



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CIVIL APPEAL NO. 31 OF 2013.

KENYA NATIONAL UNION OF TEACHERS (KITALE BRANCH):::::::APPELLANT.

VERSUS

GEORGE NABIBIA ::::::::::::RESPONDENT.

R U L I N G.

The Notice of Motion dated 10th September, 2013 was taken out by the appellant for the basic order that there be a stay of further proceeding in Kitale CMCC No. 24 of 2013 **George Nabibia vs. Kenya Union of Teachers (Kitale Branch)** pending hearing and determination of this appeal which arises from the dismissal of the appellant's application for setting aside default judgment and leave to file defence out of time by the lower court.

The present application is supported by the averments contained in a supporting affidavit dated 10th September, 2013 deponed by the appellants secretary and is opposed by the respondent on the basis of the averments contained in his replying affidavit dated 24th October, 2013.

Learned Counsel, **Mr. Karani**, argued the application on behalf of the appellant while **Mr. Okile**, learned counsel argued the same in opposition on behalf of the respondent.

Having considered the submissions by both sides, it is clear to this court that rather than address the application, the parties resorted to arguing or attempting to argue the appeal itself.

The applicant ended up not demonstrating in a proper and cogent manner why it would be just and convenient for this court to order a stay of proceedings pending the hearing and determination of the intended appeal.

Nonetheless, the appeal is against a discretionary interlocutory order made by the lower court which clears the way for the conclusion of the suit without the appellant's participation occasioned by its failure to file statement of defence.

The failure was attributed to a mistake by the appellant's counsel on record, a matter which would appropriately be addressed at the hearing of the appeal to see whether or not the mistake was excisable.

Normally, an appellate court would not interfere with the exercise of discretion by a lower court unless such discretion was exercised wrongly in principle or the court acted unreasonably on the facts.

A litigant who clearly demonstrates a mistake or error which is excusable would be entitled to exercise of discretion in his favour to avoid any injustice or hardship that may be suffered.

Courts must always take into consideration the overriding objectives enshrined in the Civil Procedure Act while exercising any power under the Act. In that regard, there must be a need to act justly in every situation, a need to have regard to the principle of proportionality and a need to create a level playing ground for all the parties by ensuring that the principle of equality of all is maintained and that as far as it is practicable to place the parties on equal footing (see, **Muiru Kamau & Another vs. National Bank of Kenya (2009) e KLR**).

It is for all the foregoing reasons that it would be just and convenient for this court to issue an order for stay of proceeding in Kitale CMCC No. 24 of 2013 pending hearing and determination of the intended appeal provided that the appellant shall take all necessary steps to ensure that the appeal is listed for hearing within the next four (4) months from this date hereof failure to which the stay order shall forthwith be discharged.

The parties shall bear own costs of this application.

[Read and signed this 15th day of July, 2014.]

[In the presence of Mr. Karani for respondent.]

J.R. KARANJA.

JUDGE.