



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 19 OF 2015

HILLARY JUSTINE IRERI.....IST APPELLANT/APPLICANT

MWEA MARTIN 2ND APPELLANT/APPLICANT

-VERSUS-

FREDRICK KAHAMA CHEGE..... 1ST RESPONDENT

FAMILY BANK LIMITED 2ND RESPONDENT

R U L I N G

1. The Applicants through an application dated 24th April 2015 brought pursuant to section 1A and 3A of Civil Procedure Rules seeks the following orders;-

1. That the Ruling delivered on 1st April 2015 in Chuka PMCC NO. 23 of 2014 herein be set aside and the Appellants be allowed to defend the suit unconditionally.

2. That there be a stay of proceedings in Principal Magistrate's Court at Chuka in Civil Suit No.23 of 2014 pending the hearing and determination of this application.

3. That costs of this application be provided for.

2. The application is premised on the ground on the face of the application *inter alia*;

(a) That the court found the Applicants were never served with summons to enter appearance.

(b) That the order for security to the tune of (Kshs.2,000,000/=) as a condition for setting aside ex-parte judgment was unreasonable and excessive under the circumstances.

(c) That the 2nd appellant is a peasant farmer and 1st appellant was his driver.

(d) That failure to set aside the ruling of 1st April 2015 means the

Applicants will not be given a right of a hearing for no fault of their own.

3. The application is further supported by affidavit deposed upon by Martin Njiru Mwea and annexures thereto in which its briefly deposed; **that** the summons to enter appearance in Chuka PMC NO.23 of 2014 which is the cause of this appeal was never served; **that** upon attachment the Respondents instructed their Counsel to set aside both ex-parte Judgment and final Judgment; **that** though the trial court held there was no proper service of summons it proceeded to allow the application to set aside both Judgments with condition that he deposits kshs.2,000,000/=; **that** he promptly filed defence upon Judgment being set aside, **that** he deposited ksh.200,000/= as advised by his Counsel; **that** he was to deposit that sum and not kshs. 2,000,000/= as security; **that** the condition attached to setting aside the exparte Judgment is unreasonable and grossly excessive and beyond his reach as he is a peasant farmer with merger sources of income; **that** the orders to set aside the Judgment should have been given unconditionally since court found that there was no service; **that** as this suit was filed last year no one would be prejudiced if the suit is heard without conditions; **that** if the orders are not granted the Applicants stand to suffer irreparable damage as they will be denied audience and hence fail to be heard on their defence as court gave 30 days for compliance with its orders.

4. The application is opposed. The Respondents filed a replying affidavit dated 12th May 2015. The Respondents averred that the Application is grossly inadequate; **that** the 1st Respondent is a victim of terrible accident while under the employment of the Applicant and has become a dependant having been reduced into a wheelchair and beggar for the rest of his life; **that** the defendant refused to defend the litigation; **that** the resulting Judgment is regular as all due process was followed; **that** applicants acceded to the conditions set by the trial court; **that** they have partially been fulfilled; **that** the application is framed on various provisions of Civil Procedure; **that** the applicant cannot appeal against a ruling on an application for setting aside without challenging the Judgment as it were; **that** the 2nd appellant has already complied with the Court's order.

5. I have very carefully considered the applicant's affidavit in support and annexures and the replying affidavit. The court has also considered the Counsel respective rival submissions and the issue for consideration is whether at this stage prayer No.2 seeking that the ruling of 1st April 2015 in Chuka PMCC 23 of 2014 can be set aside and the applicant be allowed to defend the suit unconditionally and lastly whether stay of proceedings in Principal Magistrate's Court at Chuka in Civil Suit No. 23 of 2014 can be granted pending the hearing and determination of this application before the period pleaded?

6. The Appellants filed the appeal on 24th April 2015 in which they prayed that the appeal be allowed and entire ruling and consequential orders of Chuka Principal Magistrate court delivered on 1st April 2015 be set aside and the Appellants application in the lower court be allowed unconditionally and the respondents do pay the appellants costs of this application and the application in the lower court.

7. That before this application was heard, M/s Kiome Advocate for the 2nd Applicant/Appellant applied for the 2nd applicant to be exempted from these proceedings as he had complied with the lower court's order. The court granted that prayer. The 1st Applicant proceeded with the application through his Counsel Mr. Baithabu learned Advocate.

8. I have indicated the prayers sought under prayer No. 2 of the 1st Applicant's application and the prayer in the appeal herein. The two prayers are similar and if the court proceeds to make its pronouncement on prayer No.2 of the application it would amount to disposing of the appeal without the same having been admitted to hearing and without hearing the parties on the appeal. The prayer in my view is constructed in such a manner that would mean if the application is allowed the appeal will have been determined through the back door. I therefore find that prayer to be untenable/bad in law and that it cannot be granted at the interlocutory stage as doing so

would dispose of the appeal. The appellant should therefore proceed to prosecute his appeal in the normal manner rather than taking a short cut through the application which is seeking similar orders as those sought in the appeal.

9. The applicant prayer No. 3 is seeking that proceedings in Principal Magistrate's Court at Chuka in Civil Suit No.23 of 2014 be stayed pending hearing and determination of this application. On 19th May 2015 prayer No.3 was granted on interim basis pending interpartes hearing of the application. The Applicant opted to proceed with the application as drawn.

Order 2 Rule 6 of the Civil Procedure Rules provides;

“2(6) (1) No party may in any pleading make an allegation of fact, or raise any new ground of claim inconsistent with a previous pleading of his in the same suit.

(2) Subrule (1) shall not prejudice the right of a party to amend, or apply for leave to amend, his previous pleading so as to plead the allegations or claims in the alternative”.

10. My understanding of the Applicant's prayer No.3 is that he wanted the proceedings in PMCC 23 of 2014 to be stayed ***pending hearing and determination of this application.*** A party in any pleadings is not entitled to raise a new claim or ground inconsistency with his pleadings in his suit. It is therefore not proper for Applicant's Counsel to be heard to seek stay of the proceedings in a manner contrary to his pleadings. The court cannot be left to speculate on the period for which applicant wanted stay of the proceedings when the application is clear. The Applicant's application was drawn in a casual manner and indeed did not seek stay beyond hearing and determination of his application. The applicant is bound by his pleadings, as this court cannot assume a responsibility of redrafting new pleadings for the parties. I am to point out that the Counsel should be keen in drawing their pleadings as the success and/or failure of a suit in most cases is determined by the way the pleadings have been drawn.

11. In view of the foregoing prayer No. 3 of the applicant's application cannot in my view be granted beyond the period pleaded in the applicant's pleadings. The period sought ends with the delivery of this ruling. I can not therefore grant stay of the proceedings at the lower court though there is a pending appeal as that is not one of the applicant's prayer in this application.

12. The upshot is that the applicant's application dated 24th April 2014 is without merits and the same is dismissed with costs.

DATED at MERU this 2nd day of July 2015

J.A. MAKAU

JUDGE

2.7.2015

Delivered in open court in the presence of:

Mr. Baithabu for 1st applicant

Mr. Mungai for 1st Respondent

M/s Kiome for 2nd Respondent

Court clerk – Penina/Mwenda

J.A. MAKAU

JUDGE

2.7.2015