REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU
MISCELLANEOUS APPLICATION 3 OF 2008

BLUE SHIELD INS. CO. LTD ……….……........……………. APPLICANT

VERSUS

GEORGE THURANIRA ……………..……………………...… RESPONDENT

RULING

On 31st October 2007 the court below, A.K. Kaniaru, PM delivered a judgment at Nkubu court in SRMCC No. 20 of 2006 in which he entered judgment against the applicant herein in the sum of Kshs. 663,200/=.

The applicant being aggrieved by that award has filed this application. The application was filed at Embu because, according to counsel for the applicant, the High Court at Meru was not sitting.

It is an application for two substantive orders, namely, leave to file appeal out of time and stay of execution of the decree pending the hearing and determination of this application.

In an affidavit sworn by the applicant's legal officer the failure to file an appeal against the decision of the lower court has been explained on the fact that the applicant was moving offices as a result of which a letter addressed to them by their advocates on the outcome of the trial in the lower court did not get to the deponent's desk until 4th December, 2007. By this time, the time allowed for appeal had lapsed.

Regarding the prayer for stay of execution it is deposed that the applicant is greatly aggrieved by the lower court's judgment and intends to challenge it. The application is expressed to be brought under sections 3 and 3A of the Civil Procedure Act as well as Orders 49 rule 5 and 50 rule 1 of the Civil Procedure Rules.

The respondent has opposed the application arguing that the application for stay is defective, frivolous, vexatious and is an abuse of the court process; that the applicant will not suffer any loss if the decretal sum is paid to the respondent as the latter is a prosperous businessman capable of refunding the funds if the intended appeal succeeds; that the application is made *mala fides* as the applicant had initially agreed to pay the decretal sum. These averments were argued before me on 8th May 2008. Counsel reiterated the averments in the pleadings, with the applicant's counsel stressing that the delay in filing appeal within the time allowed by law has been sufficiently explained. She also asserted that the applicant stands to suffer loss if the decretal sum is paid to the respondent who she described as a person without means.

Learned counsel for the respondent on his part submitted that the application is defective as it is brought under the wrong provisions of the law as it failed to cite section 79G of the Civil Procedure Act and Order 41 Rule 4(1) and (2). That it is also in contravention of Order 50 Rule 15 of the Civil Procedure Rules.

I have considered these rival arguments as well as the authorities cited. At the outset I would like to make observation on two (2) issues. The application, as I have indicated earlier, was heard at Embu by Khaminwa, J who granted to the applicant leave to file the appeal within 15 days from the date of that order. Counsel for the respondent stated from the bar that indeed the appeal has been filed being HCCA No. 130 of 2007. His only complaint was that they have not been served with it. Leave to appeal having been granted and the appeal having been filed the first relief in this application is spent.

The second issue relates to the prayer for stay of execution. In paragraph 3 the applicant prayers:-

"***<u>THAT</u> Honourable Court be pleased to stay execution of the decree in Nkubu SRMCC No. 20 of 2006 <u>pending the hearing and determination of this application</u>"*** (emphasis mine)

The stay sought is only for the period between the time the application was argued *experte* and the time of this ruling. It does not seek to stay execution pending the hearing and determination of the appeal or (at the time it was framed) intended appeal. It is not clear to me whether the applicant only intended to have a stay for the period of the application or whether that was a mistake.

However, from both the supporting affidavit and submissions by both counsel the purpose and intent of the application is clear that the stay sought is for the period of the appeal.

Having so found, I would like to address the issue of Order 41 Rule 4 (1) and (2). That is the provision for stay of execution pending appeal. It is the contention of respondent's counsel that the applicant ought to have cited it. But counsel for the applicant responded that that omission is curable. This provision is only applicable to applications for stay where appeal has been filed and is pending. When the application was made the appeal had not been filed. Indeed that very application sought for leave to file appeal out of time. The applicant was therefore in order to invoke the court's inherent powers under sections 3 and 3A of the Civil Procedure Act.

The court has the power *ex debito justitiae* to grant a stay in circumstances not provided for under the Civil Procedure Rules. See **<u>ICDC V. Onyango,</u>** (1983) KLR 416.

Then there is the argument that Order 50 Rule 15 of the Civil Procedure Rules have not been complied with. The rule requires that applications brought by way of motion or summons must bear at the foot the following words:-

"***If any party served does not appear at the time and place above-mentioned such order will be made and proceedings taken as the court may think just and expedient."***

The instant motion does not have the above caution. Is that fatal to the application? It is not. Although the rules of procedure are important to the due administration of justice as they are designed to formulate the issues for determination by the court and to give notice to the parties concerned, it is the duty of the court to apply substantive justice. In other words, where no prejudice or injustice is occasioned by failure to comply with rules of procedure the court should be concerned with the substantive issues in the dispute. In the present motion, it is my view that no prejudice or injustice was occasioned to the respondent by the above omission. The respondent was served with the motion and indeed appeared by counsel to argue the motion.

I turn to the main issue in this application, namely stay of execution. Although brought under the inherent powers under sections 3 and 3A of the Civil Procedure Act, I believe the same requirements under Order 41 Rule 4 of the Civil Procedure Rules are applicable. In any case the main purpose for a stay is to preserve *status quo* and to ensure there is no substantial loss.

The decretal sum, no doubt is substantial. It is the applicant's contention that the respondent does not have the means to refund it if it was paid to him and the appeal was to be allowed. The burden was therefore on the respondent to rebut that claim, that he is impecunious. He instead has merely stated that he is a prosperous businessman. That is not sufficient. He ought to have gone further than that by

disclosing either his income or any form of asset in his name. See **ABN AMRO Bank N. V. Vs. Le Monde Foods Ltd** Civil Application No. NAI. 15 of 2002.

I come to the conclusion that the applicant's apprehension is justified. For the reasons given by the applicant for the delay I find that the delay has been sufficiently explained. In the result there will be a stay of execution pending the hearing and determination of this appeal on condition that the decretal sum shall be deposited in an interest-earning account in the names of both counsel with a reputable bank within 21 days from the date of this order failing which execution shall proceed without further orders. Costs to be in the appeal.

Dated and delivered at Meru this 14 th ..day of Nov. 2008.

W. OUKO

JUDGE