



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Appeal 62 of 2007

WANYAMU MATHUKU ::::::::::::::::::::APPELLANT/APPLICANT

VERSUS

DOMINIC MWANDIA::::::::::::::::::RESPONDENT

RULING

1. The Application before me is dated 28.3.2007 and is premised on Order XXXIX Rule 1 and 2 and Order XLI Rule 4(6) and Order XXI Rule 22(2) of the Civil Procedure Rules. The specific prayers sought are:-

“i. ...

ii. *That there be a temporary stay of execution or and release of applicants attached goods in execution in Kitui SRM No. 435 of 2005 or any decree pending the determination of this application.*

iii. *That T.M. Musyoki advocate be summoned to show cause whether he was appointed by the applicant to represent him in Kitui SRM 435 of 2005.*

iv. *Costs of this application be provided for.”*

2. The grounds in support are:-

“i. *The Applicant has filed a substantive appeal with*

high probable chances of success, whereof he is likely to be executed on a suit he did not participate or and on allegation that he caused an on accident on 7.9.2005 while driving motor vehicle KAR 802 Z he caused an accident where the respondent is said to have been injured. The Applicant avers that he owns M/V. KAR 820 S but not KAR 802 Z as alleged in the pleading in Kitui 435/05. The Applicant has all the particulars to proof his case.(sic)

ii. *That the Respondent has threatened to execute against the Applicant any time now.*

iii. *That if execution herein is effected the Applicant will suffer irreparably or and his Appeal be declared nugatory.*

iv. *That it is fair and just that stay herein be granted to the applicant for him to present his case before Honourable Court for full and fair determination.”*

3. From the Supporting Affidavit sworn by the Applicant and his Further Affidavit sworn on 21.8.2008, the Applicant's case is that he was the wrong party to have been sued in this case because the motor-vehicle subject of the accident i.e motor vehicle Registration no. KAR 802 S does not belong to him but to one Moyia David. That he never instructed one T.M. Musyoki Advocate to appear for him in Kitui SRMCC No. 435/2005 and he is unnecessarily being harassed with the threat of execution when he has nothing whatsoever to do with the suit.

4. In his Replying Affidavit sworn on 18.6.2007, the Respondent depones that the Application and the Appeal are all frivolous because the accident truly occurred and the motor vehicle subject thereof belonged to the Applicant. That the Applicant was properly represented in the suit before the lower court and he has no reason now to challenge its outcome. Further, that he is capable of refunding the decretal sum in the event that the Appeal succeeds. His advocate has referred me to the following decisions;-

i. Kiwanjani Hardware Ltd vs Daniel Ndaka HCCA 187/2008 (Machakos) on the conditions to be met for stay pending appeal to be granted.

ii. Kobil Petroleum Ltd vs Quasar Ltd HCC 412/2003- (Nairobi) similar to (i) above.

5. My view is that the Applicant generally has a good case for grant of the orders sought because it is agreed that for an order of stay of execution to issue, the Applicant must show that substantial loss will be occasioned if the decree is executed. That test has been passed and this is why the court in Vishram Ravji Halai & Another vs Thornton & Turpin [1963] Ltd. Civil Application No. Nairobi 15 of 1990 held as follows:-

"...the court ... before it could decide the application (for stay of execution) must have regard to the requirements of Order XLI Rule 4 (2) of the Civil Procedure Rules under which the Applicant had to satisfy the court of two matters. Firstly, that substantial loss may result to the Applicant unless the application is granted... secondly; the Applicant had to give such security as the court may order."

6. I am saying that the test has been passed because the Applicant prima facie has shown that the motor vehicle that was involved in the alleged accident may have belonged to a party other than himself. The certificates of search marked "WM1" and "WM2" show that his motor-vehicle is Registration No. KAR 820S and not KAR 802S. To subject him to the process of attachment will cause him substantial loss. I see no need to order any security in these circumstances. Security is a matter of discretion and I decline to exercise it in this case.

7. Having so said, the Application before me has certain procedural defects which were not raised by the Respondent and I have chosen to overlook them in the interests of Justice. These include the proper procedure for bringing the Application; it ought to have been a simple Notice of Motion under Order XLI Rule 4 of the Civil Procedure Rules and not a Summons. The proper prayer is also wanting but I gathered from submissions that the parties were focused on the order for stay pending appeal.

8. In any event my final orders are that prayer 2 of the Application dated 28.3.2007 shall be granted pending hearing and determination of the Appeal herein. Prayer 3 has no bearing to the Appeal and is struck off.

9. Costs shall abide the Appeal.

10. Orders accordingly

Dated and delivered at Machakos this 25th day November of 2008.

Isaac Lenaola

Judge

In the presence of: Mr. Kimeu h/b for Mr. Mulu for Applicant

Isaac Lenaola

Judge