



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL APPEAL 284 OF 2007

PERRIER DE LA BATHIE ANDREE.....APPLICANT

VERSUS

PETER ONYANGO.....RESPONDENT

R U L I N G

The applicant Perrier De La Bathie Andree has come to this court under Order XXI Rules 22(2) and 35, Order XLI Rule 4 of the Civil procedure Rules Sections 3A, 34, 38, 63(c) & 63(e) of the Civil Procedure Act seeking an order of stay of execution of the warrant of arrest issued against the applicant on the 18th April, 2007, and a further order lifting the warrant of arrest issued against the appellant.

The applicant has sworn an affidavit in support of the application in which he blames his advocate for their failure to inform him of the hearing of the suit as a result of which the applicant did not attend court for the hearing of the suit and was thereby denied an opportunity to be heard on his defence and judgment entered against him.

Subsequently the applicant applied to have the judgment set aside. That application came up for hearing on 17th April, 2007. On the same day a notice against the applicant to show cause as to why execution should not proceed against him was also fixed for hearing.

The trial magistrate rejected an application for adjournment of the application for setting aside the judgment and dismissed the application and further issued orders for the applicant's arrest. The applicant contends that he was denied an opportunity to be heard before being committed to civil jail.

The applicant further contends that the magistrate violated section 38 of the Civil Procedure Act and Order XXI Rule 35 of the civil Procedure Rules. He maintains that due to his age and ill health he stands to suffer irreparably if arrested and committed to civil jail.

Under Section 38 of the Civil Procedure Act, the court can only issue an order for arrest and committal of a judgment debtor to prison where the court is satisfied:

“(a) That the judgment debtor, with the object or effect of obstructing or delaying the execution of the decree,

(i) is likely to abscond or leave the local limits of the jurisdiction of the court or

(ii) has after the institution of the suit in which the decree was passed, dishonestly transferred, concealed or removed any part of his property or committed any other act of bad faith in relation to his property, or

(b) That the judgment debtor has or has had since the date of decree, the means to pay the amount of the decree or serve substantial part thereof and refuse or neglects or has refused or neglected to pay the same, but in calculating such means there shall be left out of account any property which, by or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree, or

(c) That the decree is for a sum for which the judgment debtor was bound in a fiduciary capacity to account.

Order XXI Rule 35 of the Civil Procedure Rules enjoins the court before making an order for committal of a judgment debtor to be satisfied of the same issues mentioned in Section 38 of the Civil Procedure Act.

At this stage this court cannot decide whether the lower court properly addressed itself and considered the issues raised in Section 38 of the Civil Procedure Act as that will be a substantive issue to be determined at the hearing of the appeal.

It is however, evident that unless the order for stay of execution is issued the warrant of arrest will be executed. Given the applicant's advanced age and alleged ill health (which fact has not been controverted) the applicant will suffer irreparable loss.

In the circumstances I find it fair and just that an order of stay of execution do issue. However, since the respondent has a judgment in his favour, it is necessary that his interest also be taken into account.

Accordingly I will grant an order for stay of execution of the warrant of arrest issued on 18th April, 2007 pending the hearing of this appeal on the following conditions:

- (i) That the applicant shall deposit the full decretal sum into court within 10 days from the date hereof.
- (ii) That the applicant shall file and serve a record of appeal within 90 days from the date hereof.
- (iii) That the applicant shall take all necessary action to facilitate the speedy disposal of the appeal. Should the appeal not be disposed off within 12 months the order for stay of execution shall automatically lapse.
- (iv) Should the applicant fail to comply with (i) or (ii) above, the order for stay of execution shall lapse.

Those shall be the orders of this court.

Dated and delivered this 21st day of November, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Masese for the applicant

Advocate for the respondent absent