



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**CIVIL APPEAL NO.18 OF 2017**

**NATIONAL TRANSPORT AND SAFETY AUTHORITY.....APPELLANT**

**VERSUS**

**ALOICE OCHIENG OLAL.....RESPONDENT**

**(Being an Appeal from the Ruling of the Hon. S. Mokuia Chief Magistrate**

**in CMCC No. 69 of 2016 dated 4<sup>th</sup> July 2017)**

**RULING**

1. The appellant/applicant in this matter was the defendant in Kericho Chief Magistrate's Court Civil Suit No. 69 of 2016. The respondent had sued the applicant on a claim regarding the withholding of his driving licence by a traffic officer. The respondent had obtained an ex parte judgment against the applicant for a sum of Kshs. 586,770/-. An attempt had been made to execute against the applicant, which prompted the filing of the present appeal and an application dated 17<sup>th</sup> July 2017.

2. In the said application which was filed under Certificate of Urgency, the applicant sought the following orders:

***(a) (spent).***

***(b) (spent)***

***(c) The Honourable court be pleased to stay execution of the ex parte judgment entered herein on 22<sup>nd</sup> November 2016, and all the consequential decree, orders, proclamation dated 17<sup>th</sup> July 2017, attachment and processes, pending the hearing and determination of the Appeal herein.***

***(d) This Honourable Court be pleased to grant any other order it may deem fair and just in the circumstances.***

***(e) Costs.***

3. The application is supported by the affidavit of Judith Opili Sirai, an Advocate of the High Court practicing as the Legal Officer of the applicant, sworn on 17<sup>th</sup> July 2017.

4. By an order issued on 24<sup>th</sup> July 2017, the court certified the application urgent and granted a stay of execution of the ex-parte judgment entered on 22<sup>nd</sup> November 2016, and all consequential decrees, orders and the proclamation dated 17<sup>th</sup> July 2017, pending inter partes hearing of the application.

5. The facts giving rise to the application as they appear from the affidavit of Ms. Sirai are that the respondent had been arrested, charged and convicted for committing a traffic offence on 10<sup>th</sup> November 2014. He then filed a fictitious claim on 18<sup>th</sup> March 2016 arising from the said conviction with the sole intention of irregularly and unjustifiably harassing and obtaining money from the applicant, which is a public body.

6. On 22<sup>nd</sup> November 2016, the respondent had irregularly obtained ex parte judgment against the appellant for a purported sum of Kshs. 586,770/- allegedly arising from the withholding of his driving license by a traffic police officer. The traffic police officer was not a party to the proceedings.

7. The applicant had then filed an application dated 2<sup>nd</sup> December 2016 seeking to set aside the ex parte judgment of 22<sup>nd</sup> November 2016. However, on 20<sup>th</sup> December 2016, its application was dismissed by the lower court for alleged non attendance, despite there being an advocate for the applicant who was ready to prosecute the application. The reason for the dismissal of the application was that the said advocate, who was from the firm of Prof. Albert Mumma & Company Advocates, was not properly on record.

8. It is averred on behalf of the applicant that the said advocate was properly on record on 20<sup>th</sup> December 2016 when the application was slated for hearing as the firm had filed a Notice of Appointment on 15<sup>th</sup> December 2016. A subsequent application to review the decision of the lower court dismissing the application dated 2<sup>nd</sup> December 2016 was dismissed on 4<sup>th</sup> July 2017. The applicant contends that in the said ruling, the lower court misapplied himself and failed to consider the law and the facts before rendering the ruling. As a result, the applicant has filed the present appeal and application seeking to set aside the ruling and have the matter determined on merit.

9. The applicant states that the respondent had, through Kangethe Enterprises Auctioneers, visited its premises on 17<sup>th</sup> July 2017 and proclaimed motor vehicles used by the applicant in carrying out road patrols. It contends that the intended execution by the respondent will render the appeal herein nugatory unless this court intervenes and grants the stay orders sought. It asserts that it is only fair and just that the stay orders are granted to preserve the substratum of the appeal.

10. Further, that it would be unfair, illegal and unconstitutional to require the applicant, which is a public body, to pay an inflated and unmerited sum of Kshs. 865,883/- arising from a contested act of withholding the respondents driving licence which act the applicant is a stranger to. It is its case that it is a public body and would be in a position to pay the amount awarded in judgment, unlike the respondent whose ability to pay is questionable.

11. In his affidavit in reply to the application which he swore on 28<sup>th</sup> August 2017, the respondent deposes that the applicant admitted liability as far as his driving licence was concerned, and had replaced it. He further contends that while the firm of Prof Mumma did file and serve a Notice of Motion and a hearing notice when the matter was fixed for inter partes hearing on 20<sup>th</sup> December 2016, when the application came up on that date, and the application dated 2<sup>nd</sup> May 2016 was called out, Learned Counsel Mr. Kamande disowned it and informed the court that he was not aware of it. As a result, the court had no option but to dismiss it with costs for non-attendance.

12. The respondent further argues that his ownership and exclusive use of his driving licence is protected under Article 40 (2) (a) and (b) of the Constitution of Kenya 2010. His right under this Article was breached by an employee /officer of the applicant, one Denis Nthiga, when he unlawfully detained the licence on 14<sup>th</sup> April 2016, denying him his income for 480 days.

13. It is his contention that Article 50 of the Constitution cannot come to the aid of the appellants at this juncture as it had been given several opportunities to be heard, which it had squandered. He further argues that the applicant had admitted liability to unlawful detention and subsequent loss of his licence when on 5<sup>th</sup> April 2016 they had entered a consent and replaced his licence on 14<sup>th</sup> April 2016. He therefore prays that the application and the Memorandum of Appeal dated 17<sup>th</sup> July 2017 be expunged, struck out and/or dismissed with costs.

14. In the alternative, he prays that the applicant be ordered to deposit the decretal sum of Ksh. 925,554.65 being the decretal sum, costs and interest of Kshs. 853,333/- plus auctioneers charges of Kshs 72,221.65.

15. The respondent further takes the position that the firm of Prof Albert Mumma is not properly on record. The consent between Ms Sirai and the firm of Prof Mumma had not been endorsed and adopted by this court as an order; the firm had not sought leave to come on record, and therefore the appointment of the advocates is null and void, and the orders of Hon. Ndururi delivered on 20th December 2016 were legitimate. He argues, further, that the said firm has no locus standi in the present appeal.

## **Determination**

16. I have considered the pleadings of the parties and their written submissions in this matter. I note that the submissions address both the application dated 17<sup>th</sup> July 2017 filed by the appellant and the respondent's application dated 28<sup>th</sup> August 2017 seeking to strike out the appellant's application and appeal. I believe that the two issues that arise for determination are, first, whether, the firm of Prof. Albert Mumma was properly on record before the lower court and has standing in the present appeal and, secondly, whether the applicant is entitled to an order of stay of execution of the ex-parte judgment entered in favour of the respondent. The responses to these two issues will also address the prayers sought in the application to strike out dated 28<sup>th</sup> August 2017.

17. On the first issue, the respondent has argued that the applicant was represented by Ms. Sirai, who as it appears from the affidavits on record, is an in-house Counsel. The respondent argues that the firm of Prof Albert Muma & Co. Advocates was not properly on record as it had failed to comply with the provisions of Order 9 rule 9 of the Civil Procedure Rules. The response from the applicant is that the applicant was acting in person until the firm of Prof. Albert Mumma & Co. Advocates came on record and filed their Notice of Appointment on 15<sup>th</sup> December 2016 as stipulated in Order 9 Rule 7 of the Civil Procedure Rules.

18. This rule provides as follows:

***7. Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications.***

19. The applicant reiterated in its submissions that it was acting in person, and there was no need to seek leave of the court to allow the firm of Prof. Albert Mumma & Co. Advocates to come on record.

20. In **Protein & Fruits Processors Limited & another v Diamond Trust Bank Kenya Limited [2015] eKLR**, the court, when faced with a situation similar to the one before me, found that the firm of advocates in question was properly on record. The respondent in that case had defended the suit in person at the lower court, and it had appointed the advocate at the appeal stage. In the court's view, which I agree with, it was not necessary to seek leave of the court under Order 9 Rule 9.

21. The court in the Protein and Fruits Processors Case took the view that the objective of the rule was to cover two situations. One was where a party was seeking to change advocates, or was seeking to act in person, after the entry of judgment. In both cases, the new advocate or the party in person is required to make a formal application to the court with notice to all parties who participated in the suit for grant of leave to come on record or act in person. The mischief sought to be avoided, I believe, is where a party is represented up till judgment by advocates, then seeks to evade obligations to the advocates representing it in the suit by appointing new advocates or seeking to act in person.

22. In the present case, the applicant was acting in person, through its in-house Counsel, Ms. Sirai. Order 9 Rule 9 of the Civil Procedure Rules comes into operation where a party, who had an advocate on record, changes advocates after judgment has been entered. In such a situation, the party seeking to act in person, or change advocates, after judgment has been passed, is required to do so only after obtaining an order of the court with notice to all the parties; or with the consent between the outgoing advocate and the proposed incoming advocate or party intending to act in person.

23. In **Mariam Mwadena vs Said Salim Soban & Another [2014] eKLR**, the court considered the application of Order 9 Rule 9 of the Civil Procedure Rules and stated as follows:-

***“Order 9 Rule 9 of the Civil Procedure Rules provides that when there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court upon an application or upon a consent filed between the outgoing advocate and proposed incoming advocate. Order 9 Rule 9 of the Civil Procedure Rules is only applicable where the change of advocate or the notice to act in person is effected in the same matter after judgment has been delivered. If an appeal is filed in respect to the judgment, a party is at liberty to appoint another advocate at any stage of the appeal before judgment is delivered without the leave of the court. An appeal is a separate suit in an appellate court and one does not need the consent of the advocate in the lower court or to file an application for leave to appoint another advocate to either represent himself or to appoint a different advocate.”***

24. In the circumstances of this case, I am satisfied that the firm of Prof. Albert Mumma & Co. Advocates is properly on record, and was entitled to file the present application and appeal on behalf of the applicant.

25. I now turn to consider whether the appellant/applicant is entitled to the order of stay of execution of the ex-parte judgment pending the hearing and determination of the appeal. The conditions for grant of stay pending appeal are well settled. They are that the application must be made without undue delay; the applicant must demonstrate that it will suffer substantial loss unless the order sought is granted; and such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given-see for instance **Stanley Karanja Wainaina & Another vs Ridon Anyangu Mutubwa [2016] eKLR**.

26. In **Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi [2014] eKLR**, the court quoted with approval the dictum of Ringera J (as he then was) in **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** when he stated:

***“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”***

27. The ex parte judgment in this matter was entered on 22<sup>nd</sup> November 2016. An attempt was made to set it aside, unsuccessfully. A further attempt was made to review the orders of the court issued on 20<sup>th</sup> December 2016. This application was dismissed on 4<sup>th</sup> July 2017, and an attempt at execution made, which resulted in the filing of the present appeal and application. In the circumstances, I am satisfied that the application was made within reasonable time.

28. I am therefore satisfied that in this case, the interests of justice demand that orders of stay should issue in favour of the applicant. However, I am also conscious of the need to balance the competing interests of the parties. The respondent in this case has a judgment in his favour, which he was seeking to execute. The appellant/applicant seeks to challenge the decision of the lower court, which it deems to have denied it a right to be heard. It argues that its appeal will be rendered nugatory if the orders of stay are not granted. In **Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another [2015] eKLR**, the Court of Appeal observed as follows:

***“In seeking to balance the interests of the respective parties, the approach we have always taken in determining whether or not to grant a stay of execution is to ensure that applicants are not denied their opportunity to ventilate their legal cases as afforded under the laws through the appeal process, with the possibility of success, while at the same time, respondents are not denied the fruit of judgment in their favour and their rights are safeguarded.”***

29. The applicant has submitted that it will suffer substantial loss if the orders sought are not granted as the vehicles which had been attached are used to enhance road safety and the applicant may not be able to carry out its mandate. It has argued that it is a public body and funded through the exchequer and will therefore always be in a position to pay the decretal amount in the event that the appeal is unsuccessful.

30. Taking all factors into consideration and noting the respondent's submission that the decretal sum should be deposited in court, I find this the most fair option for balancing the interests of the parties. Accordingly, I make the following orders:

*i. That an order be and is hereby issued staying execution of the ex parte judgment and decree entered herein on 22<sup>nd</sup> November 2016 and all consequential orders and the proclamation dated 17<sup>th</sup> July 2017 pending the hearing and determination of this appeal.*

*ii. That the stay of execution shall be conditional upon the applicant depositing in court the decretal sum within thirty (30) days hereof,*

*iii. That in default of order ii above, the said orders of stay shall lapse.*

**Dated Delivered and Signed at Kericho this 3<sup>rd</sup> day of October 2018**

**MUMBI NGUGI**

**JUDGE**