



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 455 of 2006

HUSSEIN ZADEK.....APPELLANT

VERSUS

MARY EDNA HUWLER.....1ST RESPONDENT

WILLIAM ROMAN McTOUCH.....2nd RESPONDENT

RULING

The Appellant herein filed Civil Case No.7506 of 2006 in the Chief Magistrate's Court at Milimani Commercial Court seeking a declaration that the purported Levy of Distress is wrongful and unlawful, a permanent injunction to restrain the defendants, their agents and/or servants from proceeding with the levy of distress against the Plaintiff, restitution of the overpaid Ksh s120,775.00, damages for trespass, costs of the suit and any other relief that the court may deem fit to grant.

The suit was accompanied by an interim application seeking to restrain the defendants who are the current respondents from levying distress for rent upon the applicant herein pending the hearing and the determination of the suit. That interim application was heard and dismissed by the lower court and that is what gave rise to this appeal. The application was dismissed on 11.7.2006 and this appeal was filed the next day of 12.7.2007.

The appeal was accompanied by a notice of motion dated 12.7.2006 and filed the same date seeking restraint for levying of distress pending hearing of appeal and any other further orders that the court may deem fit to grant. The application of 12.7.2006 was withdrawn and in its place another application also by way of notice of motion was filed on 13.7.2006 having been dated the same date. It sought 5 prayers namely a withdrawal of the application dated 12.7.2006, restraint from levying and distress for rent pending hearing of the application inter parties and then the appeal and provision for costs. That application was heard ex parte and conditional restraint was granted on 13.7.2006 on condition that 366,000/= was deposited in court.

The appellant/applicant has come to this Court under Order XXIV rule 6 of the Civil Procedure Rules and all other enabling provisions of the law by way of a chamber summon dated 7th November, 2006 and filed the same date. It seeks orders that the appeal has been wholly compromised by the conduct of the parties herein, that the same be marked as settled with no orders as to costs, that money deposited herein be released to the applicants' advocate and that costs be provided for.

The grounds in support are that the distress has been abandoned the appellant has left the suit premises

and pursuit of the appeal will just be an academic exercise. They maintain that they are entitled to the release of the money and the same should not be held to await the outcome of the lower courts decision which is still pending as there is no defence filed therein to show that the Respondents who are the defendants in the lower court have a counter for claim in excess of what was deposited. That if the Respondent feels in secure about their counterclaim they can make an appropriate application in the lower court for the furnishing of security for the judgment.

In response to the application counsel for the respondents concedes that they have no objection to the appeal being discontinued but are opposed to the money being released to the applicant. The reason is because the appellant has moved from the premises and put his distressable goods out of the reach of the Respondent, leaving his counter claim in the lower court unprotected. That in view of this, this court should not order the release of the money to the applicant. Otherwise they have no objection to the termination of the appeal. They urge the court to protect the deposited funds so that who ever wins can have access to the funds.

In response Counsel for the applicant maintained that they have a right to withdraw the appeal, that the authority cited has no relevance herein as it deals with immovable property and not money.

On the courts' assessment of the facts herein, it is clear that the applicant appellant wishes to bring the appeal to an end and then withdrawn the deposit deposited herein to secure the stay order. The application is brought under order XXIV rule 6 Civil Procedure Rules which states 6(1) "*where it is proved to the satisfaction of the court and the court after hearing the parties directs, that a suit has been adjusted wholly or in any part by any lawful agreement or compromise or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the court shall on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith.*"

(2) *The court on the application of any party may make any further order necessary for the implementation and execution of the terms of this order.*"

This order talks of a suit, a plaintiff and a defendant. It does not relate to an appellant and a respondent on appeal. Appeals fall under Section 79 of the Civil procedure Act Cap.21 Laws of Kenya

It has perused the entire section and finds no provision for withdrawal of the appeal. Section 79B provides for the perusal of the appeal and its rejection where it does not raise triable issues. Order 41 Civil Procedure Rules which caters specifically for appeals is silent on the issue of withdrawal or compromise or settlement of an appeal more so where parties are not willing to bring the proceedings to an end by consent as in this case.

The only provision that can bring us closer home is order 41 rule 8B (1) where it is provided that after the delivery of the memorandum of the appeal the Registrar may list the appeal before a judge in chambers for directions. When it is so listed the judge may give directions generally in terms of order 41 rule 8B (3).

This court is alive to the provisions of Section 3A of Cap.21 Laws of Kenya which gives the court inherent powers to do all that is necessary for ends of justice to be met. This section has not been cited. Even if it can be taken that it can safely be said to have been included in the phrase "and all enabling provisions of the law", it is this court's considered opinion that it will not assist the applicant as it will be considered to be a rider to the provisions for withdrawal of a suit. There is no way this court can substitute provisions meant to apply to a suit to be those applicable to appeals.

This court is also alive to the provisions of order 50 rule 12 Civil Procedure Rules which provides specifically that no application should be rejected solely on the ground of want of form. Herein indeed where an application meant to serve an appeal, has been framed in such away so as to serve a suit is clearly one with want of form. The question that arises for determination is whether to allow the technicality to sail through and allow the application or reject it. In resolving the issue the takes Court

judicial notice of the maxim that rules of procedure are hand maids of justice. That notwithstanding they occasionally become bad masters especially where they do not provide adequately for the particular situation under review like in this case where it does not provide for compromise withdrawal or settlement of the appeal. In such a situation the court is not required to introduce its own rules but to try and operate within those provided. In the courts own considered opinion the situation that the court is being called upon to rule on can easily be catered for under order 41 rule 8 B (1) under general directions on the appeal. This will require the appellants counsel to petition the Registrar to have the appeal listed before a judge in chambers for directions to be given a appeal. The directions to be given will cater for the prayers being sought in this application.

The court appreciates the sentiments of the applicants counsel that a party has a right to terminate any proceedings providing in court initiated by such a party. The court agrees with this sentiment. However it should not be lost that there are rules pending guidelines on how such procedures are to be initiated and terminated within the rules. Where a wrong procedure has been followed like in this case where an applicant seeks to avail himself of procedures available to civil suits for the sake of an appeal it is the duty of the court to provide guidelines that since orders 24 rule 6 is not applicable to the application under consideration the application cannot stand. It is refused with costs to the Respondent.

The applicant/appellant should comply with order 41 rule 8B and partly three and seek those prayers orally before a judge is chambers. Oral representations will surface and appropriate orders will be made by the court inclusive of the order as regards the deposit mode.

DATE, READ AND DELIVERED AT NAIROBI THIS 18TH DAY OF MAY 2007.

R. NAMBUYE

JUDGE