



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL SUIT NO. 108 OF 2001

JOSEPH MBINDYO & 4 OTHERS PLAINTIFFS

VERSUS

TANA AND ATHI RIVERS DEVELOPMENT AUTHORITYDEFENDANT

R U L I N G

The Judgment in this matter was rendered by Lady Justice Joyce Khaminwa on 1st day of October 2009. She found in favour of the plaintiffs and awarded them KShs.96,800,000/= plus interest at the rate of 14% from the date of filing suit until payment in full. As would be expected where such amounts of money is concerned, the defendant immediately moved to the Court of Appeal on appeal vide the Notice of Appeal dated 12th October, 2009.

Counsel for the defendant also moved to this court seeking orders of stay of execution pending the hearing and determination of the Appeal. I granted the said orders on condition that the defendant deposited KShs.10,000,000/= as security for the due performance of the decree as may ultimately be binding on it within twenty one (21) days of the date of the Ruling. The money was deposited late but the court with the consent of both counsel herein regularized the position by extending the twenty one (21) days period granted earlier on. Those stay orders are still in force to-date.

The plaintiffs were nonetheless not happy with the speed at which the defendant was pursuing the Appeal and so their counsel filed the Application dated 29th October 2010 under certificate of urgency. The Application was served on the Respondents and the same was heard *inter-partes* before me on 1st November, 2010. This now is the ruling in respect of the said application. The Ruling was scheduled for delivery on 16th February, 2010 but due to unforeseen circumstances, the same could not be delivered then.

Part of the delay was occasioned by the fact that I was assigned other duties outside this court's jurisdiction and to-date I have not gone back to my station. I do therefore, tender my apologies to the parties herein for the delay in preparing this Ruling.

The applicant is asking the court to lift the stay orders mentioned earlier; that the decree holder be allowed to proceed with the execution of the decree; and that the KShs.10,000,000/= deposited in court as security be released to the Decree Holder forthwith.

According to counsel for the Applicants, the “purported Notice of Appeal” which was served on him was incurably defective and failed to comply with the format provided for in Form D of the first schedule of Rule 74 of the Court of Appeal Rules. He has highlighted the “defects” in the said Notice of Appeal in paragraph 7 of his supporting affidavit.

He has also deposed that counsel for the Respondent had not facilitated the court to process the Appeal as he had not paid the requisite deposit for the typing of the superior court’s proceedings. He maintained that there was inordinate delay in prosecuting the Appeal on the part of counsel for the Respondent and the said delay had hindered the Decree Holders from enjoying the fruits of their judgment.

On its part, the Respondent through its Corporation Secretary denies any inordinate delay in the matter saying that they were waiting for the court proceedings to be typed before they could prosecute the intended Appeal. He also deposed that the averment that the Notice of Appeal was incurably defective could only be taken up before the Court of Appeal where the Appeal lies. He therefore, urged the court to dismiss the application.

Both counsel reiterated these averments in their oral submissions in court. Indeed counsel for the Respondents informed the court that he did not know that a deposit was necessary before the typing of the proceedings could commence. I must say that I am not sure of what to make of this submission given that it is a standard and long standing practice in our courts that any party who applies for proceedings must pay a deposit before the typing of the proceedings can start. This in my view is meant to dissuade or discourage parties from requesting for proceedings and thereafter abandoning their quest leaving the court stuck with copies of proceedings that nobody will use or pay for. It is meant to gauge the seriousness of the party requesting for the same and also to avoid waste .It fosters expediency and good resource management of the limited resources in our registries and typing pools. It is not law but it is a good custom and practice. I do not understand how Mr. Okeyo could be unaware of such a settled practice. Be that as it may however, upon hearing Mr. Okeyo on that issue, I am satisfied that the non-payment of the said deposit was not meant to delay the processing of the Appeal. He appears to have acted in good faith albeit in ignorance. The depositing of the 10 million shillings in court did in my view show some seriousness on their part. I have also noted and appreciated the contents of Annexure to the replying affidavit marked “J00/2” which is a reminder to the Deputy Registrar asking for the said proceedings and which has made reference to three (3) other reminders sent to the Deputy Registrar between 12th October, 2009 and 6th October, 2010. Maybe the Deputy Registrar should have responded to the first letter promptly and enlightened counsel on the fact that the typing of the proceedings could not commence without the requisite deposit. Had she done so, this issue of “inordinate delay” could not have arisen. The delay in processing the appeal has in my considered view been sufficiently explained and the same cannot singularly justify the lifting of the orders of stay in question.

Having said so, has this court been given any other convincing reasons as to why the said orders of stay should be vacated?

The only other reason advanced for the said prayers is that there is no competent Appeal before the Court of Appeal.

The format of the Notice of Appeal has been challenged. Do I have jurisdiction to make a determination as to whether the Notice of Appeal before the Court of Appeal is competent or not? I am convinced that I do not have such jurisdiction. Holding otherwise would mean that I have jurisdiction to strike out an Appeal that is before the Court of Appeal. The form and substance or lack of it in respect of a Notice of Appeal can only be challenged before the court that is seised of jurisdiction to hear and determine the substantive Appeal. I therefore find myself in agreement with counsel for the Respondent when he says that this court has no jurisdiction to determine issues of conformity with Rule 74 of the Court of Appeal Rules. The Applicant is definitely at liberty to challenge the said Notice of Appeal before the Court of Appeal.

As stated in my Ruling when granting the orders of stay herein, if execution is carried out and the money is paid to the 484 applicants, it would be extremely difficult for the Respondent to reclaim that money in

the event the Appeal succeeds. The Appeal would doubtlessly be rendered nugatory and this would amount to a travesty of justice for the Respondent. In sum, the scales of justice tilt in favour of the Defendant/Respondent herein. I decline to grant orders that seek the lifting the orders of stay granted earlier. I nonetheless entreat counsel for the Plaintiffs/Applicants to proceed with dispatch to process the Appeal in order to avoid any further unwarranted delay in this matter.

This Application is therefore dismissed with orders that costs herein do abide the outcome of the Appeal.

W. KARANJA
J U D G E

SIGNED by the above but delivered and dated by the undersigned at Embu this 13th day of April 2011

M. WARSAME
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J U D G E

In the presence of:- Mr. Mutunga for the Applicant, Mr. Okeyo for the Respondent in open court.