



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CIVIL APPEAL NO. 73 OF 2018**

**JACOB MASILA DAUDI.....APPLICANT/APPELLANT**

**VERSUS**

**RASHID WANJALA MAUKO.....RESPONDENT**

**R U L I N G**

1. The applicant/appellant has filed an application dated 30<sup>th</sup> May, 2018 seeking for orders that:

1. Spent.

2. Spent.

3. This Honourable Court be pleased to grant an order of stay of proceedings of the judgment and/or the decree obtained in civil suit Kakamega No. 28/2016 and all consequential orders arising therefrom pending the hearing and determination of the appeal vide Kakamega HCCA NO. 73/2018.

4. The costs of the application be provided for.

2. The applicant was represented by the firm of **Omwenga & Co. Advocates** while the firm of **Olando Udoto & Okello Advocates** were appearing for the respondent.

2. The application is premised on the grounds on the face of the application and is supported by the affidavit of the applicant on the grounds that:-

a. That the appellant has filed an appeal vide Kakamega HCCA NO. 73/2018 against the entire judgment delivered in Kakamega NO. 28/2016 on 17.11.2016 by Hon. B.S.Khapoya (Senior Resident magistrate).

b. That the said appeal raises numerous triable issues and has high chances of success.

c. That the appellant is likely to suffer substantial loss and damage if the orders sought are not granted and further that the said appeal will be rendered nugatory.

d. That the respondent will not be prejudiced in any way if the orders sought are granted.

e. That it is the interest of justice that the proceedings of judgment and/or decree in Kakamega CMCC No. 28/2016 be stayed to pave way for the hearing of the appeal in Kakamega HCCA No. 73/2018.

f. That the respondent is a person of straw and will not be able to refund the decretal sum were they to execute and the appeal succeeds.

g. That the appellant is willing and able to abide by the terms and conditions for allowing this application.

3. The application is opposed by the respondent through the replying affidavit of the respondent. The grounds of opposition are that there is no appeal against the judgment of the lower court. That the appeal is against the ruling of the lower court delivered on 28<sup>th</sup> April, 2018. That the ruling of the magistrate did address all the grounds raised in the memorandum of appeal and as such the appeal has very little chance to

succeed. That even though the trial court found that the applicant had been properly served, the application would not be successful as the trial magistrate did give the applicant a chance to defend the suit on condition that he deposited the decretal sum in court before a hearing date could be taken. That the applicant failed to deposit the sum as ordered and rushed to file an appeal. That the judgment of the lower court was regularly entered for failure by the applicant to defend the suit. That the application should be dismissed but if the court is inclined to grant the orders sought, the applicant should be ordered to deposit the decretal sum in court together with all the due costs.

4. The applicant in his application dated 30/5/2018 says that he has appealed against the entire judgment of the trial court delivered on 17/11/16. The memorandum of appeal filed by the applicant dated 25<sup>th</sup> May, 2018 is against the ruling of the trial court dated 28<sup>th</sup> April 2018 wherein the trial magistrate declined to set aside the ex- parte judgment entered on the 17<sup>th</sup> November, 2016. It is therefore a misdirection on the part of the applicant to say that he has appealed against the entire judgment of the lower court. The court will therefore limit its findings to the ruling dated 28<sup>th</sup> April, 2018.

5. The case for the respondent was that he had instituted a suit against the applicant in the lower court seeking for damages after he was injured in a road traffic accident while travelling in a motor vehicle owned by the applicant. The applicant was served with summons to enter appearance but failed to enter appearance or defence. The matter proceeded ex parte. The trial court entered ex parte judgment for the respondent to the sum of Kshs. 2,000,000/ in general damages and Kshs. 965,685.90 in special damages. Thereafter the applicant filed an application dated 17/1/2017 seeking to set aside the ex parte judgment on the grounds that he had not been served with summons to enter appearance. In his ruling delivered on 28<sup>th</sup> April, 2018, the trial magistrate held that:

**“ I have carefully considered the submissions filed in support and opposition of this application together with the case authorities supplied and what stands out really is that though not obligated the defendant/applicant has not in any way besides denying service, stated of how he came to learn of this case. With this failure, coupled with the applicant’s unexplained indolence, bearing in mind the injuries sustained by the respondent/plaintiff and lapse of time, I decline this application and direct the defendant applicant to deposit with court the decretal sum of Kshs. 2,965,685.92 after which they may obtain a date for hearing at the registry. Orders accordingly.**

6. The application for stay of execution pending appeal is made under order 42 Rule 6(1) and 2 of the Civil Procedure Rules.

Rules (2) provides that:

**“ No order for stay of execution shall be made under sub rule (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.”**

7. The principles on which the court may order stay of execution of a decree are as stated by the court of appeal in **Patani & another Vs Patani (2003) KLR** where it was held that:

**“ the principles on which the court grants stay are well settled. The applicant must show that he has an arguable appeal and that the same would be rendered nugatory if a stay is not granted “.**

8. The powers of the court to grant a stay pending appeal is a discretionary one. The **Court of Appeal in Butt VS Rent Restriction Tribunal (1982) KLR 417** gave guidance on how a court should exercise such discretion and held that:

**1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not prevent an appeal.**

**2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.**

**3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.**

**4. The court in exercising its discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the case and unique requirements.**

**5. The court is exercising its powers under Order XL1 rule 4(2) (b) of the Civil procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”**

(see **Amal Hauliers Limited Vs Abdulnasir Abukar Hassan (2017) eKLR**)

9. The application dated 17<sup>th</sup> January, 2017 was basically on the grounds that the applicant was not served with summons to enter appearance and the plaint. The grounds on which a court may set aside its judgment were stated in **Patel Vs East African Cargo Handling Services**

Ltd (974) E.A 75 as per Duffu.P. that:

**“ The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the right of discretion given to it by the rules . I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this case defence on merits, does not mean in my view defence that must succeed , it means as Sheridan J put it “ a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication – see Mbogo Vs Shah ( 1968) E.A 93.**

10. The trial court in its ruling dated 28/4/18 was not categorical whether the applicant was served with the summons or not. The court did not consider whether the intended defence of the applicant raised triable issues. While the magistrate declined to grant the application, he at the same time directed the applicant to deposit the decretal sum with the court upon which the parties could take a hearing date at the registry. It is not clear whether the hearing was for the same application or hearing of the main suit. If the hearing was for the main suit then the magistrate should have clearly allowed the application on condition that the applicant deposited the decretal sum with the court.

11. I have considered the grounds proffered on the application and the grounds against it. The appellant/ applicant has shown that he has an arguable appeal . The respondent has not shown that he has the means to refund any money paid to him in case he lost the appeal. The appeal will be rendered nugatory if the orders sought are not granted. The court has considered that the applicant/ appellant is willing to deposit security with the court. I grant prayer 3 of the notice of motion dated 30/5/18 on condition that the appellant/applicant deposits with the court a sum of Kshs.1,000,000/= within one month from the date of this ruling failure to which the orders granted herein shall remain vacated . Costs shall be in the course. Orders accordingly.

**Delivered, dated and signed in open court at Kakamega this 18<sup>th</sup> day of October, 2018.**

**J.NJAGI**

**JUDGE**

In the presence of

No appearance.....appellant

No appearance.....respondent

George.....court assistant

Parties :

.....absent

.....absent