Joseph v Soy & another (Civil Application E499 of 2024)
[2025] KECA 1115 (KLR) (20 June 2025) (Ruling)

Neutral citation: [2025] KECA 1115 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E499 OF 2024

W KARANJA, K M'INOTI & P NYAMWEYA, JJA

JUNE 20, 2025

BETWEEN

VICTORIA MWIKALI JOSEPH ..... APPLICANT

AND

MARGARET WAITHERA SOY ..... 1ST RESPONDENT

GEN ELMA LIMITED ..... 2ND RESPONDENT

(Application for stay of further proceedings pending the hearing and determination of an appeal from the ruling and order of the High Court of Kenya at Kajiado (Mutuku, J.) dated 18th September 2024 in HCCC No. 003 of 2022)

RULING

1. On 22nd February 2022 the respondents applied in the High Court of Kenya at Kajiado for default judgment against the applicant for failure to enter appearance and file defence, although she was duly served with the plaint and summons to enter appearance. The court directed the respondents to serve the application upon the applicant for mention on 30th March 2022.

2. On the material day, all parties were represented in court through counsel. Counsel for the applicant opposed the application for default judgment, contending that the applicant had not been served with summons to enter appearance. In the event, the court adjourned the application to 26th May 2022 for cross-examination of the process server and the applicant. The court expressly ordered that the cross-examination would take place in open court.

3. On the scheduled day for cross-examination, the process server and the respondents' counsel were present in open court, but the applicant's counsel appeared online from Nairobi. Due to the non-attendance of the applicant and her counsel as directed by the court, counsel for the respondents

applied for default judgment on the basis that the process server's averments in the affidavit of service were uncontroverted.

4. Upon considering the matter, the court delivered its ruling on 25th July 2022. It took into account that there was evidence that the plaint, verifying affidavit, witness statements and summons to enter appearance were served upon the applicant and that she accepted service and appended her signature on the copies of the documents. That notwithstanding, the applicant did not enter appearance of file defence within the prescribed time.

5. After satisfying itself that the applicant had been duly served, the court noted that the respondents' claim was for a liquidated sum and for general damages. Accordingly, the court entered judgment in favour of the respondents for the liquidated amount of Kshs 23,740,199.00, with interest from 17th February 2022. As for the unliquidated claim, the court directed the suit to be set down for formal proof.

6. On 27th January 2023, after changing her advocates, the applicant applied to the High Court to set aside the default judgment dated 25th July 2022. That was some six months after the default judgment. This time round, the applicant did not deny service of the summons, but instead blamed her previous advocates for failure to enter appearance and file defence within the prescribed time and for failure to notify her and to attend court for the cross- examination of the process server.

7. After considering the application, the court found no merit in the same and dismissed it with costs, vide a ruling dated 18th September 2024. After lodging a notice of appeal, the applicant filed the instant application for stay of proceedings.

8. In her supporting affidavit sworn on 3rdOctober 2024 and written submissions dated 16th October 2024, the applicant contends that she has an arguable appeal, based on her memorandum of appeal.

   She intends to argue, among others, that the High Court erred by failing to consider the principles of natural justice; by failing to consider whether the draft defence raised triable issues; by visiting mistakes of counsel on the applicant and by failing to strive for substantive justice.

9. As to whether the appeal would be rendered nugatory, it was contended that the respondent's had withdrawn their claim for general damages and that the judgment was ripe for execution. In support of the application, the applicant relied on *Stanley Kang'ethe Kinyanjui v. Tony Ketter & 5 Others* [2013] KECA 378 (KLR); *Kenya Shell Ltd v. Kabiru* [1986] eKLR; and *International Laboratory for Research on Animal Diseases v. Kinyua* [1990] eKLR.

10. The respondents opposed the application vide a replying affidavit sworn by the 1st respondent on 11th October 2024 and written submission dated 4th November 2024.

11. As regards an arguable appeal, the respondents submitted that the applicant merely faults the trial court in the manner in which it exercised its discretion in refusing to set aside the default judgment, without demonstrating how the court erred in exercise of its discretion. On whether the appeal would be rendered nugatory, the respondents submitted that the applicant had not demonstrated that they were impecunious and unable to refund the decretal amount should the appeal succeeded. They contended that they had the means to repay the said amount if the need arose.

12. In support of their case the respondents relied on *Stanley Kang'ethe Kinyanjui v. Tony Ketter & 5 others* (supra); *Kenya Railways Staff Retirement Benefits Scheme v. Milimo Muthomi & Co. Advocates & 2 Others* [2022] KECA 491 (KLR) and *Kuko & Another v Ali & Another* [2024] KECA 305 (KLR).

13. We have carefully considered the application, the ruling of the High Court, the submissions by counsel and the authorities they cited to expound on the Court's jurisdiction under rule 5(2) (b). Starting with whether the applicant has presented an arguable appeal, we must note that although at this stage we are not required to make any definite findings, we are nevertheless required to satisfy ourselves that prima facie, there is even one bona fide issue worth of consideration by the Court, even though the Court might not eventually agree with the applicant. In *Frankline Kilonzo & 3 others v State Law & Another*, *CA No. E201 of 2024*, this Court held as follows:

> "At this stage the Court does not determine the issues to be canvassed in the appeal definitively. At the same time, the Court does not shy away from calling out a frivolous appeal when it encounters one."

14. And in *Paul Karumbi Keingati & 4 others v. Dr. Ann Nyokabi Nguthi & 4 others* [2015] eKLR, the Court explained as follows:

> "This Court has stated that in determining whether an applicant has presented an arguable appeal, it will not minutely delve into the issues, to avoid embarrassing the bench that ultimately hears the appeal. However, to the extent that we must determine whether there is an arguable appeal disclosed, we cannot avoid determining, on prima facie basis, whether indeed an arguable appeal is disclosed. A finding at this stage that an arguable appeal is disclosed or that none is disclosed does not bind the Court when it finally hears the appeal. Many are the times when on first impression an appeal is certified arguable and a relief under rule 5(2)(b) granted, only for the matter to be found bereft of merit upon the hearing of the appeal."

15. What is not in dispute is that the applicant is essentially appealing against exercise of discretion by the High Court in refusing to set aside a default judgment. We bear in mind that on principle, this Court will not readily interfere with exercise of discretion by the trial court except in exceptional cases. It is conceded by the applicant that the default judgment is a regular judgment in so far as she admits that she was indeed served with sermons to enter appearance.

16. We further note that although the applicant faults the learned judge for visiting the mistake of counsel on her, there was no affidavit from the applicant's previous advocate explaining the nature of the mistake that made it impossible to enter appearance and filed defence. Lastly, we believe that it does not lie in the mouth of a party who admits having been served with summons but failed to enter appearance and filed defence, to allege that the rules of natural justice were violated.

17. What the applicant has presented before us is a curious application where she asks the Court to exercise discretion in her favour and stay proceedings while she waits to challenge similar exercise of discretion by the High Court. In a situation where the Court is being asked to exercise discretion so that the applicant can challenge exercise of discretion by the trial court, the Court requires high degree of assurance that prima facie the exercise of discretion by the trial court was erroneous. We point out all this to show that the applicant will be hard-pressed to make out an arguable appeal.

18. Be that as it may, there is nothing on record to suggest that the respondents are impecunious or incapable of refunding the decretal amount. In her affidavit in support of the application, the applicant has not averred that the respondents are incapable of refunding the money. It is only in her written submission that she has made a fleeting statement that the respondents have not shown they are people of means. Without the applicant seriously suggesting that the respondents are incapable of refunding

the money, it is not clear how the applicant expected the respondents to answer to an issue that they had not raised.

19. Lastly, we bear in mind the salutary principle that this Court will not grant an order of stay of proceedings except in an exceptional clear and compelling case. In *Katangi Developers Ltd v. Prafula Enterprises Ltd and Another* [2018] eKLR this Court cited with approval the following passes from *Halsbury's Laws of England 4th edition, volume 37* at paragraph 330:

> "...stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore, the Courts general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not be allowed to continue."

20. Taking all the foregoing into account, we are not satisfied that the applicant has met both conditions for grant of an order of stay of proceedings under rule 5(2) (b) of the *Court of Appeal Rules*. The effect is that this application is hereby dismissed with costs to the respondents. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JUNE, 2025.

W. KARANJA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.