whether the Hon. Magistrate has jurisdiction to hear the case filed in the lower court or if the applicant has the *locus standi* to file an application to seek leave to file a reference out of time, after an earlier reference was struck out, are not issues for determination by this court at this point in time.

16. In the circumstances of this case, the authorities cited by Counsel for the applicant cannot come to his aid and the Hon. Magistrate could not have set aside the *ex parte* Judgment as a matter of right when there was no defence in the court file as at the time he considered the application by the respondent dated 6th March, 2017. On whether the said application was prematurely filed in court, that is a ground of appeal by the applicant.

17. Order 42 rule 6 of the Civil Procedure Rules provides for the principles to be considered in the grant of orders for stay of execution. It states as follows:-

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) 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.

(3) Notwithstanding anything contained in sub rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.”

18. On the issue of unreasonable delay, the present application has been filed timeously. The orders by Hon. Makori were made on 12th July, 2017 and this application was filed on 4th August, 2017.

19. On substantial loss, the Honourable Magistrate ordered the applicant to deposit the sum of Kshs. 5,650,879.04 within 21 days from date of delivery of the said court’s ruling, in an interest earning joint bank account in the names of the applicant and the respondent’s Counsel. The said amount is as reflected in the decree together with costs and interests. The court however set aside the *ex parte* Judgment and gave the applicant conditional leave to defend the suit by depositing the said sum of Kshs. Kshs. 5,650,879.04. This court takes cognizance of the fact that part of the said money constitutes the applicant's hard earned fees for having represented the respondent in a land transaction. It is my finding that in the said circumstances, it was unfair to impose such a stringent condition on the applicant. It is also worth noting that there is an application still pending in the High Court in which the applicant seeks leave to file a reference out of time.

20. In **Mbogo v Shah** [1968] EA 93, Sir Charles Newbold stated as follows:-

"A court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the Judge in exercisin his discretion has misdirected himself in the matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice."

21. It is my finding from the analysis of the facts herein that the Hon. Magistrate did not take into account that a Bill of costs had been taxed and that the applicant had a legitimate claim to some of the money he retained. The balance of the said amount is what is in dispute. For the said reason, I will exercise my discretion in favour of the applicant who stands to suffer substantial loss by having the sum of Kshs. 5,650,879.04 being held in a joint bank account awaiting the outcome of the hearing of the appeal filed herein.

22. The applicant has not offered to deposit security. This court is however enjoined by the provisions 1A and 1B of the Civil Procedure Act to do justice to litigants. I therefore grant the applicant orders for stay of execution on the following conditions:-

(i) That he will deposit the sum of Kshs. 1,792,200/= being the difference between the taxed bill of costs and the amount he claims to be due to him. The said amount shall be deposited in a joint interest earning bank account in the names of both the respondent's Advocate and the applicant within 45 days from today's date;

(ii) The applicant shall within 60 days from today file his Record of Appeal;

(iii) He shall list the appeal for directions within 14 days of filing of his Record of Appeal;

(iv) Costs are awarded to the respondent.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 6th day of April, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Tindika, applicant present in person

Mr. Masila holding brief for Mr. Mwaniki for the respondent