REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCCA NO. 25 OF 2004

JOHN IKIAMA …… PLAINTIFF

VERSUS

MATHEW MURITHI MAITIMA …….. DEFENDANT

RULING OF THE COURT

The application before court is dated 13.5.2004 by way of Chamber Summons brought under Order IXB Rule 8, Order XXI Rule 22 of the Civil Procedure Rules and all other enabling provisions of the law. The application seeks in the main an order of stay of execution of the judgment and ruling in PMCC No. 48 of 2003 Isiolo pending the hearing and determination of the appeal. The application is supported by the supporting affidavit made and sworn by the applicant, Mathew Muriithi Maitima and on the grounds that:-

1. The appellant has a meritorious appeal and it may be rendered nugatory if the stay is not granted.

2. The defendant has appealed against the ruling of the learned magistrate which gave a conditional stay.

3. The appellant has a plausible appeal.

In the affidavit sworn on 6.5.2004, the applicant has deponed that the ruling for setting aside ex parte judgment dated 17.2.2003 was adversely conditional and that applicant's property is about to be attached. That the ex-parte judgment was prejudicial to the applicant as he was never served with summons to enter appearance and that the conditional setting aside of the ex-parte judgment was unfavourable to the applicant and that unless the order of stay sought by this application is granted the applicant is likely to suffer substantial loss. That no prejudice is likely to be caused to the respondent if the order sought is granted to the applicant. Further, that it would be in the interests of justice to grant the order of stay of execution until the appeal is heard and determined.

The application is opposed. The replying affidavit is made and sworn by Julius Mbaabu M'Inoti advocate who has deponed that he is competent to swear the affidavit as he has conduct of the case on behalf of the respondent. That summons to enter appearance were duly served upon the respondent. Though the deponent said that the affidavit of service was duly filed in court no copy of it was annexed to the replying affidavit. That the conditional setting aside of the ex-parte judgment by the lower court was

procedural and done after the court satisfied itself of the circumstances and nature of the case before it. That the applicant is a vexatious litigant who should not be granted the order sought.

The facts leading to the filing of the applicant's application are that on 19.3.2004 the applicant filed a chamber application before the Senior Resident Magistrate Mr. J. Omburah sitting at Isiolo. The application was brought under Order IXA Rule 10 of the Civil Procedure rules, sections 63(e), 3 and 3A of the Civil Procedure Act seeking an order setting aside ex parte judgment entered against the defendant/applicant on 17.12.2003. In granting the application the learned magistrate allowed the application on condition that the applicant deposits with the court the sum of Kshs. 381.803/= within twenty one (21) days from 27.4.2004 and to thereafter file a defence within seven (7) days after making such a deposit. The applicant has appealed against the said ruling granting conditional setting aside of the ex-parte judgment. There are seven grounds of appeal. I set out the seven grounds as follows:-

1. The learned magistrate erred in law in not appreciating sufficiently or at all the jurisdiction conferred upon the court on an application seeking to set aside an exparte judgment.

2. The learned magistrate erred in law in not holding that the applicant was never served with summons to enter appearance.

3. The learned magistrate erred in law by allowing expert evidence of a medical officer to be adduced by the respondent.

4. The learned magistrate erred in law by according decretal amount way beyond the pecuniary jurisdiction of the court.

5. The learned magistrate erred in law and fact by condemning the appellant unheard.

6. The learned magistrate erred in law by failing to consider whether or not the defence annexed to the application was valid or reasonable or raised any triable issues, against the respondent's claim.

7. The learned magistrate erred in law and fact by failing to give costs or thrown away costs to the respondent but instead ordered the appellant to deposit the whole decretal amount with the court as a condition of setting aside the exparte judgment.

Mr. Kirima for the applicant submitted that the conditional setting aside was punitive to the applicant who does not have the means to raise in a lump sum the sum of Kshs. 381,803/= ordered to be deposited in court. That unless the order of stay sought herein is granted, the applicant's pending appeal will be rendered nugatory should the same succeed. Further, Mr. Kirima took issue with the replying affidavit sworn by the respondent's advocate and urged this court to strike out all paragraphs deponing to contentious matters as provided under Order 18 Rule 6 of the Civil Procedure Rules. He singled out paragraph 9 of the said affidavit as a good candidate for striking out. Mr. Omayo for the respondent faulted the applicant's application as being fatally defective for failure to annex copy of decree sought to be stayed. That further, the application having been brought under the wrong section of the law, namely order 21 instead of Order 41 of the Civil procedure Rules, should not be allowed to stand. That the affidavit sworn by Mbaabu M'Inoti was advocate not scandalous. In brief reply, Mr. Kirima submitted that order 50 Rule 12 provides reprieve for the applicant on the issue of whether or not application should have been brought under Order 41 of the CPR. That the annexing of the ruling to the application was all that was needed in an application of this nature and not the decree.

I have considered the submissions by learned counsels. I have also considered the pleadings and in

particular the affidavits in support of and in opposition to the application. The issue to be decided by the court is whether on the facts before it, the applicant has an arguable ground to canvass at the appeal; in other words has the applicant established that the pending appeal is not a frivolous one and secondly whether the intended appeal, if it succeeds, would be rendered nugatory if stay of the order of the trial court is not granted.

Mr. Kirima has argued that the pending appeal is not frivolous and from the grounds of the appeal, there are both matters of law and fact that the applicant seeks to canvass at the appeal, for example whether the court properly exercised its jurisdiction in considering the application to set aside the ex parte judgment and whether indeed the learned magistrate was right in condemning the applicant without giving him a chance to be heard. Infact each of the seven grounds of appeal represents an arguable ground to be canvassed at the hearing.

It follows therefore that if a stay is not granted in this case, then the applicant who has already been arrested and committed to civil fail for failing to raise the decretal amount is likely to be arrested again and might serve the jail term before the appeal is heard and determined. If such a situation were to arise, the appeal, if successful, would indeed be rendered nugatory.

I have also given thought to the respondent's contention that the applicant's application is fatally defective for having been brought under the wrong order. I do agree with Mr. Omayo that order 21 rule 22 would have been applicable if the applicant's application was before the court to which the decree had been sent for execution. Nevertheless, I also concur with Mr. Kirima that this error is not fatal to the applicant's application. Order 50 Rule 12 provides that:-

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

This is a saving provision for the applicant's application. I think that having found as I have found that the application is merited, I do not think that it is necessary to go into the merits or demerits of the replying affidavit having been made and sworn by the respondent's advocate. I need only mention that advocates need to remind themselves every time that as much as possible, the litigants themselves should swear the affidavits in order that advocates do not descend into the litigation arena where they may be required to be cross-examined on the contents of the affidavits.

In making this ruling I have been guided by the court of appeal decisions in the following cases:-

1. Nairobi Civil application No. NAI 200 of 1997 (86/97 UR) between DHANJAL INVESTMENTS LTD and SHABAHA INVESTMENTS LIMITED.

2. Nyeri civil application No. NAI 29 of 2003 (NIR 17/2003) between M'IKIARA M'RINKANYA & ANOTHER and GILBER KABEERE MBIJIWE.

3. Nairobi civil appeal No. NAI 60 of 1990 between MADHUPAPER KENYA LTD and CRESCENT CONSTRUCTION CO. LTD.

The parties' advocates did not cite any authorities.

In the circumstances outlined above, I allow the application and grant orders in terms of prayer 2 of the chamber summons dated 13.5.2004. The costs of this application shall be costs in the intended appeal.

It is so ordered.

Dated and delivered at Meru this 20th day of December 2004.

RUTH N. SITATI

Ag JUDGE

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