



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Civil Appeal 49 of 2007

KIRINYAGA CONSTRUCTION (K) LTD..... APPELLANT
VERSUS
OSCAR DUNCAN BEAUTTAH..... RESPONDENT

RULING

The subject matter of this ruling is the motion dated 30th March 2010 in which the applicant sought for the following orders:

1. **THAT the respondent by himself or his servant and/or agents or advocates or any of them taking authority or instructions from his then or otherwise so described be restrained and/or stopped by an interim stay order from any execution of the decretal sum hereof against the appellant/applicant herein, until further orders of the court and/or pending the hearing and determination of this application herein and/or pending the hearing and determination of the appeal herein.**
2. **THAT and/or in the alternative of prayer 2 hereinabove, that pending the hearing of this application inter-partes and/or until further orders of the court that the orders issued by the subordinate court on the 12th September, 2007 staying the execution of the decree issued on 23rd October, 2006, be reinstated or be deemed as reinstated.**
3. **THAT the orders given on 26th June, 2009 by the Honourable Mr. Justice Makhandia be stayed and/or varied and/or altered, the extent that they do not affect the stay orders issued by the subordinate court on the 12th September 2007 pending the hearing and determination of the Appeal and the Appeal herein, and/or extended to such time this Honourable court may deem fit and just pending the full hearing and determination of the appeal herein and/or further orders of this Honourable court as may deem fair and just.**
4. **THAT and/or in alternative or prayer (4) hereinabove, this Honourable court be pleased to review, vary, set aside and/or give further orders/directions as concern the orders given on 26th June, 2009 to the effect that the Record of appeal dated 13/8/2009 (filed and served on the same date upon the respondent) and the supplementary record of appeal dated 21/8/2009 (filed and served upon the respondent on 3rd September, 2009) be deemed properly filed and served on the respondent herein and be heard and determined on merit.**
5. **THAT upon prayer (4) or (5) herein granted, the Honourable court do give directions/provide for the manner in which the appeal herein is to be heard.**
6. **THAT the costs of this application be provided for.**
7. **THAT any other reliefs that this Honourable court may deem fit and just to grant under the circumstances.**

The motion is supported by the affidavit of Joseph Waigwa sworn on 30th March 2010. Oscar Duncan Beauttah the respondent herein filed a replying affidavit to oppose the motion.

It is the submission of Mr. Kamau, learned advocate for Kirinyaga Construction (K) Ltd, the appellant/Applicant herein that there is an error apparent on the face of record. It is said that the appellant was given an order of stay of execution pending appeal on condition that the appellant deposits security for the due performance of the decree. The appellant avers that it deposited the security documents in court. It stated that the condition set on 26th June 2009 was complied with three days after the time fixed had lapsed. The appellant blamed its advocate and the court registry for the delay. Mr. Lombo, learned advocate for the respondent on his part urged this court to dismiss the motion because the orders of 26th June 2009 had taken effect hence the same is overtaken by events. It is further argued that the motion does not meet the requirements for review. According to Mr. Lombo, if the order is given this court would have sat on appeal in its own cause. Learned advocate was of the further view that the appellant's advocate intentionally delayed until the time fixed to comply with the conditions set by court lapsed.

I have carefully considered the grounds set out on the face of the motion and the facts deponed in affidavits for and against the motion. I have also taken into account the oral submissions made by learned counsels from both sides. The history of this case started before the subordinate court where the respondent herein sued the appellant herein claiming for general damages, mesne profits plus costs and interest. It would appear the plaint and the summons to enter appearance were served upon the appellant. The appellant entered appearance but failed to file a defence. Interlocutory judgment in default of a defence was entered. The suit proceeded for hearing as a formal proof before Mrs. Gitonga, the then Principal Magistrate. The respondent's main complaint is that the appellant had encroached on his parcel of land known as L.R. No. 3449/05 along Chaka-State Lodge road wherein it excavated murrum and cut down trees without his authority. In the end judgment was entered in favour of the respondent and against the appellant in the following terms:-

- (i) Kshs.250,000/- as general damages.
- (ii) Kshs.850,000/- being mesne profits.
- (iii) Costs and interest.

It would appear the appellant applied for the judgment to be set aside. The application was dismissed by Mr. J.K. Ng'eno, the then Ag. Senior Principal Magistrate. The appellant appears to have filed an appeal. An order of stay pending appeal was given on condition that the appellant deposits the decretal sum. That order was given by Lucy Gitari, the then Chief Magistrate on 12th September 2007. This court was provoked to dismiss the appeal for want of prosecution. On 26th June 2009, Mr. Kamau, learned advocate for the appellant appeared before Justice Makhandia whereupon he applied to be given 3 months to prepare the record of appeal. The honourable judge gave the appellant 45 days to prepare, file and serve the record of appeal and in default the application dated 17th July 2008 to stand granted. The effect of the success of the application dated 17th July 2008 is that the appeal shall stand dismissed if the record of appeal shall not have been filed within 45 days from the date of the order. The appellant managed to comply with the order on 13th August 2009. The appellant complied with the order three (3) days outside the period fixed by the court. It is said that the respondent wrote to the Deputy Registrar to give effect to the order of Justice Makhandia J. The appellant's advocate admits that he filed the record of appeal outside the period fixed by Mr. Justice Makhandia. In paragraphs 13 and 14 of the supporting affidavit of Joseph Waigwa sworn on 30th March 2010, the appellant avers that the order issued by Justice Makhandia on 26th June 2009 was irregular. It is alleged that the Honourable Judge misdirected himself. With great respect, I agree with the submissions of Mr. Lombo that this court has been invited to sit on appeal in its cause. The appellant pointed out that there are errors apparent on the face of record. It is said that this court admitted the appeal to hearing on 16th February 2010. I have perused the record and it is true that this court, indeed, admitted the appeal to hearing when the file was placed before it for that purpose. In my view that in itself is not an error. In making a decision as to whether or not to admit an appeal to hearing, the court is required to peruse

the record of appeal. The attention of this court was not drawn to the effect of the order issued on 26th June 2009. By the time of admitting the appeal to hearing, the order of Justice Makhandia of 26th June 2009 had taken effect hence there was nothing to admit to hearing. In my view there is no error apparent on the face of record.

A careful perusal of the motion herein will indicate that the appellant has beseeched this court to issue several orders in the alternative. Those prayers include an order reinstating the order for stay of execution given by the subordinate court on 23rd October 2006. Of course that order went upon the automatic allowance of the application dated 17th July 2008. Secondly, I have also been asked to vary and or stay the order of justice Makhandia given on 26th June 2009. I have already stated that the reasons advanced in support of such a prayer cannot meet the requirements needed for me to vary and or stay the aforesaid order. In any case there is nothing to stay because the order took effect immediately the period fixed expired. The overall picture I get from the averments and the submissions of the appellant is that the delay to prepare and file the record of appeal within the time fixed by the court was on the part of its advocate. The appellant has not secured the affidavit of its advocate to explain what prevented him or her from complying with the court order. This court's registry has been blamed as one of the parties which caused the delay. The record does not support such a contention. It would appear the appellant's advocate did not simply want to comply with the court order. He has merely regretted the delay but has not explained the genuine reasons behind the delay. This is a case where the court will leave the client to suffer for the mistakes of his or her counsel.

In the end I am convinced the motion has no merit. It is dismissed with costs to the respondent.

Dated and delivered at Nyeri this 19th day of May 2010.

J.K. SERGON

JUDGE