



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Appeal 141 of 2007

ELITE EARTHMOVERS LTD. APPELLANT

VERSUS

JOHN OBONYO MOI RESPONDENT

(Being an application for stay of execution)

RULING OF THE COURT

1. The applicant filed his application by way of Notice of Motion dated 19/06/2007 brought under Order 21 Rule 22, Order 41 Rule 4 (1), Order 50 and Order 3 Rule 9A of the Civil Procedure Rules (CPR), Section 3A and 63 (e) of the Civil Procedure Act and all other enabling provisions of the law. By the said application, the applicant seeks the following orders:-

- a. **THAT** the instant application be certified as urgent and be admitted for hearing ex-parte in the first instance.
- b. **THAT** the firm of M/S Abuodha & Omino Associates be granted leave to come on record for the appellant instead of the firm of J.A Guserwa & Co. Advocates.
- c. **THAT** pending the hearing and determination of the appeal the Honourable Court be pleased to grant a stay of execution of the judgment and the decree in Civil Case No. PMCC No. 387 of 2002 in Machakos
- d. **THAT** cost abide the outcome (sic).

2. There are 5 grounds on the face of the application which is also supported by the sworn affidavit of MAURICE OGAMBI dated 19/07/2007. From both the grounds and the affidavit in support, the applicant alleges that they are not liable in PMCC No. 387 of 2002 since the respondent was allegedly the employee of an independent contractor.

3. Before the application could proceed to hearing, M/S Wanyoike & Juma Advocates for the respondent filed what they called "NOTICE OF PRELIMINARY ISSUE" dated 27/07/2007. They have challenged the applicant's application dated 19/07/2007 on the grounds that:-

- i. Representation of the appellants by M/S ABUODHA & OMINO ADVOCATES in the proceedings herein, and more particularly cite the stated application by the said advocates for being in violation of the provisions of Order III Rule 9A of the Civil Procedure Rules with regard to prayers 3

and 4.

ii. Appeal herein is time barred and no leave has been granted the appellant to file the same.

4. Order III Rule 9A to which the respondent's counsel have referred provides that:-

“9A. Where there is a change of advocate or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court upon an application with notice to the advocate on record.”

5. Mr Juma who argued the preliminary objection on behalf of the respondent said that the application before the court is invalid since M/S ABUODHA & OMINO Advocates are not on record and secondly, he said that prayer (a) of the application seeks two orders in one and as such the same should be rejected. Mr Juma also argued that the appeal purportedly before court is not competent since it was filed way out of time.

6. In reply, Mr Omino stated that the submissions made by the respondent's counsel have no legal basis and further that since this court has unfettered discretion to make such orders as would meet the ends of justice, it should not be swayed by technical arguments. Mr Omino also contended that the arguments against the validity of the appeal were misplaced since there was a dispute regarding the date of the judgment of the lower court.

7. I must state from the outset that the facts giving rise to the application being contested are scanty save that as it appears from the sworn affidavit of MAURICE OGAMBI, there seems to have been a judgment in favour of the respondent as against the applicant arising out of some injuries allegedly suffered by the respondent in the course of his employment. It is disputed that the respondent was the applicant's employee. A decree was obtained in which the decretal amount was shown as Kshs.104,136/= plus costs of Kshs.31,504/=. The decree is dated 5/07/2007 but since the same was not marked as an annexure to the Supporting Affidavit. I consider the same to be a mere piece of paper with no evidential value.

8. The issue that arises for determination is whether the Preliminary Objection is sustainable. My finding is that for the reason that this court has not been furnished with sufficient details as regards the lower court matter, I decline to uphold the Preliminary Objection. Both sides have not handled this matter with due diligence. It is not clear from the material before me the stage at which the firm of GUSERWA & CO ADVOCATES ceased to be in the matter. The court cannot make assumptions. He who alleges must prove. The respondent has not proved the Preliminary Objection.

9. In the result, the same is dismissed with costs to the applicant.

10. Orders accordingly.

Dated and delivered at Machakos this 8th day of February, 2008.

R.N. SITATI

JUDGE