



REPUBLIC OF KENYA

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

Misc Appli 887 of 2006

DEV. PAK STATIONERSAPPLICANT

VERSUS

ABICHEM AGENCIES LTDRESPONDENT

RULING

The Applicant herein has come to this Court by way of notice of motion in a Misc. Civil Application. The notice of motion is brought under order LI Rule 1 and Order XLI rule 4 of the Civil Procedure Rules, Section 3 and 3A of the Civil Procedure Act and all enabling provisions of the law.

It seeks stay of execution and/or any further proceedings in RMCC 5904 of 1999 pending the hearing and determination of this application, and a stay of execution/or further proceedings in RMCCC 5904 of 1999 pending appeal.

The grounds in support are that, proceedings were going on in the lower court. When the matter came up for hearing on 7.6.2006 applicants Counsel was absent because of a sick daughter.

Despite a request for an adjournment the matter proceeded ex parte. The applicants Counsel subsequently put in an application to set aside those ex parte proceedings. The said application came up for hearing inter parties on 20.7.2006. Despite both sides being ready to proceed with that application the learned trial magistrate declined to hear it and proceeded to close the defence and set the date for judgment. Apparently judgment has been given and execution process is in motion. The Applicants' Counsel applied for proceedings with a view to intending to file an appeal against the lower Courts' refusal to hear the application for setting aside ex parte proceedings. To date no appeal has been filed because no proceedings have been supplied, the file was not even available for perusal in order to draw a Memo of Appeal in order to file an appeal hence resorting to a misc. application in order to seek stay orders.

The Respondent has opposed the application on the grounds that there is no jurisdiction for the court to grant the same because the provisions under which it has been brought envisages the existence of an appeal which is not the case herein as no appeal has been filed, that assuming that an appeal is forthcoming that does not arise as time for filing the same has already expired as the applicant had up to 19.8.2006 to lodge an appeal which they failed to do, they maintain that there is no jurisdiction to entertain an application under order 41 of the Civil Procedure Rules when there is no appeal in place.

In reply Counsel for the applicant concedes that she needed only a Memo of Appeal in order to file an appeal in the High Court but the file was not available for perusal in order to draw up a Memo of Appeal, that they are still waiting for proceedings to enable them take appropriate steps in the lower court.

The application is brought under order 50 rule 1 which gives general power for applications to be brought by way of notice of motion. This provision deals with the format of the application only.

The reliefs are being sought under Order 41 Civil Procedure Rules. In order for them to be granted, the application has to satisfy the ingredients there in. Order 41 under which the reliefs are sought deals with appeals. Order 41 rule 1 gives the format of how an appeal should look like and how it should be presented. It states “**0.41(1) every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading (2). The memorandum of appeal shall set forth concisely and under distinct heads, the grounds of objection to the decree or order appealed against, without any argument or narrative and such grounds shall be numbered consecutively.**”

This means that any processes relating to an appeal can only lie where there is an appeal in existence. Here in what the court has before it is a miscellaneous application and not an appeal.

The reliefs being sought under order 41 rule 4 have also to satisfy the ingredients under that rule.

The salient provision in that rule is found running from line 4 – 7 and it states..... “*the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from, the Court, to which such appeal is preferred shall be at liberty, on application being made to consider such application and to make such order thereon as may the court seem just....*”

It is therefore clear that in order to qualify for a relief under this provision the request for the relief must be directed either to the court appealed from or the Court appealed to. This court having neither been addressed as a court appealed from or appealed to has no jurisdiction to entertain the application.

The next point for consideration is whether the error is curable by provisions of Section 3 and 3A of the Civil Procedure Act. Section 3 Civil Procedure Act reads “in the absence of any specific provision to the contrary nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred or any special forms, or procedure prescribed by or under any other law for the time being in force”. Section 3 envisages a situation whereby all forms of procedure is provided for under the Civil Procedure Act. But where none exists under the Civil Procedure Act but that kind of procedure is provided for under any other written law, a court of law can invoke that procedure and that will be perfectly in order. This section cannot assist the applicant because the procedure for stay is already provided for under order 41 rule 4 of the civil Procedure rules. That order is exhaustive and no extraneous provisions can be called in to deal with any inadequacies, if any, more so when none has been cited to the court.

Section 3A on the other hand states that “***nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the Court.***”

This section enshrines the inherent powers of the court which are called into play to do justice where no provision of law grants authority to do justice. It is not invoked where a laid down procedure is provided but has not been taken up by the litigant. Herein it is not available to the applicant because there is provision for him to seek stay in the first instance in the court appealed from or proceed to file an appeal and then seek stay from the Court appealed to. The applicant did not seek stay from the court appealed from. He sought stay from this court before filing of an Appeal. The application therefore has no legal basis. It is incompetent, and there is no need for this court to go into its merits. This Court sees no reason to depart from the holding in Nairobi HCCC 209 of 2005 CONTINENTAL CREDIT FINANCE LTD VERSUS ISAAC GATHUNGO WANJOHI & 2 OTHERS where at page 4, 2nd last paragraph the Court remarked that if there is no notice of appeal filed by the Defendants the application will fail. On the basis of the foregoing findings the application dated 5.12.2006 and filed the same date cannot stand. It is dismissed with costs to the Respondents.

DATED READ AND DELIVERED AT NAIROBI THIS 23RD THIS DAY OF MARCH 2007.

R. NAMBUYE

JUDGE