



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL APPEAL NO. 119 OF 2012

PAUL NJERU IREMARESPONDENT

VERSUS

DOMISIANO NJERU NJAGI.....APPELLANT/APPLICANT

(An Appeal from the Judgment *A.N MAKAU – Ag SRM sitting at Siakago in Civil Case No. 14 of 2012 delivered on 26/3/2013*).

RULING

The Appellant/Applicant filed this Notice of Motion dated 30th August 2013 under certificate of urgency. The application is brought under Order 51, rules 1, 3 and 4, Order 22 rule 22, Order 42 rule 6 Civil Procedure Rules. He sought an order for stay of execution of the Judgment and decree thereof issued by the Senior Resident Magistrate Siakago on 26th March 2013. The application is supported by the grounds on the face of the application plus the supporting affidavit of the Appellant/Applicant.

The gist of the application is that the Appellant/Applicant was the Defendant in PM's Court Siakago in Civil Case no.14/12. The matter proceeded exparte and his attempt to set the interlocutory Judgment aside and have him file a defence was rejected vide a Ruling dated 6/9/2012. He appealed against the said Ruling. The appeal was admitted on 12/3/2013. The said appeal was filed by the Attorney General's office Meru. Besides filing the appeal the Attorney General's office has done nothing to assist the Appellant/Applicant herein. The learned trial Magistrate proceeded to hear the matter culminating in a Judgment and decree. As at the time the Appellant/Applicant was filing the present application on 4/9/2012 the Court at Siakago had served him with a Notice to show cause over the decree therein. He was to appear before that Court on 5/9/2013 for that purpose.

The application has been opposed by the Respondent who has filed a replying affidavit raising three issues;

- i. The Applicant has not demonstrated that he has an arguable appeal.
- ii. The Applicant has not satisfied the requirements for granting stay
- iii. The Applicant had on 4th September 2013 informed the Court that he would pay the whole decretal sum on or before 12/9/2013, and so there was nothing to stay.

There is no dispute that there is an appeal against a Ruling by the Senior Resident Magistrate Siakago

Court which denied the Applicant an opportunity to defend himself in civil suit No.14/2012. There is no dispute that the said appeal was admitted on 12/3/2013 and to date no further action has been taken by the Appellant. It is also not disputed that prior to the filing of the present application there had been no application for stay of execution filed by the Applicant herein.

I have considered the application, affidavits and the submissions by Counsels. The issues I wish to determine are two;

- i. Whether Mr. Ngari is properly on record
- ii. Whether the Applicant has made out a case for grant of stay of execution.

It is Mr. Muraguri's submissions that Mr. Ngari ought to have filed a Notice of change of advocate and not Notice of appointment the reason being that the Attorney General was already on record having filed the appeal on behalf of the Appellant/Applicant. Mr. Ngari on the other hand submitted that he came in to rescue an otherwise desperate case since the Attorney General's office had failed to act on the appeal filed.

The record clearly shows that the Appellant/Applicant herein is a chief hence a Public Officer. He was unrepresented in the lower Court upto the time the Judgment was entered in that case. The Attorney General's office did not assist him in the case before the Siakago Court. After the Ruling of 6/9/2012, the Attorney General through the State Law Office Meru filed an appeal against the said Ruling. That office filed a Notice of appointment in the appeal file. No such Notice was filed in the lower Court. And after filing the appeal the Attorney General's office went to sleep. The Applicant in his supporting affidavit has alluded to all this in paragraphs 7-11. The Attorney General's office came in to represent the Appellant/Applicant as the latter is a Public Officer. And instead of giving the necessary support and guidance that office left the Applicant to carry his cross alone which is very unfortunate. That office placed the Applicant in a very awkward position. It's actions are contrary to the overriding objective of the Civil Procedure Act as envisaged in Section 1A and 1B. Under Order 9 rule 5 Civil Procedure Rules, Mr.Ngari ought to have filed a Notice of change of advocate and not Notice of appointment of advocate as there was already representation by the Attorney General. However going by the scenario prevailing and the provisions under section 3A and Article 22 (3) (d) of the Constitution I do find that the overriding objective of the Civil Procedure Act would not be met if the Applicant would be punished for omissions/commissions of the of the Attorney General's office and his advocate. The late Madam JA had the following words to say (obiter) in the case of *MURAI –V- WAINAINA (NO.4) [1982] 38*

“A mistake is a mistake. It is not a less mistake because it is an unfortunate slip. It is no less pardonable because it is committed by Senior Counsel though in the case of Junior Counsel the Court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate”.

My view therefore is that this Court should not punish he Applicant further by denying him a hearing on account of his advocate's negligence in filing a Notice of appointment instead of Notice of change of advocate.

The next issue is whether the Appellant/Applicant has made out a case for grant of stay of execution of the Judgment and decree of the Siakago Court in Civil Case No.14/2012. The appeal before this Court is not about the Judgment delivered in Siakago Civil Case No.14/12 but the Ruling delivered on 6/9/2012. The major complaint by the Applicant/Appellant in the appeal filed herein is that he was through the Ruling complained of denied his right to be heard. My view is that this is a serious issue which makes his appeal arguable. I will not try to say anything more about it less I find myself discussing the appeal. Would the appeal if successful be rendered nugatory if stay is not granted? If the appeal were successful the Appellant/Applicant would have to be given a chance to file a defence and to be heard and even cross examine the Respondent. In other words the exparte proceedings and Judgment would have to be set aside. And if the stay is not granted it would mean the Judgment would be executed and this would result in many other things including Civil jail for the Appellant/Applicant if the decree is not satisfied.

In the case of **AFRICA AVIATION HANDLERS LTD & ANOTHER –V- FORTTROT CHARLIE INC. CIVIL APPLICATON NO. NAIROBI 302/04** Omollo Githinji & Waki JJA held thus;

“In Order to succeed in an application for stay of execution pending appeal, the Applicant should satisfy the Court that the appeal or intended appeal is an arguable one, that it is not frivolous and that unless the Order of stay of execution is granted, the intended appeal if it eventually succeeds will be rendered nugatory”.

I am satisfied that the Appellant/Applicant has established that he has an argueable appeal and that in the event of a successful appeal the same would be rendered nugatory if the stay of execution is not granted.

I therefore make the following Orders;

1. Mr. Ngari to regularize his position as Counsel for the Appellant/Applicant within seven days. The notice must be filed and served accordingly.
2. There shall be stay of execution of the Judgment/Decree of the Siakago Civil Case No.14/12 on condition that the Applicant deposits to this Court shs.25,000/= as security for costs. This must be complied with within seven (7) days. If this is not complied with, the Order for stay of execution will be vacated.
3. The Appellant/Applicant must move with speed to have the appeal heard and determined within ninety (90) days from today.

Costs to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT EMBU IN OPEN COURT THIS 11TH DAY OF SEPTEMBER 2013.

H.I. ONG'UDI

J U D G E

In the presence of:-

Mr. Ngari for Appellant/Applicant

Mr. Muraguri for Respondent

Kirong– C/c