



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Civil Appeal 36 of 2006

**GUIDO KANYANGI NABEAAPPELLANT/
APPLICANT**

V E R S U S

**CHAIRMAN, BOARD OF DIRECTORS MIATHENESUB-DISTRICT
HOSPITAL.....RESPONDENT**

R U L I N G

1. The Application dated 26.9.2006 is brought under Order XLI Rule 4 of the Civil Procedure Rules and the sustentative Order sought is that of stay of proceedings pending hearing of the Applicant's intended Appeal to the Court of Appeal. The intended appeal is against the Ruling of Sitati J. in which the learned Judge overruled a preliminary objection raised by the Applicant to the hearing of a Motion by the Respondent within this Appeal and a further argument that the instant Appeal was itself premature and the Appellant/Respondent ought first to go to the trial court and seek setting aside of the ex parte judgment. The learned Judge rejected the objection.

2. In the present Application, it is argued that the Applicant has already instituted C.A. 94/2006 in the Court of Appeal and the record thereof served on the Appellant. Counsel for the Applicant reiterated all the arguments made before Sitati J. and argued that since an Appeal is pending against that decision, the proper and reasonably fair thing to do is to stay the present proceedings and await the decision of the Court of Appeal.

3. Counsel for the Respondent also reiterated his arguments before Sitati J. and in respect of the present Application argued that the Procedure adopted by the Applicant is wrong because stay of proceedings should have been sought under s.6 of the Civil Procedure Act and not under Order XLI rule 4(2) of the Civil Procedure Rules which provides for stay of execution only. He urged the point that in the Affidavit in support of the Application, not one reason is given as to why the proceedings should be stayed and no prejudice is shown nor is there anything to be averted. That the Appeal would not be prejudiced and the whole Application as is the Appeal are misguided.

4. My approach to the contest here is very simple; technicalities aside, I note that the Applicant obtained ex-parte Judgment in Nkubu PMCC No 22/2006 and proceeded to execute the decree and the Respondent was evicted by the Applicant pursuant to an order of court in that regard. The Respondent did not seek to set aside that ex-parte judgment but appealed to this court and the Memorandum of Appeal is very elaborate. The Applicant takes the view that the Appeal is premature and that the right of appeal in this case is fettered by certain provisions in the Civil Procedure Rules, chiefly orders XLII rule 9 and Order VI A Rule 10 Sitati J. rejected that argument and in effect said that the Appeal should proceed to hearing. Against that decision is an appeal in the court of Appeal being C.A. 94/2006. If the Appeal

succeeds, the effect would be to uphold the preliminary objection and the instant Appeal struck out. If the Appeal herein was to proceed to hearing and later it is struck out, obviously there would be the possibility of conflicting orders of this Court and of the court of Appeal and the administration of justice would be brought into great disrepute. If on the other hand the Court of Appeal upholds the decision of Sitati J., the Appeal herein would then proceed to hearing on its merits and I see no prejudice to any party.

5. In the end, I will allow the Application dated 26.9.2006 and stay the present proceedings until C.A. 94/2006 pending in the Court of Appeal is heard and determined

6. costs shall be in the Appeal.

7. Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 23RD DAY OF OCTOBER 2007 AT MERU.

ISAAC LENAOLA

JUDGE

In presence of

Mr. Rimita Advocate for the Appellant/Applicant

Mrs Kaume holding brief for Mr. Kioga Advocate for the Respondent

ISAAC LENAOLA

JUDGE