



REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 48 of 2011

DAN LALLY WAMANI APPELLANT/APPLICANT

VERSUS

ISAAC AYAKO ONGAKI 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. What is before court is a Notice of Motion dated 8th November 2012 by which the applicant herein Dan Lally Wamani prays for **ORDERS THAT:-**

1. *The instant application be certified urgent and same be heard Ex-parte in the first instance.*
2. *Pending the hearing and determination of the instant application, the Honourable Court be pleased to grant an Interim Order of stay of Execution of the Judgment and Decree vide KISII CMCC NO.648 OF 2006, dated 24th November 2010, together with all consequential orders and in particular, the Warrants of Attachment and Sale dated 22nd October 2012.*
3. *The Honourable Court be pleased to grant an Order of stay of Execution of the Judgment and decree vide KISII CMCC NO.648 OF 2006, dated 24th November 2010 together with all consequential orders and in particular, the Warrants of Attachment and Sale dated 22nd October 2012, pending the hearing and determination of the instant appeal.*
4. *The honourable court be pleased to issue and/or give directions relating to the expeditious hearing, adjudication and determination of the appeal herein.*
5. *Costs of this application do abide the appeal.*
6. *such further and/or other orders be made as the court may deem fit and expedient.*

2. The application is based on 15 grounds set out on the face thereof and is also supported by the applicant's affidavit sworn on 6th November 2012. The applicant avers that being aggrieved by the judgment of the trial magistrate in Kisii CMCC NO.648 of 2006 he applied for and was granted requisite leave to appeal out of time vide order rendered on the 9th March 2011. That an appeal was duly filed and

the court also granted interim orders of stay of execution on condition that the decretal sum be deposited in court and that the said decretal sum was deposited in court.

3. He further averred that on the 4th October 2012 this court rendered a ruling in respect of the application dated 9th March 2011 and as a result struck out the said application. That as a consequence, the 1st respondent has commenced execution proceedings and as a result of the 1st respondent's actions the applicant's movable properties are now exposed and on the verge of imminent attachment. That the said execution proceedings have been commenced despite the deposited sum and the attachment process mounted by or at the instance of the 1st Respondent amounts to double jeopardy.

4. On 9th November 2012, this court granted orders (a) and (b) of the application and ordered the application to be heard inter partes on the 22nd day of November 2012.

5. The application was opposed. The 1st Respondent Isaac Ayako Ongaki filed a notice of preliminary objection on grounds that:-

1) *The appeal was wrongfully and unlawfully instituted and any interlocutory proceedings based on such an appeal are null and void.*

2) *The application for stay of execution of judgment and decree in KISII CMCC NO.648 OF 2006 dated 24th November 2010 is based on a memorandum of appeal which was filed contrary to the provisions of **Order 9 Rules 5, 6 and 9 of the Civil Procedure Rules.***

3) *The purported memorandum of appeal having been filed and served way back on 16th day of March 2011 is due for dismissal pursuant to the provisions of **Order 42 Rule 35 (2) of the Procedure Rules.***

4) *The application violates the principles of **section 1A, 1B and 3A of the Civil Procedure Act.***

5) *The jurisdiction of this court is wrongly invoked.*

6. Both counsel agreed to argue the application by way of written submissions. I have read and considered both sets of submissions. I also wish to go back to the ruling of the court delivered on 4th October 2012 where this court addressed its mind on the provisions of **Order 9 Rules 5, 6 and 9 of the Civil Procedure Rules, 2010** and held that:-

“The relevant provisions of Order 9 of the Civil Procedure Rules are

couched in mandatory terms so that it behoves a litigant who wishes to change advocates after delivery of judgment to follow the stipulated procedure when it is intended to bring another advocate on board. What the applicant needed to do to comply with the said provisions was very easy indeed but instead of doing so the applicant decided to take a short cut. In short the applicant is not properly before this court, having failed to do that which was required of him under the provisions of Order 9 of the Civil Procedure Rules. He who wants equity must do equity.”

7. The above ruling was delivered on the 4th October 2012 in the presence of a representative of counsel for the applicant. I have carefully perused the file and I fail to understand why counsel did not ensure that he is properly on record so as to conduct his client's matters. It goes without saying that counsel cannot ignore the orders of a valid ruling given by this court then come back to the same court without rectifying his mistakes and expect the same court to come to his aid.

8. I am therefore persuaded that the preliminary objection raised by the 1st respondent dated 13th November 2012 is valid and is sustained. There is no doubt that the instant application is similar in substance to the earlier application decided by this court on 4th October 2012. The instant application is

therefore *res judicata* and is an abuse of the due process of the court.

9. Accordingly the Notice of Motion dated 6th November 2012 is struck out with costs to the 1st respondent.

10. It is so ordered.

Dated and delivered at Kisii this 27th day of March, 2013

**RUTH NEKOYE SITATI
JUDGE.**

In the presence of

Mrs E. Asati for Oguttu-Mboya for Appellant/Applicant

M/s Ombachi & Co. (absent) for 1st Respondent

No appearance for 2nd Respondent

Mr. Bibu Court Clerk

**RUTH NEKOYE SITTI
JUDGE.**

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