



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Civil Suit 32 of 2004

TABITHA KERUBO OMAMBIA.....APPLICANT

VERSUS

AKAMBA PUBLIC ROAD SERVICE LTD.RESPONDENT

RULING

On the 26th May, 2008 Justice Fred Ochieng delivered a ruling whereby he stayed execution of the decree herein pending the hearing and determination of an appeal by the respondent. It was further ordered that the decretal sum be deposited in a joint interest earning account in the names of Advocates for both parties.

The applicant herein who is the decree holder filed her application on 13th July, 2009 praying that the stay of execution orders made on 26th May, 2008 be vacated to pave way for execution so as to satisfy the decree and that the decretal sum deposited in the joint account be released to the applicant.

Mr. Samba, counsel for the Applicant submitted that the respondent has not filed any appeal before the court of Appeal yet proceedings and judgement were supplied by the court on 19th June, 2008. Counsel further submitted that the respondent's contention that the proceedings after judgement had not been supplied was baseless as such proceedings relate to stay of execution and are not relevant on the appeal. Time for filing of appeal has lapsed and the orders of stay ought to be vacated.

Mr. Odhiambo, counsel for the respondents, in opposing the application submitted that proceedings after judgement had not been supplied and those proceedings are relevant as they include crucial annexures. On 12th September, 2009, Counsel for the respondent wrote to the court seeking the proceedings. Time to file the appeal has not lapsed and if it has, then the same can be extended under Rule 81 of the Court of Appeal Rules.

From the record herein, judgement was delivered on 15th February, 2007 by Justice G. B. M. Kariuki. The applicant was awarded Kshs.731,600 plus costs. The respondent moved the court by a Notice of Motion and sought stay of execution pending the hearing and determination of its appeal which orders were granted on 26th May, 2008. The applicant contends that no appeal has been filed to date yet proceedings and judgement had been supplied by the court to the respondent.

The respondent has exhibited a Notice of Appeal. The Memorandum of Appeal is dated 17th September, 2007 but the same does not bare the Court of Appeal stamp. I do agree that it has taken quite a long time for the respondent to file his appeal. However, I do note that

the applicant herein also filed a Notice of Appeal indicating that she was not satisfied with the judgement of the trial court but learned counsel did not submit as to what became of that intention to Appeal.

The decretal sum was deposited in a joint account as ordered by the court. There is no risk to the applicant as to the realization of the decree unless it is shown that the bank where the decretal sum is deposited is likely to collapse. However, the respondent's right to pursue its appeal should not delay the applicant's rights to realize the fruits of her decree. Although the respondent has exhibited several correspondences to the Kakamega court Deputy Registrar, no other effort has been shown to the court by the respondent in obtaining the remaining proceedings which I note from the record of the court that they have already been typed. These relate to proceedings from 2nd October, 2007 to the delivery of the ruling by Justice Ochieng on 26th May, 2008.

Since the proceedings have been typed I do order that the respondent herein file and serve his Appeal including the record of Appeal WITHIN thirty (30) days from the date of delivery of this ruling failing which the orders of stay granted on 26th May, 2008 shall be vacated and the applicant shall be at liberty to execute. The application dated 13th July, 2009 is dismissed. Each party to meet its own costs.

S. J. CHITEMBWE

J U D G E

Delivered, Dated and Countersigned at Kakamega this 16th day of March, 2010

ISAAC LENAOLA

J U D G E