



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

Civil Appeal 123 of 2006

AYUB MURIITHI APPELLANT

VERSUS

PETER ONDALA..... 1ST RESPONDENT

SAMWEL MUGAMBI

T/A CLEAR REAL TRADERS AUCTIONEERS2ND RESPONDENT

RULING

The applicant seeks that the decree extracted pursuant to judgment in Meru CMCC No.713 of 2001 be stayed pending hearing and determination of the appeal.

That application is grounded on the premise that the applicant is aggrieved by the judgment in question and has preferred an appeal to challenge it.

That the respondent is in the process of execution and should that proceed the applicant will suffer loss if his appeal succeeds, thus rendering the said appeal nugatory.

The respondent states in his replying affidavit that he was awarded costs assessed at Kshs.14,625/=. He confirms that he is an employee of Ministry of Livestock and therefore in a position to refund the decretal sum in the unlikely event of the appeal succeeding .

In arguing the application counsel for the respondent urged the court to dismiss the same as it is brought by the wrong procedure. She also argued that the application ought to have been filed in the first instance before the court below. She finally submitted that the appeal has no chances of success.

Starting with the last submission, it is not for this court in considering an application under Order 41 Rule 4 of the Civil Procedure Rules to be satisfied that the appeal has high or chances of success.

The only consideration is whether the application has been brought without unreasonable delay; whether the applicant stands to suffer substantial loss if the stay is not granted and whether the applicant has given an undertaking to provide security as may be ordered by the court.

Regarding the wrong procedure, the application has been brought by way of Chamber Summons instead of Notice of Motion. Is this irregularity sufficient to vitiate the entire application? It is now established beyond peradventure that irregularities as to form which do not go to jurisdiction and which do not cause prejudice to the other side are not sufficient to invalidate proceedings before the court. See **Boyes V**

Gathure(1969) EA 385 where sir Charles Newbold, P said as follows;

“As regards the first point, the Chamber Summons initiated proceedings in court between the parties. The form was that of an interlocutory summons, which is not a suitable form to bring the parties initially before a court, and not an originating summons. This was clearly wrong, the error being emphasized by the fact that the summons purports to be in a miscellaneous civil suit which did not, in fact, exist. Did this erroneous procedure result in the whole proceedings being a nullity as it is argued by Mr. Da Gama? In my view, the concept of treating something which has been done and acted upon as a nullity is a concept which should be used with the greater caution”

In my view, although this application ought to have been by motion, that omission alone is not a fundamental issue. The application is not incompetent.

Turning to the question of substantial loss, the costs in question was assessed at Kshs.14,625/=. The applicant has not convinced the court that the respondent is not capable of refunding that sum should it be paid over to him and subsequently the appeal succeeds. The respondent himself has averred that he is employed by the Ministry of Livestock and will be able to refund the amount in question.

Secondly the applicant has not given undertaking as to security, either in the pleadings or by his counsel during the hearing of the application.

The application was brought without unreasonable delay having been filed three months after the order in question. A final point was raised by counsel for the respondent to the effect that the application ought to have been filed in the subordinate court in the first instance. By dint of order 41 Rule 1 of the Civil Procedure Rules, there is no bar for an applicant to seek orders of stay of an order of the subordinate court directly to the High Court.

For the reasons stated in the previous paragraphs, this application lacks merit and is dismissed with costs to the respondent.

DATED AND DELIVERED AT MERU THIS 7th DAY OF May, 2007

W. OUKO

JUDGE