



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 656 of 2006

CHUI MANUFACTURERS LTD.....1ST APPELLANT

MANUKANT NEMCHAND SHAH.....2ND APPELLANT

VERSUS

JUDY WARIARA MUNGAI.....RESPONDENT

R U L I N G

1. The application before me is a notice of motion dated 20th November, 2006 brought under order XLI Rule 5 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The applicants Chui Manufacturers Ltd and Manukant Nemchand Shah, who are also the appellants, are seeking orders that the respondent be directed and ordered to provide security for the decretal sum of Kshs.352,316/= and auctioneers charges of Kshs.82,940/= which have been paid by the appellants.
2. The applicants contend that the respondent is not a person of means and may therefore not be able to refund the decretal sum if the applicants' appeal is successful. The 1st applicant contends that the accident subject of the respondent's suit is a subject of a traffic case which is still pending in the Traffic Court.
3. The 1st applicant has sworn an affidavit in which he avers that the judgment entered against the applicants was irregularly obtained as no notice of the judgment was served prior to the purported execution.
4. Judy Wariara Mungai, who is the respondent has filed grounds of objection contending that the application before the court is frivolous vexatious and without any merit. It is further contended that there has been inordinate and unexplained delay in filing the application in court, and that the application is an abuse of the process of the court as a similar application was dismissed in Milimani CMCC No.9437 of 2005.
5. Counsel for the respondent submitted that no evidence has been laid before the court to support the contention that the respondent is not a person of means nor has any documents been exhibited to show that there are pending proceedings in the Traffic Court relating to the current proceedings. It is submitted that payment made by the appellants was lawful as the same was made pursuant to a lawful decree. It was contended that the orders sought by the applicant were not interlocutory orders but final prayers which has no relations with the appeal as there is no prayer for restitution in the main appeal.
6. Order XLI Rule 5(1) of the Civil Procedure Rules states as follows: -

“Where an order is made for the execution of a decree from which an appeal is pending, the court which passed the decree or the court to which an appeal is pending in terms of rule 4 shall, on sufficient cause being shown by the appellant, require security to be taken for the restitution of any property which may be or has been taken in execution of the decree or for the payment of the value of such property and for the due performance of the decree or order of the court from whose decree or order such appeal shall have been brought.”

7. It is evident that the applicants’ prayer for security for the decretal sum is anchored on the above provision. Thus, it is necessary that the applicant establishes sufficient cause to warrant the court requiring security for restitution of the decretal sum and the auctioneer’s charges which the applicants have already paid should that become necessary.

8. In this case, the reason being put forward by the applicant is the allegation that the respondent is not a person of means. That allegation has not been backed by any evidence and is therefore nothing more than a mere allegation. Secondly, it is contended that a traffic case arising from the accident subject of the suit is still pending in the City Court. However, that is neither here nor there. Even assuming that the accident subject of the traffic case is the same accident subject of the cause of action in CMCC No.9247/05, the two cases are independent. CMCC No.9247/05 has already been finalized and a decree issued. Unless that decree is stayed or set aside, the court cannot interfere with its lawful execution. To do so would be to deny the respondent who is a successful litigant the benefit of her judgment without any appropriate orders staying the execution of the decree. Moreover, the execution process has already been carried out and finalized.

9. For these reasons, I find no merit in this application and do therefore dismiss it with costs.

Dated and delivered this 18th day of December, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Oduor for the appellant/applicant

Ndurumo for the respondent