



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL 45 OF 2007

JAMES TWARA MOSIORIAPPELLANT

VERSUS

ELPHAS ODIWUOR OMONDIRESPONDENT

(From the Original Civil Suit No.6 of 2005 of Chief Magistrate's Court at Kisumu)

Coram

J. W. Mwera J.

Onyari for Momanyi for the appellant

P. J. O. Otieno for the respondent/applicant

Court Clerk Raymond interpreter/Swahili/English/Luo

R U L I N G

The main prayer sought under Order 41 rule 5(1) Civil Procedure Rules is that:

(a) this court do order the appellant to furnish security for the performance of the decree granted in default of which this appeal be dismissed.

The grounds on which the application dated 16th October 2008 is based include the one to the effect that the appellant/respondent had no known means of income and as such he will be unable to pay costs of the proceedings and that would not accord with interests of justice. Also that because the appellant was resident in the U.S.A. i.e. outside the jurisdiction of this court, the respondent/applicant felt apprehensive that his costs could not be paid in the event of success in the proceedings. The applicant's lawyer, Mr. P. J. Otieno swore an affidavit supporting the application.

In reply Mr. Momanyi, Advocate for the respondent/appellant deponed in reply that the prayers laid by the applicant/respondent were only open to the appellant/respondent. There was no appeal pending and none fell to be dismissed – as per Order 51 rule 5 Civil Procedure Rules. Accordingly, while Mr. Otieno

supported the application Mr. Onyari for Mr. Momanyi held an alternative view.

Mr. Otieno submitted that the lower court judgment was set aside on 7th February 2008 on condition that the appellant deposit the decretal sum or in default the judgment be reinstated. Such a deposit was never made. If the intended appeal is filed, none had been filed yet, the respondent/applicant fell to suffer loss even of the costs that will have been incurred.

Mr. Onyari countered that the intended appeal herein is against the order that set aside judgment on condition of depositing the decretal sum. It prejudiced his client greatly, hence this appeal, without making the deposit. His client's appeal cannot be dismissed in the circumstances. He must be heard. Mr. Otieno summed up that his client simply required deposit of security for due performance.

The provision of law under which this application was brought reads: Order 41 rule 5(1) Civil Procedure Rules.

“5. (1) Where an order is made for the execution of a decree from which an appeal is pending, the court which passed the decree or the court to which an appeal is pending in terms of rule 4 shall, on sufficient cause being shown by the appellant, require security to be taken for the restitution of any property which may be or has been taken in execution of the decree or for the payment of the value of such property and for due performance of the decree or order of the court from whose order such appeal shall have been brought.

(2).....” (underlining supplied.)

This court's reading of the above provision of law appears to be that under Order 41 rule 5 Civil Procedure Rules a court may require security for due performance of a decree appealed from, on sufficient reason being shown by the appellant and not the respondent as this court is being asked to do now. Indeed in our present case there is no appeal filed – not even a notice of appeal is traced on this file. What is there is a memorandum of appeal of 30th May 2007 which was amended on 5/6/07. And there is no order of stay of execution in this matter.

Anyway, all in all this application appears misconceived if not, premature.

It is thus dismissed with costs.

Orders accordingly

Delivered on 14th May 2009.

J. W. MWERA

J U D G E

JWM/mk.