



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CIVIL APPEAL 11 OF 2008**

**SURJIT SINGH & MALKIAT SINGH ..... APPELLANTS**

**V E R S U S**

**MARY KUNYA WESONGA.....1<sup>ST</sup> RESPONDENT**

**FLORIDA ROSE OKWOMI (suing on behalf of the estate of**

**MOHAMED WESONGA OULO [deceased]..2<sup>ND</sup> RESPONDENT**

**R U L I N G**

On 15<sup>th</sup> December, 2008 the firm of Namatsi & Company Advocates and Masinde & Company Advocates signed a consent to the effect that Appeal No.**Kakamega HCCA 11 of 2008, SURJIT SINGH & ANOTHER –vs- MARY KUNYA WESONGA & ANOTHER** be withdrawn. That consent letter was filed on 2<sup>nd</sup> February, 2009 and the Deputy Registrar endorsed it on 3<sup>rd</sup> February 2009.

The appellant filed the current application dated 8<sup>th</sup> June, 2009 seeking orders that the orders of the Deputy Registrar of 3<sup>rd</sup> February, 2009 be reviewed on account of some mistakes or error on the face of the record and that the execution in Kakamega CMCC No.327 of 2003 be stayed pending the outcome of the Appeal.

Mr. Muma, counsel for the appellant submitted that the Appeal on record was filed by the firm of Muma Nyagaka & Company Advocates. The firm of Masinde & Company Advocates had no jurisdiction to file the consent withdrawing the Appeal. The appellant was not aware of the withdrawal of the Appeal. Notice of change of advocates was not filed. The order of the Deputy Registrar emanates from a consent filed by a stranger. The order was transported to the lower court case and no leave was granted for the firm of Masinde & Company advocates to appear for the appellant in the lower court case yet there was judgement and this was in total disregard to Order III rule 9. The decretal sum was to be paid by installments and it's the appellant's agents who paid KShs.300,000/= . Appellant's counsel contends that that all along the appellant has been keen to have his appeal heard.

Mr. Namatsi for the respondent opposed the application. He submitted that the lower court had ordered that the entire decretal sum be deposited in court within a month from 11<sup>th</sup> June, 2008 and that order was not complied with. The lower court order on stay has not been set aside and the application for stay of execution is an abuse of the court process. Counsel further submitted that there was an intention

on the part of the appellant to withdraw the appeal. The appellant made part payment of the decretal sum meaning they abandoned the Appeal. The appellant's intention to reinstate the Appeal is an abuse of the court process. The appellant was notified by the court that the appeal had been admitted and he was to file a record of Appeal within 30 days but that was not done. Thus even if the appeal had not been withdrawn it would have been dismissed. The firm of Masinde & Company Advocates forwarded to the respondent's Advocate the installment cheques.

The only issues for determination is whether the withdrawal of the appellant's Appeal was proper and whether there should be stay of execution in Kakamega CMCC 327 of 2003 pending the hearing of the Appeal, that is if the Appeal would be reinstated.

The appeal herein shows that it was filed by the firm of Muma, Nyagaka & Company Advocates. It was filed on 12<sup>th</sup> March 2008. The appeal was admitted for hearing by Justice Fred Ochieng on 19<sup>th</sup> May, 2008. However, on 3<sup>rd</sup> February, 2009 a consent was filed by the firm of Masinde & Company Advocates (Advocates for the defendant) and Namatsi & Company (Advocates for the plaintiff) to the effect that the Appeal be withdrawn. The consent letter cites the Appeal as the reference.

The lower court record shows that the plaintiff was represented by the firm of Namatsi & Company Advocates while the defendant was represented by the firm of Muma Nyagaka & Company Advocates. The record does not show how and when the firm of Masinde & Company Advocates was appointed. No Notice of change of Advocates was filed in both the lower court and the High Court. It is therefore evident that the firm of Masinde & Company Advocates had no instructions. How the firm of Namatsi & Company Advocates engaged in dealing with Masinde & Company Advocates is not explained as the respondent's Advocates had all along dealt with the firm of Muma Nyagaka & Company Advocates.

The order of the Deputy Registrar was entered erroneously. The same was as a result of a consent signed by an Advocate who had no instructions. I do set aside the order withdrawing the appeal and the appeal shall be deemed to be duly pending before the court for final determination.

On the second issue as to whether there should be a stay of execution in Kakamega CMCC No.327 of 2003 pending the final determination of the Appeal, counsel for the respondent submitted that the lower court had directed that the decretal sum be deposited in court and the appellant has not complied with that order.

Order 41 rule 4 (1) allows this court to deal with an application for stay of execution pending the hearing of an appeal even if a similar application was made before the lower court. The above rule does not limit the jurisdiction of the High Court to setting aside the initial order of the lower court only. The respondent was awarded Kshs.2 million by the lower court. A total of Kshs.300,000/= was paid to the respondent's Advocates. The proclamation by the auctioneer shows that the Appellant has some assets that can be attached in satisfaction of the decretal sum. There is no allegation that the appellant is not able to satisfy the decretal sum. Security becomes necessary when the judgement debtor seems not to be able to satisfy the decretal sum. Already KShs.300,000/= has been paid. I do find that the sum of KShs.300,000/= already paid is enough security pending the hearing and determination of the Appeal.

In the end, the appellant's application dated 8<sup>th</sup> June, 2009 is allowed. The order of the Deputy Registrar withdrawing the Appeal is hereby set aside. There shall be stay of execution in Kakamega CMCC 327 of 2003 pending the hearing and determination of the Appeal. Each party shall meet its own costs.

*Delivered, Dated and Signed at Kakamega this 13<sup>th</sup> day of October, 2009.*

**SAID J. CHITEMBWE**

**J U D G E**