



REPUBLIC OF KENYA

IN THE REPUBLIC OF KENYA

AT MERU

MISC CIVIL APPL 42 OF 1993

M. M. KIOGA & CO.ADV APPLICANT

VS

JOSEPH MACHARIA 1ST RESPONDENT

WAWERU THIRIKWA 2ND RESPONDENT

RULING

This is a motion on notice brought by an advocate of this court seeking the vacation of orders of stay of sale issued by the court (Sitati,J) on 21st February, 2006.

The applicant states that the orders of stay were granted subject to certain conditions to be met by the respondents who have failed to comply. Those conditions required the respondents to file a notice of objection to taxation within 14 days and thereafter within a further 14 days to file a reference to the judge.

The respondents were also ordered to deposit the taxed costs of Kshs.79,469/60 in an interest earning joint account in the names of the parties' advocates within 14 days.

It is averred that the respondents have not filed a notice of objection. Neither have they filed a reference. It is not clear, from the applicant's averments whether a joint account has been opened and whether funds have been deposited in terms of the stay order. In one breath the applicant states that he was hoodwinked into signing documents brought to him by a manager of Consolidated Bank, a friend to counsel for the respondents, who promised to furnish him with the account number. In the same breath he has averred that the funds were not deposited in time and that if they were deposited the account is only operated by counsel for the respondents.

Nonetheless these averments have not been controverted as the respondents did not file any replying affidavit or grounds of opposition. Arguing for the respondents, their counsel submitted that the order of stay cannot be vacated as the notice of appeal is still pending. I have duly considered these rival submissions and take the following view of the matter. It is not controverted that the conditions upon which the order of stay were granted have not been met. Clearly the respondents have taken advantage of the fact that the stay orders had no rider for a default to comply.

Now, this application is brought pursuant to Sections 34 (1), 63(e) and 80 of the Civil Procedure Act. Of immediate relevance to the instant application is Section 80, which provides that

“80. Any person who considers himself aggrieved –

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit”.

The jurisdiction of the court, according to the above provision can only be invoked by an aggrieved person in cases in which either no appeal lies or where appeal is allowed but from which no appeal has been preferred. Although the application that was before the court was brought under Sections 3, 3A, 63 (c) and (e) of the Civil Procedure Act, the court came to the conclusion that in fact the respondents had sought and were entitled to an order of stay of execution pending further orders. It was, however, not an application for stay under Order 41 rule 4 of the Civil Procedure Rules. It was also not brought under the provisions of Order 21 rules 22 to 25. It was therefore brought under the court’s inherent jurisdiction. No appeal from the decision of the court did lie as of right in terms of Section 75(1) of the Civil Procedure Act and Order 42 of the rules. It means therefore that an appeal from that decision could only lie with the leave of the court.

There is a notice of appeal dated 27th February, 2006 filed on 2nd March, 2006, to challenge the decision in question. I have perused the file carefully and confirm that no leave was sought and obtained. That notice is, in my view, a nullity.

That being so, the present application comes within the provision of Section 80(b) of the Civil Procedure Act. But that is not all. Section 80 is the substantive law. Order 44 then provides the parameter for granting orders of review.

A review will be granted in the following circumstances;

- (i) Where the applicant discovers a new and important matter or evidence which was not within his knowledge and which could not be produced at the time the order was made, or
- (ii) Where there is some mistake or error apparent on the face of the record; or
- (iii) Where the court for any sufficient reason may grant a review.

It is also a requirement that an application for review must be made without unreasonable delay. The instant application has not stated under which one of the above three limbs it is brought. But from the onset I can say, with regard to time, that the application was made expeditiously.

The ruling was delivered on 21st February, 2006 and on 3rd March, 2006, this application was filed. Looking at the three requirements for the grant of review, no new matter or evidence has been discovered. Neither is there a claim that there is an error apparent on the face of the record.

However, the court can review an order or judgment for any other sufficient reason which need not be related to the first two requirements. I am inclined to consider this application under this requirement.

Taking into account the casual approach the respondents or their counsel have given this serious matter, and bearing in mind that they have deliberately failed to comply with the conditions for which the stay order was issued, I will review the order of the court issued on 21st February, 2006 by vacating it, and order execution to proceed. The costs of this application is awarded to the applicant.

DATED AND DELIVERED AT MERU THIS 8TH DAY OF JUNE 2007

W. OUKO

JUDGE