



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Miscellaneous Civil Application 414 of 2008

HENRY TIROP:.....1ST DEFENDANT/APPLICANT

WILSON CHUMO:.....2ND DEFENANT/APPLICANT

VERSUS

JOHN K. KEINO:.....PLAINTIFF/RESPONDENT

RULING

Before me is a Notice of Motion stated to be brought under Orders XLI Rule 4(1), XLIX rule 5 of the Civil Procedure Rules and sections 3,3A and 799 of the Civil Procedure Act cap. 21 of the Laws of Kenya. It prays for stay of the order dated 11.09.08 and stay of any further execution issued in Eldoret CM.CC.NO.689 OF 1996 and for time to be enlarged within which the applicants may lodge an appeal and that the applicants do deposit into court such sum of money as the court may order by way of security for costs pending the hearing and final disposal of the intended appeal. It is based on the grounds that the Respondent filed suit in 1996 though on the face of the claim the same arose in 1985 and hence it was a claim statute barred which ought to have been dismissed with costs, that the judgment was for a sum of Kshs.36,000/= which was not claimed in the plaint; and the mistake of counsel in not paying court filing fees for the defence should not be visited on the party and that in any case there is no valid degree on the file and so warrants of arrest issued were null and illegal. There is an affidavit in support of the application sworn by the 1st Defendant/Applicant in which is detailed the history of the lower court's case.

The Application was opposed and the Plaintiff/Respondent filed a Replying affidavit sworn by himself in which he states that his advocate's advice to him is that the application is totally defective and an abuse of the process of the court and is brought in bad faith and with malice with the aim to delay, frustrate and/or prevent him from enjoying the fruits of his judgment as no appeal has been preferred six years later and gives a lengthy history of the case.

Mr. Otieno learned counsel for the Applicants submitted that there was no decree and therefore there could be no execution. He added that in any event what was sought in the plaint is not what was awarded in the judgment and the suit ought never to have been heard as the same was time barred. He contended that for leave to appeal out of time to be given the applicant must show that there were valid grounds of

appeal and the general principle is that where possible cases should be heard on their merit and that an arguable appeal does not mean an appeal that must succeed but one that is not frivolous.

Mr. Nabasenge learned counsel for the Respondent opposing the application submitted that the Defendant has brought application after another now totaling five in an attempt to deny the Plaintiff the fruits of his judgment as the right of appeal must be weighed against the right to enjoy the fruits of judgment. He submitted that no exceptional circumstances were shown to exist to warrant an order for stay of execution. As for the prayer for extension of time within which to file an appeal he submitted that the appeal must be shown to have merit and not to cause undue prejudice to the other party. Counsel saw the proposed Appeal as being frivolous and being brought after inordinate delay. He prayed that the Respondent be paid half the decretal amount should the application succeed.

I have taken into consideration the application herein, the Reply thereto and all the submissions by both counsel and the authorities which I was referred to. The issues for determination to my mind are two, to wit, has a case been made out to warrant a grant of an order for stay of execution and should time be enlarged for filing an appeal. This court is not considering the merits or demerits of the appeal and hence submissions on that are considered irrelevant.

It appears quite clearly that no decree was extracted after the judgment of the 18/12/2002. It therefore must follow that any warrants of execution issued thereafter and without a decree are illegal. And that is the case here. No lawful warrants of execution were lawfully issued and that then must empower this court to stay any execution. Accordingly prayer 5 of the Notice of Motion under consideration succeeds. That is upon the terms that the decretal sum be paid into an interest earning account in Savings and Loan Eldoret Branch in the joint names of both firms of Advocates appearing herein. Such opening of the account and deposit of the decretal sum be done within thirty (30) days of the date hereof in default of which the stay lapses.

It is trite that for leave to file appeal out of time to be granted the applicant must show that he has an arguable appeal and an arguable appeal does not mean an appeal that must succeed **See Keter & 6 Others Vs Kiplagat & 2 Others (2004) 2 Klr.159**. In the circumstances of this case where there has been a multiplicity of applications for setting aside exparte judgments and for stay of execution I do not find that the application for leave to file an appeal out of time has been brought after inordinate delay. In the circumstances of this case I therefore order that leave be and is hereby granted for the applicant to file his appeal. Such appeal be filed within 21 days of the date hereof in default of which the leave hereby granted shall automatically lapse. Cost of this application to the Applicant.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 2ND DAY OF DECEMBER, 2009.

P.M.MWILU

JUDGE

IN THE PRESENCE OF:-

Mr. C. F. Otieno for the Applicant

Mr. Nabasenge for the Respondent

Court Clerk - Paul Ekitela.