REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO.131 OF 2013

BETWEEN

JASON MATONDA ……………………………………APPELLANT

AND

MARY WANJIKU ………….…....………………………RESPONDENT

(Being an appeal from the Ruling of the Hon. Resident Magistrate, Mr. Mugendi

Nyaga, in Kisii CMC Civil Suit No.340 of 2012 made on 10th September, 2013).

RULING

1. The application is supported by the applicant's affidavit sworn on 1st October 2013. The applicant depones to the following matters:-

There are apparently two conflicting judgments in the proceedings;

The appeal has high chances of success;

· *The temporary stay was due to expire on 3rd October 2013, and unless the orders sought are not granted, the applicant is likely to suffer prejudice;*

· *The respondent will not suffer any prejudice if the orders sought are granted;*

· *It is fair and just to allow the application as prayed;*

· *The applicant's draft defence carries serious triable issues;*

· *Though the trial court had ordered that the case do proceed to formal proof, there is no record of any formal proof proceedings;*

· *The applicant was never served with summons to enter appearance nor with notice of judgment;*

· *There is no record of entry of judgment on 5th November 2012;*

· *The respondent's request for judgment dated 1st October 2013 appears to be for final judgment yet there is no record of an interlocutory judgment.*

1. There are also grounds appearing on the face of the application. The said grounds are fully covered in the applicant's supporting affidavit.

2. The application is opposed vide one ground of opposition dated 10th October 2013 and filed in court on the same day. The respondent contends that the application does not demonstrate the requirements for grant of a stay of execution.

3. The application was canvassed by way of written submissions. There were also oral highlights of the submissions. Both counsel reiterated the content of the written submissions. I have carefully studied both sets of the submissions as well as the supporting authorities.

4. The applicant contends that the agreements upon which the respondent based her claim were made under duress at Kisii Police Station on the 8th, 9th and 10th September 2011 and that such agreements made under threats, promise or coercion should not form the basis of a civil claim. The applicant also contends that the lower court record has serious gaps and omissions. The applicant prays that the application be allowed so that he is not condemned unheard. The applicant has placed reliance on the case of **Maina -vs- Mugiria [1983] KLR 78**. The case basically deals with the exercise of judicial discretion to set aside exparte judgment which is obtained in absence of defence appearing or failure to attend by either party. The case also sets out the factors to be considered in applications to set aside ex parte judgment. The following holdings are relevant to this matter before me:-

> **"2. The principles governing the exercise of judicial discretion to set out an exparte judgment obtained in default of either party to attend the hearing are:-**

a) Firstly, there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.

b) **Secondly, the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Shah -vs- Mbogo [1967] E.A. 116 at 123B, Shabir Din or Ram Parkash Ahamd [1955] 22 EACA 48.**

c) **Thirdly, the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result, has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. Mbogo -vs- Shah [1968] EA 93.**

d) The court has no discretion where it appears there has been no proper service (Kanyi Naran -vs- Velji Ramji [1954] 21 EACA 20).

e) A discretionary power should be exercised judicially and in a selective and discriminatory manner, not arbitrarily and indiosycratically. (Smoth -vs- Middleton [1972] SC 30).

> **3. The power to set aside the judgment does not cease to apply because a decree has been extracted (Fort Hall Bakery Supply Company -vs- Frederick Muigai Wangoe [1958] EA 118).**

> **4. Some of the matters to be considered when an application is made are, the facts and circumstances, both prior and subsequent; and all the respective merits of the parties together with any other material factors which appear to have entered into the passing of the judgment, which would not or might not have been present had the judgment not been ex parte and whether or not it would be just and reasonable, to set aside or vary the judgment upon terms to be imposed (Jesse Kimani -vs- McConnel [1966] EA 547,**

555F).

5. The nature of the action should be considered, the defence if one been brought to the ntoice of the court however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered; and finally, it should be remembered that to deny the subject a hearing should be the last resort of a court. (Jamnadas -vs-Sodhia -vs- Gordandas Hemraj [1952] 7 ULR7).”

5. I entirely agree with the above principles and the factors to be considered by this court in the instant application.

6. On her part, the respondent contends in her written submissions that the applicant is not deserving of the order sought because he has fallen foul to the provisions of **Order 42 Rule 6 (2)** of the **Civil Procedure Rules** which provides as hereunder:-

“No order for stay fo 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. In essence therefore, the applicant in the instant matter must demonstrate to this court that there will be substantial loss upon his head if the order for stay is not granted. He must also show that the application has been brought without undue delay and thirdly that he is ready and willing to provide such security as may be ordered by this honourable court for the due performance of such decree or order as may ultimately be binding on him. Compliance with one or other of the conditions will not suffice.

8. Concerning substantial loss to be suffered, the respondent submits that by merely stating *“that I will incur irreparable loss if I am put in civil jail before this appeal is heard and determined is not demonstrative of the substantial loss envisaged under **Order 42 Rule 6 (2)** of the **Civil Procedure Rules**. It is further submitted on behalf of the respondent that the trial court found as a fact that the applicant owes the respondent the sum of Kshs.200,000/= and for that reason, the trial court declined to set aside the exparte judgment. Further, that there is no deposition throughout the pleadings that the respondent will be unable to refund the monies should the appeal succeed.”*

9. On the issue of security, the respondent submits that the applicant does not say it anywhere in his supporting affidavit that he is ready to provide any security for the due performance of such decree or order as may be ultimately be binding on him, and therefore that in the circumstances, the applicant is not entitled to the order sought. The respondent prays that the applicant's application be dismissed with costs.

10. Before I move on to the final segment of this matter, as to whether or not the instant application has any merit, it is necessary to set out the facts giving rise to the appeal and to the instant application.

11. By her plaint dated 11th September 2012, the respondent sued the applicant for the following reliefs:-

a) *Kshs.200,000/= and interest w.e.f 31st December 2011;*

b) Costs of the suit;

c) Interest at court rates.

1. The respondent's claim is at paragraph 3 of the plaint which reads as follows:-

"3. That vide an agreement dated 9th September 2011, the defendant acknowledged his indebtedness to the plaintiff in the tune of Kenya shillings Two Hundred Thousand (Kshs.200,000/=) and committed himself

(the defendant) to pay the debt due and owing to the plaintiff by paying Kshs.50,000/= (Kenya Shillings Fifty Thousand) on or before the 15th day of November 2011 and Kshs.150,000/= (Kenya Shillings One Hundred and Fifty Thousand) on or before the 31st day of December 2011."

2. Apparently the applicant failed to enter appearance and file defence and on 1st October 2012, the trial court entered judgment as against the applicant in the following terms:-

> **"I enter judgment for the plaintiff against the defendant as prayed with costs of the suit.**
>
> **Matter be set down for formal proof."**

3. On the 27th November 2012, at the civil registry, the following record is shown:-

> **"Omwenga from Minda & Co. Advocates for the plaintiff/applicant – present**
>
> **N/A for the defendant.**
>
> **Order: Matter is hereby fixed for NTSC on 20th December 2012,**
>
> **Signed**
>
> **Magistrate."**

4. The matter came up before Hon. Mugendi Nyagah, R.M. On 20th December 2012 for NTSC. The applicant was absent. Counsel appearing applied for W/A. The order for W/A was issued after the trial court was satisfied that the applicant who had been served was absent. The matter was thereafter fixed for mention on 16th January 2013 but there is no court record for that day. The matter was next mentioned on 1st August 2013 before Hon. Mugendi Nyagah, R.M. On that day the applicant had been arrested following the orders made on 20th December 2012. Mr. C.A. Okenye came on record on that day for the applicant. The court allowed Mr. Okenye to file an application contesting the entry of the ex parte judgment and requesting that the same be set aside.

5. The Notice of Motion dated 13th August 2013 was duly filed and canvassed before Hon. Mugendi Nyagah, RM on 22nd August 2013. The applicant sought the following substantive orders:-

a) *That the judgment entered by this court on 5th November 2012 and all consequential decree or order be set aside;*

b) That the applicant be allowed to file his memorandum of appearance and defence;

c) That the draft defence herein be deemed valid defence and duly filed;

d) Costs of this application be provided for.

1. In his reserved ruling dated and delivered on 19th September 2013, the learned trial magistrate dismissed the applicant's application on grounds that:-

· *Applicant had not proved that he was not served with court papers;*

· *The applicant had acknowledged that he owed the sum of Kshs.200,000 to the respondent and gave a proposal on how to settle the same in two instalments of Kshs.50,000/= and Kshs.150,000/= respectively;*

· *The applicant did not produce evidence that he was coerced into signing the agreements while he was at the police station;*

· *The applicant had not shown why the criminal case, filed against him by the respondent was withdrawn and whether the case was withdrawn pending further investigations or otherwise.*

1. That ruling is the subject of this appeal and it is part of the reason why the applicant seeks stay of execution pending hearing and determination of the appeal.

2. I have now carefully considered the application as filed, the grounds in support of the same and the grounds raised in opposition to the application. I have also carefully weighed the parallel submissions by both parties in this matter. I have also considered the applicable law. The issue that arises for determination is whether the applicant is entitled to the relief sought.

3. Applying the principles set out in the **Maina -vs- Mugiria case** (above), and considering the circumstances both before and subsequent to the filing of the plaint, and further considering the nature of the action, I am satisfied that the applicant should not be condemned unheard. Whether or not his claim succeeds is another matter, and whether or not the appeal eventually succeeds is a matter for the judge who will hear the appeal. From the record, the case was meant to proceed to formal proof after entry of the interlocutory jdugment on 1st October 2012. Between that date and 27th November 2012 when the matter was fixed for formal proof some action seems to have taken place, but there is no record of it. The question that begs for an answer in my view is: why did the case move from an order for formal proof to an order for NTSC without an appropriate record for what transpired in between the two orders? This court does not have before its eyes; the original lower court record, so it is difficult to say why there are blanks in the record. Secondly, it is clear from all the documents on record that there was more to the agreements the basis of the respondent's claim than meets the eye.

4. For the above reasons, I am satisfied that the applicant would suffer substantial loss if he is condemned unheard. It is a cardinal principle of natural justice that no man should be condemned unheard. I am also satisfied that considering the nature of the dispute between the parties, the instant application was filed timeously. I have also carefully considered the draft defence, and it appears to me that the see-saw between the criminal case and the civil claim shows that the applicant's defence is not frivolous.

5. As regards the issue of security, it is true that the applicant is silent on the same. Nonetheless, it is my considered view that it is appearing that the applicant was not served with court papers, it behoves this court to ensure that the applicant is not denied a hearing. In any event, this court has the power to impose such terms as seem just and reasonable in the circumstances.

6. In the premises, I allow the applicant's Notice of Motion dated 1st October 2013 in the following terms:-

1) Pending the hearing and determination of the appeal herein, there shall be stay of execution and proceedings in Kisii CMCC No.340A of 2012.

2) The applicant shall deposit into court the sum of Kshs.100,000/= (Kenya Shillings One Hundred Thousand only) within Fourteen (14) days of this ruling being security for costs of decree or order as may ultimately be binding upon the applicant.

3) The applicant shall file and serve his defence upon the respondent within Fourteen (14)

days from the date of this ruling.

4) In default of (2) and (3) above, the applicant's Notice of Motion dated 1st October 2013 shall stand dismissed with costs to the respondent.

5) *The respondent shall have the costs of this application*.

Dated and delivered at Kisii this 9th day of October, 2014

R.N. SITATI

JUDGE

In the presence of:-

Mr. C.A. Okenye (present) for the Appellant

Mr. Minda (deceased) for the Respondent

Mr. Mobisa - Court Assistant