



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL MISC APPL NO. 234 OF 2017**

**PROF DR. AMER YUSUF ABDULKARIM.....APPLICANT**

**VERSUS**

**ADRIAN PETER MARTIN**

**JONATHAN NAUGHTEN.....RESPONDENT**

**RULING**

1. The application dated 12<sup>th</sup> June, 2017 principally seeks orders that this Honourable Court be pleased to stay the proceedings in CMCC 8614 of 2016 pending the hearing of the Appeal herein.
2. It is stated in the grounds and the affidavit in support of the application that the Respondents filed suit against the Applicant on 16<sup>th</sup> December, 2016. That the Applicant was served with Summons to Enter Appearance but delayed in giving instructions to the Advocates and default judgment was entered. That the Applicant's application to set aside the said judgment was heard in the absence of the Applicant and was dismissed. The Applicant thereafter filed the appeal herein.
3. The application is opposed as per the grounds dated 7<sup>th</sup> July, 2017 which state as follows:
  1. Default judgment was entered in the lower court as against the Appellant/Applicant herein on 20<sup>th</sup> February, 2017. Service of summons was effected on the Appellant/ Applicant on 27<sup>th</sup> January, 2017.
  2. The Appellant/Applicant filed his Notice of motion in the lower court to set aside the default judgment on 5<sup>th</sup> April, 2017. Such application was filed over 2 months from the service of Summons upon the Appellant/Applicant – long delayed.
  3. The Appellant/Applicant's said the Notice of motion came for hearing before the lower court on 18<sup>th</sup> April, 2017 at which time another advocate held brief for the Appellant/ Applicant's advocates on record. At that hearing, the Respondent was given 14 days to file a supplementary Affidavit and the matter was stood over for hearing to the 16<sup>th</sup> May, 2017.
  4. On the 16<sup>th</sup> May, 2017 there was no appearance for the Appellant/Applicant and the magistrate in the lower court stood over his ruling until 30<sup>th</sup> May, 2017. On that date and despite having been served with a Notice, there was no appearance again for the Appellant/Applicant. The learned magistrate in a considered ruling dismissed the Appellant/ Applicant's said Notice of Motion dated 5<sup>th</sup> April, 2017.
  5. The Affidavit in support of the Appellant/Applicant's said Notice of motion dated 5<sup>th</sup> April, 2017 had annexed to it a draft Statement of Defence which amounted to a series of denials but no triable issues as found by the magistrate in his said ruling.
  6. Following upon the magistrate's said ruling, the Respondent found it necessary to file an application dated 5<sup>th</sup> June, 2017 under Certificate of Urgency seeking for an early hearing date for formal proof in this matter. Such application came about as a result of Respondent leaving Kenya on a permanent basis on 3<sup>rd</sup> July, 2017. The Appellant/Applicant being aware of such application, the same having been served upon his advocates, filed his current application before this Honourable court in bad faith in order to unduly delay this matter before court.
  7. That the excuse for non-attendance on the part of the advocate having the conduct of this matter on behalf of the Appellant/Applicant as contained in the Affidavit in support of the application before this court simply does not add up. The

said advocate, as detailed above failed to appear before the lower court on 18th April, 2017, 16<sup>th</sup> May, 2017, 30<sup>th</sup> May, 2017, 21<sup>st</sup> June, 2017 and 27<sup>th</sup> June, 2017. Her brief was held on 18<sup>th</sup> April 2017 and 27<sup>th</sup> June, 2017 by other advocates appearing in the lower court on other matters.

**8. From the above, it is clear that the Appellant/Applicant or his advocates on record in this matter are not serious in pursuing the same and the application before Court is dated 12<sup>th</sup> May 2017 before the learned magistrate's said ruling dated 30<sup>th</sup> May, 2017 was delivered. The application is an abuse of the court process, is vexatious and should be dismissed accordingly.**

4. The application was canvassed by way of written submissions. I have considered the said submissions.

5. The facts herein are not in dispute. There is no affidavit evidence to rebut the same. The crux of the matter herein is whether to grant the orders of stay of the proceedings in the lower court pending the hearing of the appeal in respect of the dismissed application.

6. From the Applicant's own averments, it is clear that the default judgment was entered following delay on their part in filing a memorandum of appearance and a defence. It is also noted that the Applicant's application to set aside the *ex parte* judgment proceeded in their absence. While these are matters to be determined in the appeal herein, it is noted from the affidavit in support of the application dated 5<sup>th</sup> June, 2017 (annexture "BN3") that the Respondent herein has applied to have his evidence taken, stating that he is about to leave the jurisdiction of the court. The issue of delay is therefore pertinent especially taking into account the circumstances of this case.

7. To balance the competing interests of both parties, I will give the Applicant a chance to ventilate his appeal. On the other hand it is also necessary to preserve the evidence of the Plaintiff who is said to be leaving Kenya on a permanent basis. Consequently, I allow the application on condition that the lower court is at liberty to record the Plaintiff's evidence and have it subjected to cross examination. The Record of Appeal to be compiled, served and the appeal fixed for directions within 30 days from the date hereof. In default the appeal to stand dismissed.

**Date, signed and delivered at Nairobi this 9<sup>th</sup> day of Oct., 2018**

**B. THURANIRA JADEN**

**JUDGE**