



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 228 OF 2015

FREDRICK KITHYA KITUNGA.....APPELLANT/APPLICANT

VERSUS

CHRISTOPHER MULWA MUNGUTI..... RESPONDENT

RULING

1. The appellant herein, took out the motion dated 5th October 2015 in which he sought for the following orders:

1. ***THAT the application herein be certified urgent and heard ex parte in the first instance.***
2. ***THAT this Honourable Court do review the ruling and order made on 25th September 2015 dismissing the Appellant's/Applicant's Notice of Motion dated 21st May 2015 and the same be vacated or set aside and an order made allowing the said application as prayed.***
3. ***THAT a stay of execution be granted pending the hearing and determination of this application.***
4. ***THAT the costs of this application abide with the appeal.***

2. The motion is supported by the affidavit of Christine Atieno Otieno sworn on the same date. The respondent opposed the motion by filing grounds of opposition/points of law.

3. When the motion came up for interpartes hearing, learned counsels from both sides presented oral submissions. It is the submissions of the appellant that the ruling delivered on 25.09.2015 is punitive against the appellant and that there are sufficient reasons for it to be reviewed and set aside. The appellant's advocate admitted that she made an inadvertent mistake when she failed to disclose the figure of appeal of kshs.600,000/=. The appellant argued that the aforesaid figure was excessive and that should the amount be released to the respondent, he will not be able to refund the amount if the appeal succeeds since the respondent is a man of straw. The appellant further averred that he is ready and willing to provide security. The respondent on the other hand vehemently opposed the motion on the basis that it does not meet the criteria set in determining applications for review.

4. It is also argued that the motion was dismissed on its merits hence there is no room for review. The appellant further pointed out that the motion was res judicata.

5. I have considered the rival submissions plus the material placed before me. The main order sought is to have the order dismissing the motion dated 21.5.2015 reviewed and set aside. The appellant is of the view that the motion was dismissed due to the fact that the appellant's advocate did not disclose the judgment sum of ksh.600,000/=. I have re-examined the ruling of the trial court delivered on 25.09.2015. This court was able to discern from the pleadings that the trial court gave an award which

the appellant feels is excessive. This court also noted that the judgement sum was not stated. This court formed the opinion that it was difficult in the circumstances to make a finding that the judgment sum was excessive. The appellant states that his advocate made a mistake by failing to avail the figures. In my considered view, it would appear that the appellant is saying that there is an error apparent on the face of record. That is to say that there was an inadvertent mistake by the advocate for the appellant. The respondent is of the view that the mistake is not self evident on the face of record. It is the respondent's argument that the current motion was meant to cause further delay and to force parties to opt for a renegotiation. Both learned counsels agree that the judgement sum awarded to the respondent by the trial court is kshs.602,700. They also agree that the aforesaid figure was not stated in the motion dated 21.5.2015. It is also not in dispute that the failure to state the judgement sum was the mistake of the appellant's counsel. The question is whether the omission was of any significance to this dispute? In my humble view, the figure left out is important because it will enable the court assess whether or not the amount awarded is excessive on appeal. It will also assist the court to determine whether or not the respondent is capable of refunding the same if the appeal is successful.

6. The other question which must be determined is whether or not the motion meets the conditions required in applications for review. Under Order 45 rule 1(1)(b) of the Civil Procedure Rules, an applicant can lodge an application for review on the basis of a mistake or error apparent on the face of record or for any other sufficient reason. In the motion before this court, the applicant has averred that the court ruled against his application on the basis of his advocate's mistake of omission. I find the argument to raise sufficient reason.

7. I am satisfied that the applicant was entitled to apply for review.

On account of the above reasons, I am convinced that the motion is well founded. Consequently the motion is allowed. The order dismissing the motion dated 21.5.2015 is set aside and is substituted with an order allowing the same. For the avoidance of doubt this court grants the Applicant an order for stay of execution of the decree of the trial court issued on 29th April 2015 pending appeal on condition that the appellant deposits the principal sum of sksh.600,000/= in an interest earning account in the joint names of the advocates and or firms of advocates appearing in this appeal within 30 days from the date hereof. Costs of the motion to abide the outcome of the appeal.

Dated, Signed and Delivered in open court this 19th day of February, 2016

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent