



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

MILIMANI LAW COURT

Environmental & Land Case 1222 of 1999

LAZARO KABEBE.....PLAINTIFF

VERSUS

NDEGE MAKAU.....1ST DEFENDANT

ANJELO NJAIBU MUGO.....2ND DEFENDANT

RULING

1 Lazaro Kabebe who is the plaintiff in this case, has moved this court under Order XLI Rule 4 and Order XLIV Rules 1, 2 and 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. He is seeking to have the orders made on 9th February, 2010, reviewed and or set aside. He is also seeking an order for stay of execution until further orders of this court.

2. The background to the application is that a judgment in regard to the plaintiff's originating summons, was delivered on 27th February, 2006. By an application dated 28th March, 2006, the plaintiff sought an order of stay of execution pending appeal against the judgment delivered on 27th February, 2006. The application was heard by Onyancha J. who delivered a ruling on 9th February, 2010, in which the plaintiff's application for stay of execution pending appeal was dismissed on the grounds that there was no valid notice of appeal, which was filed by the plaintiff, nor was there a substantive appeal filed within 60 days as required by Rule 81 of the Court of Appeal rules.

3. The applicant now seeks to have the orders made on 9th February, 2010, reviewed. In his affidavit filed in support of the application, the plaintiff reiterates that the notice of appeal was received by the Court of Appeal on 15th March, 2006, and therefore it was valid. He further contends that the proceedings were received late by his counsel hence the delay in filing the appeal, and that his counsel was to obtain a certificate of delay. The plaintiff reiterates that his appeal has high chances of success and that he is likely to suffer irreparable loss if the order of stay of execution is not granted as he may be evicted from his home.

4. The 1st respondent did not file any response to the application nor did he attend court for the hearing of the application. The 2nd respondent opposed the application through grounds of opposition filed on 11th may, 2010. It is contended that the application is incompetent, fatally defective and an abuse of the court process. Counsel for the 2nd respondent submitted that the applicant cannot bring a new application for stay of execution, as a similar application has already been dealt with. On the issue of review, counsel for the 2nd respondent contended that the applicant has not brought himself within the provisions of the Civil Procedure Rules providing for review.

5. Counsel for the 2nd respondent further submits that the issue of the validity of the notice of appeal is not a new issue as the same was raised and argued in the previous application. Counsel also argues that the applicant has not demonstrated any mistake or error apparent on the face of the record nor has he shown any sufficient reason to warrant review of the orders made on 12th February, 2010. It is argued that the applicant has filed his application after undue delay which has not been explained. Finally, counsel submits that the application is also defective as no formal order has been annexed to the application. In support of these arguments, counsel for the 2nd respondent relied on *National Bank of Kenya Ltd vs Ndungu Njau Civil Appeal No. 211 of 1996*.

6. I have carefully considered the application, as well as the submissions made before me and the authorities cited. The

substantive prayer which is being sought is an order for review of the orders made on the 9th February, 2010. In order for that prayer to succeed the applicant must satisfy the threshold of granting an order for review as set out under Order XLIV Rule 1 of Civil Procedure Rules. Therefore he must satisfy this court either that there is discovery of a new and important matter or evidence which after the exercise of due diligence was not within the applicant's knowledge or could not be produced by him at the time when the order was made or that there is some mistake or error apparent on the face of record, or that there is any sufficient reason justifying review.

7. In this case, the applicant's contention appears to be that there is a mistake or error on the face of the record as the notice of appeal filed and received on 15th March, 2006 was proper and secondly that the decision of the judgment was misinterpreted.

8. I have examined the ruling which was delivered on 9th February, 2010. The issue of the notice of appeal was canvassed and addressed in detail both by the parties and the court. Therefore, in arriving at the conclusion that there was no valid appeal notice which was filed, the court made a deliberate and conscious decision, having regard to the arguments made before it on that issue. Under these circumstances, if the court arrived at a wrong decision, it cannot be said that the decision was arrived at through a mistake or error apparent on the face of the record. It is a kind of decision that can only be impugned on appeal and not review. The applicant having not demonstrated any discovery of new matter or evidence or any other sufficient reason, I find that the application before the court is misconceived and lacks merit. It is accordingly dismissed.

Dated and delivered this 18th day of October, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Gekanda for the plaintiff/applicant

Makori for the defendants/respondents

B. Kosgei - Court clerk