



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KERICHO

CIVIL APPEAL NO. 22 OF 2010

PAUL OTIENO OMONDI APPELLANT

VERSUS

EVERLINE AOKO NDOLORESPONDENT

RULING

The Appellant in this appeal, **Paul Otieno Omondi**, was the Defendant in the lower court (*in Kericho CMCC.NO. 463 of 2006*) while the Respondent, **Everline Aoko Ndolo**, was the Plaintiff. The suit related to a claim by the Respondent against the Appellant for, *inter alia*, general damages for pain and suffering and loss of amenities arising out of an accident on 18th June, 2004 when the Appellant's motor vehicle registration No. KAE 309T in which the Respondent was a passenger overturned along Kericho/Nakuru road at a point near Sokobet thereby causing injuries to the Respondent. The trial Magistrate after hearing the case found the Appellant 100% liable and entered judgment on 15th April, 2010 in favour of the Respondent and awarded her Shs. 350,000/= by way of general damages and shs. 11,950/= as special damages and Shs. 220,000/= as future medical expenses.

Aggrieved by the judgment, the Appellant lodged the appeal herein seeking orders that the judgment and decree be set aside and in its place the suit be dismissed with costs to the Appellant.

On 27th June, 2010, the Appellant lodged an application by way of Notice of Motion seeking an order to vary the terms of the order of stay of execution of the decree/judgment made on 4th June, 2010 by the trial magistrate, Hon. Nyarima in the said suit No. SRMCC. 463 of 2010 in which he ordered that the whole decretal sum be deposited in a joint interest bearing account pending the disposal of the appeal.

One of the grounds on which the application for variation was made is that the appeal will be rendered nugatory if the order for variation sought is not granted. I am unable to see in what way the appeal would be rendered nugatory if the decretal dues were in an interest bearing joint account of the parties for the simple reason that if the Appellant won the appeal, he would get an order to collect his money which would have earned interest but if he lost, the Respondent would similarly get an order to collect the money. There is no merit in that contention.

The Appellant also concedes that he has not complied with the trial court's order made on 4th June, 2010 which he now seeks to have varied. He does not state that he is unable to comply with the order, but his fear is that the Respondent may not be able to reimburse the money as the Respondent's income is unknown. But in view of what I have stated above, this fear is totally unfounded.

The Appellant did not appeal against the order made by the trial court. That is the only way he could have it overturned. If he desires to have it varied, the Appellant should have applied to the trial Magistrate for its variation or for its review. He cannot be allowed to get variation of the very order he has failed to comply with. In any case, this court is seized only of the appeal against the judgment and the decree of the trial court. There is no appeal before it relating to the order of 4th June, 2010. The application is therefore made in a vacuum because the application is not for setting aside the order for stay under **Rule 6(1) of Order 51 of the Civil Procedure Rules 2010**.

Rule 6(1) of Order 51 of the Civil Procedure Rules 2010 provides that the court to which the appeal is preferred is at liberty on application being made to consider such application and make such order thereon as may seem just to it and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred *may apply to the appellate court to have such order set aside*. The Appellant in this case seeks not to set aside the order, but to vary it. **Rule 6(1)** does not allow this.

The case of **National Industrial Credit Bank V. Aquinas Francis Wasiki (Nbi C.A. Civil Appeal No. 238 of 2005)** related to stay in an appeal preferred to the Kenya Court of Appeal and the stay there was governed by **Rule 5(2) (b) of the Court of Appeal Rules** and not by **Civil Procedure Rules** which govern stay in appeals to this court.

Mr. R. Olendo, learned counsel for the Appellant, urged me to order variation of the trial court's order as aforesaid. My answer to that plea is answered as above.

Mr. J.J. Onyango, learned counsel for the Respondent, opposed the application and contended, *inter alia*, that the order sought to be varied was not attached. The old **order 44 (now order 45 in the 2010 Civil Procedure Rules)** required that a copy of the formal order sought to be reviewed be attached to the application for review. It is not necessary under **Rule 6(1) of Order 45 of the Civil Procedure Rules 2010 (or even in the old rules)** to furnish a formal copy of the order sought to be set aside where there is an appeal against the judgment/decree and the lower court record is *(therefore)* available to the appeal court.

In the light of what I have stated above, I do not find merit in the application. The Notice of Motion dated 28th June, 2010 is dismissed with costs to the Respondent.

DATED at KERICHO this 7th day of March, 2011

G.B.M. KARIUKI, sc
RESIDENT JUDGE

Advocates

Mr. R. Olendo Advocate for the Applicant/Appellant

Mr. J.J. Onyango Advocate for the Respondent

Court Clerk – Mr. Koech