



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI LAW COURTS)
CIVIL APPEAL 291 OF 2004

ANTONY MUTURA NJAU..... APPELLANT

VERSUS

SIMON NJAU & ANOTHER..... RESPONDENTS

—
R U L I N G

The Notice of Motion herein, dated 11/10/05, under Order 41 r. 4 of the Civil Procedure Rules seeks the following orders:

1. Already spent
2. Stay of execution of the Judgment delivered on 25/3/4 pending the determination of the appeal herein,
3. Lifting of the Warrant of Arrest issued on 6/10/05 in execution of the said judgment pending the determination of this application.
4. Costs of this application.

Supported by an Affidavit by Antony Mutura Njau, the application is on the grounds that:

- a) the warrant of arrest in execution issued herein is fatally defective as the same is addressed to a total stranger herein while at the same time being enforced against the appellant. The same seeks recovery of an amount unknown to this cause and is hence grossly oppressive.
- b) The applicant will suffer substantial loss and irreparable damage if the Respondent proceeds unrestricted in pursuance of the said judgment.
- c) The applicant has valid grounds of appeal with high probability of success which would be rendered nugatory if stay is not granted.
- d) The application is made without unreasonable delay.

At the commencement of the hearing of this application, learned counsel for the Respondent, Mr. E.M. Njenga, raised the following Preliminary objection; namely that the application has been filed by a

stranger – an Advocate who is not properly on record.

The counsel stated that the Advocate came in without leave of this court, as they came on record improperly.

In reply Mr. Njugi, learned counsel for the applicant, submitted that the application to come on record was made in Kiambu and it was by consent; filed on 3/8/05. The consent was adopted by the lower court on 11/8/05. He stressed that the Lower court had granted leave to come on record on 11/8/05, which coming on record was by consent.

In response, Mr. Njenga submitted that consent by parties – not granted by the court – is not the same as leave by the court, to come on record. In any case, he continued, by 11/8/05, the appeal had been filed by another Advocate, on 26/4/04 when the Memorandum of appeal had been filed. He concluded by submitting that the court to grant leave to come on record was this court – the High Court, not the lower court.

At that juncture; I ordered for the file from the lower court for perusal, before writing this Ruling.

My perusal of the pleadings and consideration of the submissions by the learned counsels for both sides, and the record in the file from the lower court, leads me to the following findings and conclusions.

The judgment by the lower court was delivered on 25/3/04 in the presence of Mr. Njuki Advocate for the Defendant and Mr. Kiiru, Advocate for the Plaintiff.

Order 3 rule 9A of the Civil Procedure Rules provides as under:

“When there is a change of Advocates, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court upon an application with notice to the Advocate on record.”

At this juncture, it is important to stress that after 25/3/04 when the judgment was delivered, any new Advocate wishing to come on record had to seek, by way of an application, and obtain leave of this court, before coming on record or before such change could be legally valid.

From the pleadings before me, and perusal of the two files – this one and the one from the lower court, the two files do not have any evidence of any application by the learned counsel, who made this application, to come on record, much less such leave being granted.

It is, odd to submit that the applicant’s counsel sought leave to come on record from the Kiambu Court. What would be the purpose much less the validity of such leave and grant, given that by the 3/8/05, and 11/8/05 the Kiambu Court had long delivered its judgment and closed the file, at least for the purpose of the suit at that level.

However, even assuming that such leave had been sought and obtained, however irregularly/illegally, the appeal arising from which this application and Preliminary objection stem from, had long been drawn and filed on 26/4/05 by an Advocate other than Mr. Njuki [whether that other Advocate was properly on record is not in issue here, at least at this stage]

Further, under the above quoted provisions of Order 3 rule 9A, only the court to which the appeal is intended to be lodged can grant leave to come on record if judgment has already been entered, as in this case, not the court against whose judgment/Ruling the appeal is against.

The leave to come on record must be sought and be obtained – granted, by the court. Parties have no capacity to alter/or change the law. Parties cannot arrogate to themselves the power of the court and purport to grant themselves leave to come on record by consent.

To avoid any unnecessary confusion I need to add that during the hearing of the application for leave to come on record, the party, other than the applicant, can state in court “that he has no objection to the application.” Then the court will grant or decline to grant the leave to come on record. It would be irregular and illegal, however, for the parties to come to court and purport to record a consent if they agree that: “so and so, by consent, comes on record.” That is an illegal usurpassion of the power of the court.

All in all, and for the above reasons, I uphold the Preliminary Objection, find that the Applicant’s counsel is not properly on record, and conclude that the application is drawn and filed by a stranger to the matter before me.

Having held as I have above, I declare the application to be incompetent and hold all those papers drawn and filed by Mr. Njugi to be null and void, and I strike the same from the record. The effect of that is that the application is dismissed for incompetence, with costs to the Respondent and against the applicant.

DATED and delivered in Nairobi, this 15th Day of March, 2007.

O.K. MUTUNGI

JUDGE