



REPUBLIC OF KENYA

High Court at Mombasa

Civil Appeal 166 of 2012

FEISAL YASIN APPELLANT

V E R S U S

NARESH RATHOD1ST RESPONDENT

FASTRAK LOGISTICS LIMITED 2ND RESPONDENT

RULING

The Notice of Motion application dated 29th day of January 2013 is brought under Order 42 rule 6 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya.

Principally it seeks the reinstatement of exparte orders of the Court and further orders that the conditions given to the Applicant for a stay of execution be changed to include an option to give alternative security in the form of fixed and or movable assets.

The Respondents obtained a judgment in their favour and against the Applicant in Civil Suit No. 4350 of 2003 filed in the lower Court on 12th September 2012.

Dissatisfied with that judgment the Applicant filed an application for stay of execution before Hon. Odenyo (SPM) which application was heard and granted on 13th December 2013 but with the condition that the Applicant deposits the Decretal amount within three weeks in an interest bearing account in the joint names of the Advocates for the Applicant and that of the Respondents.

Upon failure to fulfil these conditions the Applicant filed another application for stay of execution under a Certificate of Urgency dated 27th December 2012 in High Court. It was certified urgent and it was ordered that half of the Decretal amount be deposited in Court within 30 days pending hearing interpartes. The conditions were never complied with and for the expiry of the exparte order filed the present application.

It is the Applicants contention that this Court has wide and unfettered discretion under Order 42 rules 6 of the Civil Procedure Rules 2010 to grant orders of stay pending hearing of the appeal notwithstanding the fact that such an application was made before the trial Court.

The Applicant also relies on the provisions of Article 48 of the Constitution which is to ensure access to justice.

To ensure that the overriding objectives of Court rules of procedure as found in Section 1A 1B of the Civil Procedure Act for fair and just determination of the proceedings.

A pitch has been made of the Applicants predicament to the effect that he was dishonourably dismissed from his employment on allegation of having committed criminal offences against his employer (The Respondents). That he was later acquitted but lost in terms of legal fees and costs incurred in the proceedings. The upshot being that the Applicant is benefit of funds to deposit in Court and therefore prays for an order for the depositing an alternative security.

This application is opposed on the grounds that the Applicant has not come to Court with clean hands in that he transferred ownership of his motor vehicle registration No. KAM 600U to avoid execution by the Respondents even after objection proceedings were dismissed by the Court.

Secondly that the Applicant has failed to comply with several other orders granted to him for stay. If the orders of stay are not granted it is contended that the Appellant will not suffer any loss as the Respondents have the wherewithal to refund the whole decretal amount.

The Applicant does not deny that he has not complied with orders to deposit the decretal amount made by the lower Court and that of depositing half the decretal amount made by my brother Justice Tuiyott.

The Applicant also does not deny by way of affidavit or otherwise the allegation that he has attempted to defeat the ends of justice by transferring ownership of his motor vehicle registration number KAM 600U to another party to avoid execution after objection proceedings were dismissed by a Court.

What he seeks in his application are discretionary remedies which are acquittable in nature and which require a party who seeks them to come to Court with clean hands.

The random nature of filing one application after another after the expiry of the time given does not augur well for his case.

I find no good reasons to alter the conditions of stay granted to the Applicant.

It is accordingly ordered that the Applicant deposit half the decretal amount in an interest bearing account in the joint names of his Advocate and that for the Defendants within 30 days from the date of this ruling.

Costs in the cause.

Ruling read and delivered in open Court this 28th day of May, 2013.

M. MUYA
JUDGE

In the presence of:-

Counsel for the Applicant/Appellant

Mrs. Armashi Counsel for the Respondent – present

Court clerk – Mr. Musundi

