



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI**

Civil Case 228 of 1996

JEREMIAH NDIRANGU GITONGA.....PLAINTIFF/APPLICANT

Versus

JAMES NDUMIA GITONGA

MUNYEKI GITONGA

MIRICHU GITONGA.....DEFENDANTS/RESPONDENTS

RULING

By the judgment of this court dated 22nd June 2004 the Plaintiff's suit was dismissed with costs being awarded to the Defendant.

The Defendant's costs were taxed on 1st October 2004 by consent at Ksh.85,806/= all inclusive.

The Plaintiff by an application dated 3rd November 2004 sought stay of the judgment of 22nd June 2004 and all subsequent orders pending the determination of the appeal No. 213 of 2004 at the Court of Appeal. This court, by its ruling dated 24th November 2004, granted conditional stay. The Plaintiff was granted stay of execution on condition that he would pay 50% of the taxed costs within 15 days from the date of taxation.

The Defendants have now brought an application by way of Chamber Summons dated 1st November 2006. That application is brought under *Order XLIV Rule 1(1)* of the Civil Procedure Rules. The Defendants seek an order that the court does review the orders of 24th November 2004 which orders granted the Plaintiff conditional stay of execution. The application is based on the grounds that the Plaintiff has failed to deposit the 50% of the taxed costs which was ordered to be made within 30 days and that even to date he has failed to make that deposit. In the affidavit in support of the application it is stated that the Plaintiff is in contempt of the court order of 24th November 2004 and that accordingly the court should vacate the orders thereof. The Plaintiff opposed the application by relying on the filed grounds of opposition as follows:

- 1. The court is functus officio.***
- 2. The application is incompetent and lacks merit.***
- 3. That the application is misconceived and an abuse of the process of the court.***
- 4. That there is no annexed order to warrant the court to exercise its discretion.***

In submissions Plaintiff's Counsel stated that the application did not show the discovery of any new matter to qualify for review. That the Defendant ought to have appealed against the order for stay.

I have considered the Defendant's application. The same is brought under *Order XLIV Rule 1 (1)* of the Civil Procedure Rules. That rule provides:-

“1(1) Any person considering himself aggrieved:

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of a new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

The Defendant did not in this application show that there was discovery of a new and important matter or evidence which, after the exercise of due diligence, was not within knowledge and could not be produced at the time the stay order was issued. The Defendant did not also show that when the order of stay was issued there was an error or mistake apparent on the face of the record. It perhaps could be that the Defendant seeks review on the ground that there was sufficient reason to warrant review.

I have, however, considered the Defendant's application and I find that the orders sought therein cannot be granted even on the ground that there is sufficient reason to warrant review. I so find because the stay granted to the Plaintiff was conditional stay. If the Plaintiff has failed to abide by the condition the Defendant could simply proceed to execute the decree. In the alternative the Defendant should have sought to vacate the stay order. It ought to be noted, however, that the Plaintiff in opposing the Defendant's application, he did not controvert the argument raised by the Defendant that he has not to-date deposited 50% of the taxed costs which was condition of stay of execution. That being so the court finds that there cannot be stay in the absence of that condition being fulfilled. Accordingly the court's finding is that the Plaintiff does not have stay of execution. The end result therefore is that the Defendant's application does fail for not being grounded on *Order XLIV* of the Civil Procedure Rules. The court will dismiss that application but will not condemn the Defendant to pay costs of the same because the same was motivated by the Plaintiff's failure to abide by a court's order. The court in summary makes the following orders:

(1) That the Chamber Summons dated 1st November 2006 is hereby dismissed with no orders as to costs.

(2) The court, for the avoidance of doubt, does hereby declare that there is no stay of execution of the decree of costs of 1st October 2004 in view of Plaintiff's failure to fulfill the condition of stay.

Dated and delivered at Nyeri this 29th day of June 2007.

MARY KASANGO

JUDGE