



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT 140 OF 1999

MAWJI PATEL PLAINTIFF/RESPONDENT

VERSUS

TONY KETER DEFENDANT/APPLICANT

R U L I N G

This is an application by the Defendant under the provisions of Order XXI, Rule 22 and Order XLI, Rule 4 for inter alia an order:-

“1.

2.

3. That this Honourable Court be pleased to grant a stay of execution of the Judgment and Decree given herein on 4/12/02 and/or any further proceedings herein pending the hearing and determination of the Defendant’s Appeal against the decision, Ruling and Orders given herein on 10/02/09 dismissing the Defendant’s application to set aside the aforesaid Judgment and Decree upon such terms as the Court deems fit and just in the circumstances of this case.

4. “

The application is supported by an affidavit on 27th February, 2009. The application was opposed by the Plaintiff/Respondent who filed a Replying Affidavit sworn on 4th March, 2009.

The Respondent also took out a Notice of Preliminary Objection dated 4th March, 2009 in the following terms; that:

1. This Honourable Court has no jurisdiction to entertain an application for stay of execution of the Judgment and Decree given by the Court on 4th December, 2002 in the absence of a Notice of Appeal lodged against the said Judgment and Decree by virtue of the provisions of O. XLI R. 4 (1) and 4 of the Civil Procedure Rules.

2. The Order given by Court on 10th February, 2009 is incapable of execution and the Court has no jurisdiction to entertain an application for stay on the basis of the said Ruling and Order.

3. The Application now before Court is generally an abuse of the Court process.

I have considered the submissions by Counsel and authorities. The Defendant herein has filed a Notice of Appeal against the Ruling in this Court delivered on 10th February, 2009. Strictly, there is no direct or specific prayer in the present application for stay of the said ruling/order and if there is any possible construction that prayer No. 3 includes such a prayer then it is my view that such prayer is not sustainable. This is because this Court's ruling made on 10th February, 2009 was a dismissal or refusal of an application to set aside an order refusing adjournment of hearing of the case before the case was heard and the final Judgment was delivered.

There is nothing to stay as the order is not executable. The Order to be extracted is not, per se, capable of being executed. The Judgment and decree herein is not the product or result of the Orders of 10.02.09. They existed before the said Order and are still intact and enforceable by themselves. There is nothing from the orders of 10.02.09 which gave them any further validity, efficacy or enhancement. For the said Judgment and Decree to be stayed they must be attacked directly.

I do find that there is no dispute of fact that the Defendant/Applicant indeed filed a Notice of Appeal against the Judgment and the Decree on 17th December, 2002. The Plaintiff applied to have the said Notice of Appeal struck out. The Court of Appeal sitting in Nakuru allowed the application and struck out the Notice of Appeal with costs to the Plaintiff on 2nd October, 2003.

As a result, there is no pending Notice of Appeal against the Judgment and Decree and there is no pending appeal.

I have been referred to the decisions of the Court of Appeal in respect of the jurisdiction of the Court of Appeal in respect of Rule 5 (2) (b) of the Court of Appeal Rules.

It is my view that similar principles apply to application for stay of execution under the provisions of Order OXLI R. 4 (1) and 4 of the Civil Procedure Rules. It is lodging of a Notice of Appeal to the Court of Appeal which gives the High Court jurisdiction to grant any order of stay under Order 41, Rule 4 (1) and 4 of the Civil Procedure Rules. The Order of stay of execution can only relate to the subject-matter of the Notice of Appeal which is the decision of this Court – that is appealed from – See **CIVIL APPLICATION NO. 47 of 2007 DAVID THIONGO T/A WELCOME GENERAL STORES –V- MARKET FANCY EMPORIUM.**

I therefore do hold that in the absence of a Notice of Appeal against the Judgment and Decree herein, this Court lacks jurisdiction to consider an application for stay of execution of the said Judgment and Decree.

I have already found that the Ruling/Order of 10.02.09 is incapable of execution or is not executable. There is nothing capable of or to stay.

In all, I do hereby uphold the Notice of Preliminary Objection and do hereby strike out the application dated 27th February, 2009 with costs to the Plaintiff/Respondent.

DATED AND DELIVERED AT ELDORET ON THIS 12TH DAY OF MAY, 2009.

M.K. IBRAHIM

JUDGE

In the presence of:

Mr. Gicheru for the Respondent

Ms. Cheptinga for Mr. K'Opere for the Applicant