



Randolph Tindika t/a Tindika & Company Advocates v Marete (Civil Appeal 131 of 2019) [2023] KECA 690 (KLR) (26 May 2023) (Judgment)

Neutral citation: [2023] KECA 690 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 131 OF 2019
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
MAY 26, 2023**

BETWEEN

**RANDOLPH TINDIKA T/A TINDIKA & COMPANY
ADVOCATES APPELLANT**

AND

JANE MARETE RESPONDENT

(Being an appeal against the ruling and order of the High Court of Kenya at Mombasa (P.J.O. Otieno, J.) delivered and made on 11th April 2017 in High Court Civil Appeal No. 35 of 2017 Consolidated with High Court Civil Appeal Nos. 57, 58 & 59 of 2017)

JUDGMENT

1. In this appeal, the appellant, Randolph M. Tindika t/a Tindika & Company, Advocates has challenged an order made on April 11, 2017 by the High Court at Mombasa (P.J.O Otieno, J) in favour of the respondent, Jane Marete, staying execution of monetary judgments and decrees issued in several suits in favour of the appellant by the Magistrate’s Court at Mombasa.
2. The background is that the appellant and the respondent had an advocate/client relationship that did not end well. The appellant filed suits against the respondent before the Magistrates Court, being SPMCC No 2494 of 2014 SPMCC No 2495 of 2014; SPMCC No 2496 of 2014; SPMCC No 2497 of 2014 (the suits) to recover payments for work done and services rendered by the appellant as the respondent’s advocate. The appellant obtained judgments against the respondent in all those suits, the defences filed by the respondent having been struck out.
3. The respondent was aggrieved by those judgments and escalated the matters to the High Court at Mombasa in civil appeal numbers 35 of 2017; 57 of 2017; 58 of 2017; 59 of 2017. By separate applications dated February 27, 2017 and March 20, 2017 made in those appeals and filed through the firm of Chala & Company Advocates, the respondent sought, in the main, orders that there be a stay



of execution of the judgments and all consequential orders delivered on January 27, 2017 by the Senior Resident Magistrates court in the suits pending hearing and determination of the appeals.

4. The applications were supported by similar affidavits in which the respondent deposed that the judgments in favour of the appellant were delivered by the Magistrate's Court without notice to her advocates; that she stood to suffer irreparable loss if orders of stay of execution were not granted and that her intended appeals would be rendered nugatory if the stay orders were declined.
5. In opposition to those applications, the appellant filed grounds of opposition asserting that the applications lacked merit; that the applications offended the mandatory provisions of order 42 of the Civil Procedure Rules; and that in the unlikely event that the court would be minded to grant the orders of stay, then, the same should be conditional upon the respondent depositing the entire decree amounts either in court or in a joint interest earning account in the names of the advocates for the parties within fourteen days.
6. During a court appearance before the High Court on April 11, 2017, counsel for the parties consented to a consolidation of civil appeal numbers 57 of 2017; 58 of 2017; 59 of 2017 (no mention appears to have been made in the proceedings of that day to civil appeal numbers 35 of 2017).
7. Immediately after recording that consent, the learned judge of the High Court, on his own motion, in what the judge stated to be "for purposes of active case management" directed the respondent to file a record of appeal within 14 days and serve the appellant; that once the record is filed, the parties to attend in court on April 26, 2017 for directions on appeal; and that "for that reason the application dated April 27, 2017 (should be February 27, 2017) is abandoned on terms that status quo prevails."
8. The appellant was dissatisfied and sought and was granted leave to appeal and further expressed, after counsel for the respondent had sought an order for stay of execution that

"the court cannot order stay on an application it does not intend to proceed with". The High Court then issued an order, the subject of this appeal, as follows:

"As the court has on its own motion directed that the application for stay be abandoned to fast track the appeal, it is only just that the status quo now prevailing be maintained so that the appeal is not rendered academic. For that reason, I order that pending further orders herein there shall be stay of execution of the judgement and decrees appealed from against in these appeals."
9. The appellant has challenged that decision on seven grounds set out in his memorandum of appeal. The main complaint, however, is that the judge erred by giving orders, in the name of directions, without hearing the parties and thus violated the cardinal principle of natural justice.
10. During the virtual hearing of the appeal before us on December 8, 2022, the appellant, Mr Tindika, appeared in person and orally highlighted his written submissions. The appellant submitted that what was scheduled for hearing before the judge on the April 11, 2017 was the applications by the respondent for stay of execution; that the judge "proceeded to sidestep" the applications and instead gave directions and orders without hearing the parties. Citing decisions in Mebul Nemchand Haria v Hombe Sour Mills & another, civil appeal No 160 of 2004 [2013] eKLR; Savings & Loan Kenya Limited & Odongo, civil appeal No 6 of 1987 [1987] eKLR and JMK v MWM & another, civil appeal No 15 of 2015 [2015] eKLR, it was submitted that the course taken by the learned judge violated rules of natural justice and the orders should therefore be set aside.
11. Despite notice of hearing having been served, there was no appearance for the respondent during the hearing.



12. We have considered the appeal and submissions. It is clear from the record as captured above, that when the matter was before the judge on April 11, 2017, the parties agreed, and recorded a consent for the consolidation of the appeals, and in effect, the consolidation of the respondent’s applications for stay of execution of the judgments of the subordinate court in favour of the appellant. However, in what was clearly a noble intention towards expeditious disposal of the matter, the learned judge case managed the matter and directed the respondent to file her record of appeal within 14 days and fixed a date for April 26, 2017 “for directions on appeal and to take a date for hearing”. The judge did not, however, stop at case management but went on to “direct” that the respondent’s applications were “abandoned” yet proceeded, without hearing the parties on the “abandoned” applications, to effectively grant the orders that the respondent was seeking in those applications.
13. In effect, neither party was heard on the merits or otherwise of the respondent’s applications and neither did the judge consider the same. In the circumstances, the appellant has, in our view justifiably complained that principles of natural justice were breached and his right to be heard on the applications violated.
14. The circumstances in this appeal are somewhat like those in *Savings & Loan Kenya Limited & Odongo* (above) where the High Court had issued stay of execution orders without hearing the appellants. Frowning upon that approach Nyarangi, JA expressed:

“The judge has decided in a manner which is absolutely wrong and opposed justice. The very foundation upon which our judicial system rest is that a party who comes to court shall be heard fairly and fully. A judge who does not hear a party before him or the party’s advocate offends that fundamental principle and it the becomes the duty of this court to tell him so. People come to court as a last resort and we judges are employed to hear them and then determine their cases.”

15. In the same case, Gachuhi, JA was equally clear that:

“It is fundamental principle of justice, that parties who appear in court should be heard, and the determination of their grievances given.”

16. We are persuaded that by issuing the orders that he did, in the name of case management, without hearing the parties, the learned judge thereby erred by breaching the appellant’s right to natural justice. The right to be heard. Consequently, we allow the appeal and set aside the orders made by the High Court on April 11, 2017.
17. The matter is remitted back to the High Court for hearing *de novo*, the respondent’s consolidated applications dated February 27, 2017 and March 20, 2017 in civil appeal numbers 35 of 2017; 57 of 2017; 58 of 2017; 59 of 2017 before any judge other than P.J.O Otieno, J. The appellant will have the costs of this appeal.
18. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 26TH DAY OF MAY 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA



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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

