



REPUBLIC OF KENYA
HIGH COURT OF KENYA AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL APPEAL CASE 445 OF 2005
PIONEER HOLDINGS LIMITED.....APPELLANT/APPLICANT

VERSUS

BISHOP P. KARANJA.....]

IDA W. KARANJA.....]RESPONDENTS

RULING

On 28/10/05, the appellants/Applicants herein filed a Notice of Motion in this court, under Section 3, Section 3A, Order 21 rules 22(1) (2) and (3), Order 41 rules 4,5, and 6 of the Civil Procedure Act and Rules, respectively, seeking the following orders:

1. Already spent
2. There be a stay of execution pending the hearing and determination of the appeal herein.
3. Stay of execution of the decree/judgment in Nairobi CMCC No. 768 of 2003, delivered on 26/5/05 pending the hearing and determination of this application.
4. Costs of this application.

The application, supported by the Affidavit of Ida Karanja, is on the grounds, **inter alia** that:

- a) the Respondent has taken steps to execute against the appellants;
- b) the appeal will be rendered nugatory unless the orders sought are granted.
- c) the orders sought are in the interest of natural justice.

d) Appellants are ready and willing to provide security pending the determination of the appeal.

The Respondent raised a Preliminary Objection on a point of law, vide a Notice dated 16/11/05 to the effect that the application is fatally defective having been grounded on a Memorandum of Appeal that is incompetent and defective in form and substance.

The Preliminary Objection was heard on 6/6/06, during which the Learned Counsel for the Respondent, Mrs. Njogu, submitted as follows:

The application is fatally defective because it does not attach a copy of the Memorandum of Appeal as filed; the application is brought by way of a Notice of Motion under Order 21 Rule 22 (1) (2) and (3) which refers to an application for restitution where property has been seized. Here, property has not been seized and the application should be under Order 21 rule 22(1), by way of a Chamber Summons, as provided by Rule 91 of the same Order 21, of the Civil Procedure Rules.

The second objection by the Respondent is that on 23/5/06, the appellants filed an amended Memo of Appeal, which was served on the Respondent on 24/5/06. It is the Respondent's case that the amended Memo of Appeal was after their Notice of Preliminary Objection and that the amendment was done without first obtaining the leave of the court. The effect of the purported amendment is that the Appellants become the Respondents and **vice versa**.

Thus, it is the Respondents case that the application is based on a defective Memorandum of Appeal which is not curable by the amended Memo of Appeal dated 23/5/06. Accordingly, the Respondent submits that the Memo of Appeal should be struck out, and once that is done, there is nothing upon which the application can stand.

In Reply, the appellant submitted that the Preliminary Objection has been overtaken by events as the appellant filed and served the amended Memo of Appeal in accordance with Order 41 rule 1(B)(1), under which an appellant can file and serve an amended Memo of Appeal without leave of the court before directions.

Having carefully gone through the pleadings and the submissions of both learned counsels, and the authorities cited and relied upon, I have reached the following findings and conclusions.

I begin with the issue of filing an amended Memorandum of Appeal without first obtaining the leave of this court. The Respondent's case is that given that there was no leave obtained prior to the filing and serving of the amended Memorandum of Appeal, the application should be struck out as it hinges on an incompetent and defective memorandum of appeal.

The above submission is legally misconceived and untenable. The question of leave to amend the Memorandum of Appeal arises only if the law so requires such leave.

From the pleadings, and the law, no such leave is required unless and until the court has given directions on the appeal. I need not stress that the appeal has not been admitted, much less directions being given. This is as per Order 41 rule 1(B) (1) of the Civil Procedure Rules, which provides as under:

“The appellant may amend his Memorandum of Appeal without leave at any time before the court gives directions under rule 8B”

Accordingly, the Preliminary Objection fails on that point.

However, the Respondent's objection on whether or not the application is properly before the court has merit.

The application is brought under Order 21 Rule 22(1)(2) and (3) of the Civil Procedure Rules, among

others, and is a Notice of Motion.

From the pleadings, and the applicable law, the position is as under:

Rule 22(2) is clearly not applicable here because that sub-rule only **applies “where the property or person of the judgment – debtor has been seized under an execution”**.

The same is the case under sub rule (3) of Rule 22. It is not applicable.

Consequently, sub-rules (2) and (3) of Rule 22 are not applicable in the application for stay pending appeal, before me. That being the case, the only sub-rule of Rule 22 under which the application is brought that is applicable is sub-rule(1). And if that be the case, as I find and hold to be the case, the procedure to move the court under that sub-rule is as provided for under rule 91 of Order 21, which is by way of Chamber Summons.

The Rule provides as under: **“applications under rules 2(2), 4, 11, 12, 22(1)..... shall be by summons in Chambers.”**

In the application before me, the application is by way of a Notice of Motion.

Accordingly, I find and hold that this court’s jurisdiction has not been properly invoked in the application before me. The application has not been brought before this court in the manner prescribed by law, under Order 21 Rule 22(1) of the Civil Procedure Rules, as provided, by the mandatory provisions of Rule 91 of the same Order.

All in all, the Preliminary Objection is upheld on this leg of the Respondent’s submissions.

In the result, the, the application for stay, pending appeal, is not granted. But the appeal stays and may proceed as provided for under Order 41 Rule 8B of the Civil Procedure Rules.

Appellants to bear the costs of the application herein.

DATED and delivered in Nairobi this 11th Day of December, 2007.

O.K. MUTUNGI

JUDGE