

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Case 63 of 1997

EPHANTUS KIRUHI KIHUNI.....PLAINTIFF/RESPONDENT

Versus

NANYUKI MUNICIPAL COUNCIL.....DEFENDANT/APPLICANT

RULING

The court in this matter delivered judgment on 16th March 2006. The Defendant made an application dated 20th March seeking stay pending appeal. That application was considered by the court and by a ruling dated 15th June 2006 the court granted stay on condition that the Applicant would provide evidence of filing of the said intended appeal by the 25th July 2006 when this matter was to be mentioned. The proceedings show that on the 25th July 2006 the Defendant/Applicant was absent in court and in the presence of the Plaintiff's advocate the court set aside the stay granted previously.

The Defendant has now come by way of Chamber Summons dated 15th August 2006. By that application, the Defendant seeks that the court would review or set aside the order of 25th July 2006. Further the Defendant seeks that the court would reinstate the stay granted on 15th June 2006. In support of that application, an affidavit is sworn by Mr. Gori, an advocate of the High court. Mr. Gori deponed that on the 25th July 2006 he attended the High Court registry and went through the cause list of both court number one and two and found that this matter was not listed. On finding that the matter was not listed, Mr. Gori attended to other matters in the lower court. It was not until later on that he was called on telephone by Mr. Mukunya advocate who informed him that the matter had been mentioned in court number one. On being informed he rushed to the High Court Number one but the court refused to indulge him. It is on the basis of that affidavit that the Defendant seeks the orders that are sought.

The application was opposed by a Replying Affidavit and the same is sworn. The Plaintiff deponed that the Defendant had failed to apply for extension of the orders of 15th June 2006. He therefore stated that the present application is an after thought and should not be allowed.

I have considered the present application. The first prayer that the Defendant seeks is the review of the order of 25th July 2006 or the setting aside of the same. In the first instance I am of the view that a review or setting aside cannot be granted for indeed the Defendant has not proved to this court that by the 25th July 2006 they had complied with the order of 15th June 2006. In other words the Defendant was required to show evidence to the court of filing the intended appeal as a condition of stay of execution pending appeal. Even as the Defendant made the present application, they have not shown evidence of complying with the order of 15th June 2006. What then would be served by the court granting the order sought by the Defendant? As of today the order of 15th June has not been complied with. Accordingly that prayer is misconceived.

The second prayer seeks that the court would reinstate the order of 15th June 2006. That also cannot be granted because that order provided that a stay was granted on condition that the Defendant would show evidence of the appeal. That evidence was to be shown by the 25th July. The Applicant, as submitted by Plaintiff has not, did not seek extension of the period within which it was required to show evidence of the filed appeal. I have considered the arguments brought before me by the parties and in view of what is

stated hereinbefore I find that the application brought by the Defendant by way of Notice of Motion dated 15th August 2006 is misconceived and incompetent and the same is dismissed with costs to the Plaintiff. Orders accordingly.

Dated and delivered at Nyeri this 6th day of July 2007.

MARY KASANGO

JUDGE