



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

Misc Appli 37 of 2005

GRACE ONYANGO KIAYOAPPLICANT

VERSUS

ALFRED NYADIMO NGUNGARESPONDENT

R U L I N G

By an application dated 17th August 2005 by way of Notice of Motion, pursuant to the provisions of Order XLI Rule 4 and Order XLIX Rule 5 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, the applicant seeks three substantive orders:

- (i) The honourable court be pleased to enlarge time to enable the defendant/applicant to file its appeal out **of time**.
- (ii) That the honourable court be pleased to grant a stay of execution of the court's decree in the Chief Magistrate's court at Malindi being No. 135/05 pending the determination of the defendant's appeal against the ruling in the Chief Magistrate's Court No. 135/05 delivered on 27th May 2005.
- (iii) Costs be provided for.

The application is based on the grounds:

- (a) That the plaintiff/respondent has now commenced execution proceedings which will prejudice the defendant/applicant's intended appeal and the defendant/applicant herein stands to suffer substantial loss unless an order for stay of execution is granted by this honourable Court.
- (b) That the defendant/applicant has an arguable appeal with a very high chance of success hence it is in the interest of justice that this honourable Court grant leave to the defendant/applicant to appeal.
- (c) That the defendant/applicant's advocates herein acted diligently since the ruling by Hon. Ogembo SRM against her application dated 16th February 2005 to review and set aside the consent orders/judgment recorded in court on the 21st May 2004 which consent judgment was entered by mistake on the part of MR BEN MUSYOKI Advocate for the defendant/applicant without instructions from the defendant/applicant since the defendant/applicant had only given instruction to consent to the principal sum claimed being ksh. 70,000/- and proceed with full hearing on the issue of costs and interest thereto yet the said advocate entered a consent judgment for the principal sum together with costs and interest from the date when the loan was advanced.

The application is predicated upon the annexed affidavit of Jane Abuodha Advocate; sworn on the 17th day of August 2005. The applicant relied wholly on the contents of the said affidavit and argued that the application dated 16th February 2005 seeking a review and setting aside of the judgment entered into on 21st May 2004 was dismissed with costs.

Pursuant to the dismissal of the aforesaid application, the defendant/appellant sought to stay execution by an application dated 27th July 2005 which application was equally dismissed.

That the applicant being aggrieved by the aforesaid dismissal order (27th July 2005), seeks to appeal but the time for filing appeal has since lapsed.

In the meantime, the decree-holder has now commenced execution proceedings. That the interest of justice would be served by granting the orders sought.

The respondent filed replying affidavit sworn on 16th March 2007, and relied wholly on the same. By way of submission, counsel argued that on 21st May 2004 a consent judgment was entered in the following terms:

“By consent judgment is entered for the plaintiff against the defendant in the sum of Sh. 157,463.70 including costs, interest to remain at 10% as per agreement dated 3rd July 2005. Further, that the plaintiff to avail log book to the defendant to enable her get a vehicle inspection license and the plaintiff to retain the log book until payment in full. In default of any one installment execution to issue.”

That subsequent thereto, the applicant made payments amounting to Ksh. 70,000/= in part satisfaction of the judgment. On 3rd November 2004, the applicant reneged on the consent judgment.

On 4th November 2004 the applicant filed application for stay in the lower court which was heard and dismissed on 4th February 2005. Subsequently, the applicant applied for a stay of execution for two weeks pending appeal. The applicant instead of appealing filed another application dated 16th February 2005 before the same lower court, under Order XLIV Rule 1 as read together with Order L rule 1, and XXV Rule 1 seeking orders inter-alia that:

- a) There be stay of eviction pending the hearing of the application.
- b) The court be pleased to review and set aside the consent judgment entered on 21st May 2004. The court dismissed the application with costs on 27th May 2005.

That there is no basis in law on which this application is brought. That a consent order is not appellable in terms of the provision of Order XLIV of the Civil Procedure Rules and also Section 61 (3) of the Civil Procedure Act.

That the applicant has not shown any reasonable cause for failing to file an appeal in time. That in any event the affidavit in support of the application is sworn by an advocate as opposed to the party and ought to be struck out. If struck out there would be no evidence in support of the application.

That under Section 79 of the Civil Procedure Act the appeal ought to have been filed within 30 days. This was not done and no good reason has been advanced for failing to do so. The application is thus an abuse of the process of the court.

I have carefully analyzed the rivaling arguments as best as I can.

Firstly, it is common ground that a consent judgment was entered into between the parties on 21st May 2006. Thereafter the applicant partly paid the decretal amount to the tune of Sh. 70,000/- and

subsequently reneged on payment terms on 3rd November 2004.

Secondly, after a series of applications, the applicant filed application dated 16th February 2005 in the lower court for review. This application was dismissed with costs on 27th May 2005.

The applicant now wishes to appeal from the order of dismissal on 27th May 2005 and by this application seeks, to inter-alia:

- a) enlarge time on which to appeal, the time having lapsed.
- b) in the meantime the court do grant stay of execution of the decree

Order XLIX Rule 5 of the Civil Procedure Rules provides:

“where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

I take the view that the court has to be satisfied that there are sufficient reasons why the applicant could not have filed its appeal in time. That is within 30 days after 27th May 2005.

All available evidence point irresistibly to the fact that the applicant had sufficient time but squandered it making one application after the other. At one stage, 4th November 2004 – applicant applied for stay pending appeal but instead made another application dated 16th February 2005. It is trite law that a party who has opted for review by abandoning his appeal cannot turn around and ask for extension of time. See GHARIB MOHAMMED GHARIB – VS – ZULEIKHA MOHAMMED NAAMAN: CIVIL APPLICATION NO NAI 4 OF 1999 (OMOLO JA) on 19th January 1999.

Accordingly, I am disinclined to grant the orders sought. I order the application dismissed with costs to the respondent.

Dated and Delivered at Malindi this 17th day of May 2007

N.R.O. OMBIJA

JUDGE