



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Appeal 34 of 2005

GUINNESS CONSTRUCTION & HOUSING CO. LTD APPELLANT

- Versus -

ABDALLA NASSOR RESPONDENT

RULING

The respondent / applicant herein prays for two orders:-

1. That the order given by this Honourable Court (Lady Justice Khaminwa) on 6th May, 2006, be set aside.
2. That the costs of this application be provided for.

The application is brought by a Notice of Motion dated 14th November, 2005, under Order XLI rule 4(1) and Order L. rule 1 of the Civil Procedure Rules. It is supported by the annexed affidavit of Mr. Adam Omar Hamza, the respondent/ applicant's advocate, and is based on the following grounds:-

- (a) The respondent's appeal is an appeal against a ruling delivered by the Resident Magistrate on 4th May, 2005 in Mombasa Resident Magistrate's Court Civil Suit No. 5322 of 2004 and not the entire suit.
- (b) The stay granted by this Honourable Court ought to have been a stay of the said order.
- (c) The said order was however for a stay of execution of the decree pursuant to the judgment of the Resident Magistrate in Civil Case No. 5322 of 2004.
- (d) The respondent therefore obtained the said order by misrepresenting facts to this Honourable Court.
- (e) The appeal herein is a nullity for the reason that the appellant/respondent did not obtain leave of this Honourable Court as per the provisions of Section 76(1) of the Civil Procedure Act read with Order XLII of the Civil Procedure Rules.
- (f) The said order is a nullity.
- (g) The applicant continues to suffer by not enjoying the fruits of his decree through an illegal order.

When the application came for hearing on 5th March, 2008, Mr. Hamza appeared for the applicant but there was no attendance by the respondent or its advocates. The record shows that the appellant's/respondent's advocates were M/S Gichana Bw'Omwando & Company. On 12th February,

2008, the hearing date was taken ex-parte by the applicant's advocates, Y. A. Ali, and this application was fixed for hearing on 5th March, 2008. An affidavit of service sworn by HERBERT MWAKUDUA, a Court clerk in the firm of M/S Y. A. Ali, Advocates, who is also an authorized court process server, shows that he served the firm of Gichana Bw'Omwando & Co., with the hearing notice on 18th February, 2008. A copy of the hearing notice is also attached to the affidavit of service and it shows in no uncertain terms that a clerk in the firm of Gichana Bw'Omwando & Co. received and date-stamped the Hearing Notice on 18th February, 2008 at 11.00 o'clock. That gave the respondent's advocates 15 clear days before the date of hearing, and that was sufficient time for them to attend court, but they did not attend. The court thereupon elected to proceed ex parte.

Mr. Hamza relied on the grounds set out on the face of the application and his affidavit in support. Copies of the proceedings and the order sought to be set aside were annexed to the affidavit. In a nutshell, the applicant's case is that the appellant applied for an ex parte interlocutory judgment which had been entered against it to be set aside, and the consequent execution and attachment of the appellant's goods to be stayed. That application was dismissed, and that dismissal is the subject of this appeal.

That appeal was accompanied by an application for stay of the decree while the appeal itself is against the ruling. According to Mr. Hamza for the applicant, what the appellant should have applied for would have been an order for the setting aside of the ruling dismissing its application and a stay of proceedings. In Mr. Hamza's submission, the order staying the decree should neither have been sought nor granted. In the circumstances it ought to be set aside.

As outlined herein above, the respondent did not attend court as it should have done. The application precipitating this appeal was made under Order XXI rule 22 of the Civil Procedure Rules. Under O. XLII rule 1, an appeal lies as of right from O. XXI rules 25, 57, 65(3) and 81. These do not include rule 22. On face of the record, there is nothing to show that leave to file this appeal was sought and obtained. Failure to obtain leave renders the appeal incompetent.

For the above reasons, the order given by this court in this matter on 6th May, 2005 is hereby set aside as prayed.

The appellant will pay the respondent's/applicant's costs of this application.

It is so ordered.

Dated and delivered at Mombasa this 9th day of May, 2008.

L. NJAGI

JUDGE