



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Misc Appli 200 of 2006

JOSEPH M. MWANGI.....CLIENT/APPLICANT

VERSUS

NYAMOGO & NYAMOGO ADVOCATES.....ADVOCATES/RESPONDENTS

RULING

By a notice of motion brought under **Order L Rules 1 and 17** of the Civil Procedure Rules, **Section 3A, 63e and 89** of the Civil Procedure Act Joseph M. Mwangi the client/applicant came to this court under certificate of urgency seeking *inter alia* to have: -

- (i) *this court set aside the ex-parte ruling delivered on the 27th September 2006 and all consequential orders entered against the client/applicant on the 27th September 2006,*
- (ii) *That there be a stay of execution of the Ruling and orders made on the 27th September 2006 by the taxing master Hon. E. J. Osoro pending the hearing and determination of the application to set aside the ruling delivered on the 27th September 2006 interparties.*

The Notice came before Hon. Mr. Justice Khamoni on 29th September 2006, but the same was not certified as urgent and the applicant directed to take a date in the Registry. No date was however taken. Instead the applicant filed another notice of motion under **Sections 3A and 63 e** of the Civil Procedure Act, **Order XXIX Rule 6** and **Order L Rules 1,2 and 3** of the Civil Procedure Rules and **Section 51** of the Advocates Act seeking *inter alia* orders for: -

- *Stay of execution of the Warrants of Attachment and sale issued to the Respondent on 16th October pursuant to the certificate of costs dated 16th October 2006 pending the hearing of the Notice of Motion dated 29th September 2006.*
- *A declaration that the warrants of attachment and sale issued to the Respondent on the 16th October 2006 are irregular null and void and all further action arising therefrom be stopped.*
- *A declaration that the suit has been fully satisfied by the full payment of sums due to the Respondent under certificate of costs dated 16th October 2006.*

On the same date i.e. 23rd October 2006, the Notice of Motion was placed before Hon. Mr. Justice Khamoni but again He refused to have the same certified as urgent. About 7 weeks later on the 15th

December 2006, the applicant had the Notice of Motion of 29th September 2006 and the one of 23rd October 2006 served upon the Respondent.

In the meantime since the applicant had failed to take a date for the hearing of any of the two applications, the Respondent had the Notice of Motion dated 29th September 2006 fixed for hearing. The Respondent also filed a notice of preliminary objection with respect to jurisdiction of the court and the competence of the application. A replying affidavit was also sworn by Nyamodi Ochieng Nyamogo.

At the hearing of the application the applicant's advocate requested to have the application dated 29th September 2006 marked as settled with no orders as to costs as the same had been overtaken by events the applicant having made payments to the Respondent. The Respondent through Mr. Nyamogo has objected contending that the applicant can only withdraw his application with costs to the Respondent.

It is evident that the applicant served the Respondent with the two applications on 15th December 2006. This was actually after the payment of the amount taxed in favour of the Respondent. If it is true that the matter was settled by the payment then there was no need for the application to be served. It is evident that the Respondent having been served, it was prudent upon him to defend the application and He did this by filing a notice of preliminary objection and a replying affidavit. That being so, the applicant cannot talk of a settlement unless both parties are agreed on the settlement which in this they are not.

I concur with Mr. Nyamogo that the applicant can only withdraw his application dated 29th September 2006 subject to costs. Accordingly I reject the application to have the notice of motion dated 29th September 2006 marked as settled and order that the motion shall either proceed to hearing or if parties are agreed marked as withdrawn subject to costs being paid to the Respondent.

These shall be the orders of this court.

Dated, signed and delivered this 7th day of February 2007.

H. M. OKWENGU

JUDGE