IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, OUKO & M'INOTI, JJ.A)

CIVIL APPEAL NO. 174 OF 2014

BETWEEN

DANIEL MAINGI MUCHIRI.....APPELLANT

AND

JUBILEE INSURANCE CO. LTD.....RESPONDENT

(An appeal from the Ruling and Orders of the High Court of

Kenya at Nairobi (Onyancha, J) dated 6th June, 2014

in

H. C. C. A. No. 195 of 2014)

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JUDGMENT OF THE COURT

1. In what we have characterized elsewhere as appeals filed in 'relay fashion', this is the first leg challenging the order made by **Onyancha, J.** on 6th June, 2014. The other appeals are **175/2014**, **136/2016**, **137/2016** and **138/2016**, challenging orders made on 18th June, 2014, 3rd March, 2015, 12th March, 2015 and 6th November, 2015, respectively. They all arose from the same proceedings in the High Court and were heard on the same day before the same bench, one after the other. Common to all appeals is the introduction of constitutional claims for the first time before the Court of Appeal on the basis that **Article 258** of the Constitution permits it. The issue has been analysed fully in CA 138/2014 and reinforced in CA 136/2016 supporting the conclusion that the claims do not lie to this Court. We need not therefore rehash the reasoning here. The grounds of appeal which double up as a constitutional petition in this matter raising the same issue must suffer the same fate.

2. There is another issue common to appeals 136/2016, 137/2016 and 138/2016 which does not feature in CA 174/2014 and 175/2014. That is the representation of the respondent here by the Firm of ***Majanja Luseno & Company Advocates,*** one of whose former partners, Justice Majanja, is now a sitting Judge of the High Court. We need not concern ourselves with that issue.

3. The background to the appeal is well covered in CA 138/2016 and again there is no good reason to rehash it. Suffice it to say that the appellant had obtained judgment on 7th May, 2014 from the

subordinate court in a declaratory suit for enforcement of a decree issued against its insured on 3rd May, 2014 for Sh. 1,273,520 and a certificate of costs for Sh. 105,575. An order for stay of execution was however granted for 30 days pending the filing of an appeal to the High Court. The appeal was filed on 20th May, 2014 and on 6th June, 2014, the respondent filed a motion seeking the following orders.

> ***"1. THAT service of this application be dispensed with and the same be heard ex parte in the first instance.***
>
> ***2. THAT there be a stay of execution of the Ruling and Order made by Honorable Senior Resident Magistrate (A.g) Mr. T. S Nchoe delivered on 7th May 2014 CMCC Number 6553 of 2013 (Daniel Maingi Muchiri vs Jubilee Insurance Company Limited) and subsequent Decree pending the hearing and determination of this Application.***
>
> ***3. THAT there be a stay of execution of the Ruling and Order made by Honorable Senior Resident Magistrate (A.g) Mr. T. S Nchoe delivered on 7th May 2014 CMCC Number 6553 of 2013 (Daniel Maingi Muchiri vs Jubilee Insurance Company Limited) and subsequent Decree pending the hearing and determination the Appellant's Appeal herein.***
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> ***4. THAT the costs of this application be in the cause."***

4. The apprehensions of the respondent in seeking protection of the court were expressed in a certificate of urgency filed with the motion and stating:

> ***"1. THAT the Appellant faces imminent execution with the granting of an application striking out the Appellant's defence on 7th May 2014 and which execution process shall render the Appeal herein nugatory as it shall not be able to recover the decretal sum from the Respondent.***
>
> ***2. Such other reasons and grounds to be adduced at the hearing hereof."***

5. It was amplified in the affidavit in support of the motion, the relevant portions of which we reproduce:-

> ***"4. THAT the Appellant and the insurer are apprehensive that the substantial decretal sum herein may not be recoverable should it satisfy the same as the Respondent may not be able to refund the said amount in the event the appeal is successful.***
>
> ***5. THAT in any event at the time of taking steps in the matter, there was a moratorium in respect of other related matters which stand stayed.***
>
> ***6. THAT we are willing to abide by any order as to security as the Court may order if the same is necessary given the new amendment to the Civil Procedure Act, Chapter 21 Laws of Kenya.***
>
> ***7. THAT there has been no attempt to delay this matter as the intention to appeal was disclosed to the Plaintiff timely.***
>
> ***8. THAT the lower court granted a limited stay for 30 days from 7th May 2014 which period shall lapse and the Respondent is likely to execute the resultant Decree hence the filing of the Application herein.***
>
> ***9. THAT I am advised by Steve Luseno Advocate, which advise I verily believe to be true that a Party has to be given an equal and affordable opportunity to access the court both in its original and appellate jurisdiction.***
>
> ***10. THAT I now annex hereto in a bundle marked "CN1" copies of documents in support of the averments herein."***

6. That is the matter that landed *ex parte* before Onyancha, J. on 6th June, 2014. The learned Judge recorded that he had perused the application and formed the view that an interim order for stay was deserved but would be conditional. He issued the following orders:-

> *"**1. THAT mention inter-partes on 18th June, 2014.***
>
> ***2. THAT service within 4 days.***
>
> ***3. THAT Respondent served to file a Replying Affidavit before or on 17th June, 2014.***
>
> ***4. THAT interim stay granted until 17th June, 2014 on condition that the decretal sum plus the assessed costs and court interests shall be deposited in Court on or before 16th June, 2014, in default of which the stay order shall automatically stand discharged.***
>
> ***5. THAT this order to be served with the application."***

The respondent and the appellant had complied with all those orders by 16th June, 2014.

7. In his 11-ground memorandum of appeal, shorn of prolixity and the constitutional issues raised therein, the appellant, through learned counsel **Mr. P. Ngoge,** complains that the orders were *'drastic, draconian, substantive, final and conclusive'* and ought not to have been granted *ex parte*; that the judge had no jurisdiction to grant the orders before admitting the respondent's memorandum of appeal; the orders could not issue on the basis of ***Order 41 Rule 4*** of the Civil Procedure Rules (CPR) which was cited by the applicant; that the order of stay granted by the subordinate court was still subsisting and there was no jurisdiction to issue another one; that the application was *res judicata* owing to the existence of the earlier order; that the Judge erred in failing to deliver a considered ruling; and that the appeal on which the application was predicated was frivolous and only meant to buy time for the respondent to delay settlement of the decree.

8. The appellant prayed that the *ex parte* order be set aside *ex debito justitiae*; execution of the decree should proceed as if it was not interrupted by the order of stay; and general damages for violation of human rights. In oral submissions, Mr. Ngoge assessed the general damages at Sh.2 million. He also confirmed that the decretal amount that was deposited in court was subsequently released to him on behalf of his client.

9. Responding to the appeal and submissions, learned counsel **Mr. Luseno,** pointed out that there was an error citing the procedural rule for seeking stay of execution which ought to be ***Order 42 Rule 6 CPR. Sections 1A, 1B*** and ***3A*** of the CPA were, in addition, cited in aid. Counsel submitted that the interim measure of protection was sought and properly granted in exercise of the discretion of the court; it was a money decree decision and there was a pending appeal; it was the appellant who offered to deposit the security; attachment had already been carried out, hence the need for expedition to save the situation; there was nothing permanent about the interim order since it was only given up to 17th June, 2014 and would have expired if not complied with; it would also have dissipated if service of the application for hearing was not complied with. Mr. Luseno disclosed that in the end, an intended appeal to the Court of Appeal was not successful, the decree became final and the money deposited in court was released to the decree holder's advocates, M/s O. P. Ngoge & Associates. In his view, that should have been the end of the matter.

10. We have considered the appeal fully. Since the original focus of it was to advance constitutional issues, it may not be obvious that the appeal challenges the exercise of judicial discretion. Judicial discretion, in the words of Madan, JA (as he then was) in the case of ***United India Insurance Co Ltd Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd vs East African Underwriters (Kenya) Ltd. [1985] eKLR,*** *"is of daily occurrence in the courts".* Madan, JA also restated the principles upon which an appellate court may be entitled to interfere with such discretion, thus:-

"The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established:

(i) the judge misdirected himself in law;

(ii) he misapprehended the facts;

(iii) he took account of considerations of which he should not have taken account;

(iv) he failed to take account of considerations of which he should have taken account, or

(v) his decision, albeit a discretionary one, is plainly wrong."

11. This Court in ***Matiba vs Moi & 2 Others, 2008 1 KLR 670***, further held:-

"The High Court was exercising discretion and the Court of Appeal was not entitled to substitute the Judges' discretion with its own discretion. It had to be shown that the Judges' decision was clearly wrong because he misdirected himself or because he acted on matters on which he should not have acted on or because he failed to take into consideration matters which he should have taken into consideration and in doing so, arrived at a wrong decision".

12. We shall apply those principles in considering the appeal before us. We first deal with the technical issues raised by Mr. Ngoge; that the citation of the wrong procedural rule divested the court of jurisdiction. In this era of ***Article 159 (2)***

(d) of the Constitution on procedural technicalities, one may frown on such objection. But long before the new Constitution and Article 159, there was ***Order 51 Rule 10*** of CPR which provides as follows:

"10 (1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application."

13. The substance of the application placed before Onyancha, J. was *"stay of execution"*. Under the CPR such orders can only be sought under ***Order 42 Rule 6*** and the citation of ***Order 41 Rule 4*** relating to *'Enforcement of Receiver's duties'* would make nonsense of the substance of the application. It was open to the court to take and follow the sensible view that was in consonance with the law and we have no reason to fault it.

14. Secondly, the application was said to be *res judicata* on account of the existence of a similar order. It is trite that *res judicata* applies to applications as it does to main suits. But the situation here is different. The order of the subordinate court was issued for 30 days and was expiring the same day the application for stay was filed in the High Court. It was a fact disclosed to the learned judge and he was aware that time was of the essence since the decree was ripe for execution. The respondent cannot be accused of expedition because that is one of the requirements for seeking favourable orders from the court. In our view, whether the calibration of official hours would amount to 30 days before the fresh order was issued or what percentage of confluence of the two orders offended the law, would be an exercise in hair splitting and therefore unnecessary. The jurisdiction of the High Court was not ousted.

15. As for the other arguments against grant of the orders, there can be no contention that a court of law has the power to grant *ex parte* orders and do so judiciously. It is all done in the interests of justice and to

prevent abuse of court process.

Order 42 donates very wide powers to the court in cases of intended appeals.

The court is:

> ***"..at liberty, on an application being filed, to consider such application and to make such order thereon as may to it seem just.."***

The court is supposed to satisfy itself that substantial loss may result, there was no unreasonable delay, and on security for performance of the decree before issuing the order. But even without these, or any formal application, the court may in an appropriate case make orders for stay. That is the import of ***Rule 6***

> ***(3)*** which states:
>
> ***"(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application."***

16. There is nothing in the record before us to show that Onyancha, J. did not have these principles in mind as he considered the *ex parte* application before him. A memorandum of appeal had been filed on 20th May, 2014 in accordance with ***Order 42 Rule 1*** CPR and therefore there was an appeal upon which the application was predicated. It did not require admission by the court, as submitted by Mr. Ngoge, in order to validate the application. That is also true of an intended appeal to this Court. A *'notice of appeal'*, not a *'valid notice of appeal'*, will suffice to give jurisdiction for consideration of an application for stay. We also find no permanence in the orders of Onyancha, J. as contended, as it is obvious that they would only last as long as the conditions upon which they were granted lasted or until 18th June, 2014 when the application was due for mention and directions *inter partes*.

17. On the whole, we find nothing plainly wrong in the manner Onyancha, J. exercised his undoubted discretion. The conditional *ex parte* orders issued on 6th June, 2014 were within the power of the court to grant and were lawful. We have no intention of supplanting the discretion of the learned judge. For those reasons, the appeal is dismissed with costs.

Orders accordingly.

Dated and delivered at Nairobi this 15th day of December, 2017.

P. N. WAKI

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR