REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 658 OF 2007

USAFI SERVICES LTD.....PLAINTIFF

VERSUS

GELU UNICRAFTS LIMITED.....1ST DEFENDANT

ALEX SANAIKA OLE MAGELO.....2ND DEFENDANT

LUCY MUTHONI KAHIA MAGELO.....3RD RESPONDENT

R U L I N G

The applicant's notice of motion dated 8th April 2014 seeks stay of further proceedings in this suit pending lodging, hearing and final determination of an intended appeal against part of the ruling and order made by **Hon. Justice Hatari Waweru** on 14th February 2014.

Briefly, the applicants are the defendants in this suit wherein the respondents/plaintiffs obtained judgment for Ksh. 3,615,540.00 with interest being purchase price paid in consideration for a foiled sale of land transaction. The said judgment was entered in default of defence after they had entered appearance on 15th April 2008. Final judgment was entered on 18th May 2012 after a hearing on 29th February 2012.

The defendants/applicants then sought to set aside the interlocutory judgment as well as final judgment entered against them and vide a ruling delivered on 12th February 2014, by **Hon. Justice Hatari Waweru**, the final judgment was set aside to enable the defendants participate in the hearing. He further found that it was not in the interest of justice to set aside interlocutory judgment which was lawfully and properly entered, or grant the defendants leave to file defence.

The Judge took into account the fact that the defendants herein had not denied receiving the claimed amount from the plaintiff towards purchase price of Ksh. 4 million. He further observed that there was no positive averment in the defendants papers that they had title to the land they purported to sell or that they were in a position to sell the same to the plaintiff.

The defendants herein are aggrieved by the said ruling by the **Hon. Justice Waweru** and have lodged a notice of appeal. They contend that they were denied an opportunity to be heard in defence and therefore failure to set aside interlocutory judgment occasioned a miscarriage of justice as they will not be in a position to effectively participate in the proceedings and fully defend their case if the interlocutory judgment is still intact. They have also annexed to this application a draft memorandum of appeal to the Court of Appeal.

Counsel for the defendants/applicants relied on the decision in **HCCA 122 of 2006 Daniel Maore – Vs – Miriti M'Nkanatha** Per **Hon. Ouko J** and submitted that they have demonstrated that there was sufficient cause for the orders sought to be granted as the power to issue the orders sought falls entirely on the unfettered discretion of this Court which is not bound to follow the strict rules under Order 42 rule 6 (2) of the Civil Procedure Act.

He further submitted that the application had been filed timeously without delay and that they had an arguable appeal with high chances of success. He implored the Court to consider the consequences of having an appeal proceeding before the Court of Appeal and at the same time this Court proceeding with the hearing, urging that the Court herein will be compelled to go through many motions should the appeal be determined in favour of the applicants. Further, that no prejudice will be suffered by the plaintiff if the stay of proceedings is ordered as they will have an opportunity to restate their case while giving the applicant an opportunity to defend the suit. He further submitted that if the proceedings are not stayed and they are not allowed to defend the suit, then they will be restricted to challenging the interest charged by the plaintiff and no more. He prayed for the orders stating that the plaintiff can adequately be compensated by an award of damages. Counsel resisted any orders for deposit of security and or deposit of decretal amount in an interest earning account as there was no decree capable of being executed, final judgment having been vacated by the same ruling which the defendants are challenging and as they are not seeking an order of stay of execution of decree pending appeal.

He cited the Daniel Maore M'Rithi case to support that contention stating that the principles applicable in application for stay of proceedings and stay of execution are very different and should not be confused.

In opposition to the application herein, the plaintiff submitted that grant of orders sought will seriously prejudice the plaintiff as the money in question is liquidated and was received by the defendant from 1998 to 2007. She submitted that as there has been no denial that the defendants received the claimed sum of money, they had no defence to the suit herein to the tune of Ksh. 3,615,540.00 out of 4 million shillings. Which amount has been enjoyed by the defendants. She urged the Court to find that it is not in the interest of justice to grant the orders sought as a successful litigant should not be denied the fruits of their lawfully obtained judgment. She further urged the Court to disregard the plea that it was mistake of counsel that gave rise to the defendant's failure to file defence in time as alluded by the **Hon. Justice Hatari Waweru** in his ruling of 12th April 2014. She however urged that should the Court be inclined to grant the orders sought then the applicants should be conditioned to deposit the decretal sum to be deposited in a joint account to be opened by advocates for both parties to safeguard the interests of the plaintiff.

I have carefully considered the defendant's applicants' application, the grounds upon which the same is based and the supporting affidavit sworn by the 3rd defendant/director of the 1st defendant company Ms Lucy Muthoni Kahia Magelo on 8th April 2014 and the annextures thereto.

I have also considered submissions by Mr Inyangu advocate for the applicant in support of the application and the opposing affidavit sworn by Geoffrey Chege Kirundi and submissions by counsel for the plaintiff M/s Kamau.

The test as to whether this Court can grant the orders of stay of proceedings are first, that the applicant has an arguable appeal. The thrust of the intended appeal surrounds the failure by **Hon. Justice Waweru** to set aside interlocutory judgment. They content that that failure has occasioned them prejudice as they are not enabled to file defence to defend the suit fully thereby being denied an opportunity to be heard.

The Court of Appeal in **Chris Bichage – Vs – Richard Nyagaka Tongi & 2 Others [2013] eKLR** at page 7 of the ruling observed that:

> ***"The law regarding application for stay of execution, stay of proceedings or injunction is now settled. the applicant who would succeed upon such an application must persuade the Court on two limbs, which are, first, that this appeal or intended appeal is arguable, that is to say, it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to***

succeed, would be rendered nugatory. The two limbs must both be demonstrated and it would not be enough that one is demonstrated."

The Court went further and stated that Per **Hon. Justice Onyango Otieno JA**,

"I do not think, in law, it is necessary that there be more than a certain number of arguable issues for the Court to find that the appeal filed or the intended appeal is arguable. In fact, in law, one arguable point suffices for that finding."

The Court of Appeal in the recent decision of **Mumias Sugar co. Ltd – Vs – Mumias Outgrowers Co. 1998 Ltd [2014] eKLR ca 233 of 2013 (ur 168/13)** Per **Nambuye, Maraga** and **Warsame JJA** reiterated the above principles at page 5 of their ruling that:

"We are alive to the fact that in applications of this nature, the applicant need only show that the appeal deserves the court's consideration."

Referring with approval the decision in **Dennis Mogambi Mongare – Vs – The Attorney General & 3 Others CA NRB 265/2011 (UR 175/2010 -unreported)**

In the application before me, the applicants have submitted that they are aggrieved by the failure of the Learned Judge **Hon. Waweru** to set aside interlocutory judgment. In their view, allowing them to defend the suit by setting aside the final judgment and therefore decree alone, without according them an opportunity to be heard is prejudicial and does not serve the interests of justice.

In my view this point as raised is an arguable one, taking into account the cardinal principle of law that no individual ought to be ousted from the seat of justice by failure to hear them to ventilate their grievances. I am enjoined on this point by the Court of Appeal decision (judgment) **Per Visram, Koome & Odek JJA in Nyeri CA No. 18 of 2013** that the inherent jurisdiction vested in the Court was meant to ensure the ends of justice are achieved. In addition, the Court also observed that:

"Nowadays pendulums have swung and the Courts have shifted towards addressing substantive justice and no longer worship at the alter of technicalities."

It was further argued by the applicants that the Court should consider the consequences of two cases proceeding simultaneously at the High Court based on interlocutory judgment and on appeal challenging the proceedings and seeking to set them aside. On this point, I find the argument by counsel plausible. The Courts are expected to advance the overriding objectives in the administration of justice which justice which includes saving on time and resources. It would be a waste of time and resources if the appeal as intended succeeds whereas on the other hand the High Court has continued to hear and determine the dispute which is based on a liquidated sum.

As I have stated before, the right to a hearing has been and is a well-protected right in our Constitution and is the cornerstone to the rule of law **(CA 18/2019) (supra)**. The appeal as intended, in my view, is therefore arguable and not frivolous.

As to the consequences of proceedings with the High Court matter whereas the appeal is pending, it has been further argued that the appeal shall be rendered nugatory if the case herein proceeds and decree is issued and executed against the applicants.

As was observed in the **Mumias Sugar Co. Ltd – Vs – Mumias Outgrowners Co (1988) Ltd (supra)**, the Court has unfettered discretion to make orders, in appropriate cases that may be necessary for the ends of justice, or to prevent an abuse of the processes of the Court (see **Jackson Kipkemboy Kosgei & Anotherr – Vs – Bishop Samwel Muriithi Njogu & 8 Others [2008] eKLR.**

Whereas at this stage the Court cannot make observations that tend to be definitive of either fact or law touching on the merits or demerits of the impending appeal as that may embarrass the ultimate hearing of

the main appeal, the Court of Appeal in **Stanley Kangethe Kinyanjui – Vs Tonny Ketter & 5 Others [2013] eKLR CA 31 of 2012** observed, among others that *"the terms nugatory"* has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling … that whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages, will reasonably compensate the party aggrieved; and that where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecunity, the onus shifts to the latter to rebut by evidence of the claim.

The prevailing situation between the parties to this suit is that the final judgment which includes decree was set aside by the order of 12th June 2014. What remains on record undisturbed is interlocutory judgment and the law requires that the plaintiff formally proves their claim against the defendants. The applicant entered an appearance and therefore they are expected to appear and all that they can do is cross examine the plaintiff on their evidence to be adduced and no more.

Yet as it is a well known legal principle, parties are bound by their pleadings and cross examination however probeful it may be, does not amount to a defence. If there is no defence to challenge the plaintiff's allegations, the plaintiff has an advantage over the defendants which if the appeal succeeds and execution has already taken place, would render the appeal nugatory.

I am therefore satisfied, based on the submissions before me and the Court of Appeal decisions I have relied on that the applicant has satisfied this Court that they deserve being granted stay of proceedings herein pending the filing, hearing and final determination of the intended appeal. I therefore order that the proceedings herein between the parties be stayed pending the filing, hearing and final determination of the intended appeal.

The plaintiff can adequately be compensated by an award of costs and I award them costs of preparing and attending to this application.

As the execution is not imminent in this matter, since final judgment has not been entered, I hesitate to order for depositing of the claimed amount into a joint bank account by both advocates. My reasoning is that the principles applicable in this case where what is sought is stay of proceedings are different from those applicable in cases of stay of execution. I am enjoined by **Ringera J** (as he the was) in the case of **Global Tours & Travels Ltd – Winding up Cause No. 43 of 2000** when he expressed the same principles thus

> ***"as I understand the law, whether or not to grant a stay of proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice such discretion is unlimited save that by virtue of its character as a judicial discretion it should be exercised rationally and not capriciously or whimsically. 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.***
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> ***In deciding whether to order a stay the Court should essentially weigh the pros and cons of granting the order. And in considering those matters it should bear in mind such factors as the need for expeditious disposal of the case 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."***

I am aware that under Order 42 rule 4(1) the appeal or intended appeal does not operate as stay of the proceedings herein but I am satisfied on the application that sufficient cause has been shown to warrant stay, and I so grant. As stated earlier, the plaintiff shall have costs of this application.

Dated, signed and delivered at Nairobi this 4th Day of November, 2014.

R.E. ABURILI

JUDGE