



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

**Civil Appeal 107 of 2005**

**JOASH KIMUTAI .....APPELLANT**

**-VERSUS-**

**KENELI AGENCIES .....RESPONDENT**

**R U L I N G**

**Coram J. W. Mwera, Judge,**

**Siele for Appellant,**

**Ms. Pandit for Respondent**

**Raymond CC.**

The ruling subject of this appeal was delivered on 25.8.2005. Invoking Order 41 rule 4 (1), (2), (3), (6), Order 50 rule 1, Order 29 rule 2 (2), Order 49 rule 5, Civil Procedure Rules and Section 3A, Civil Procedure Act, the appellant filed a notice of motion dated 22.3.2006, praying that:-

- i) there having been a delay in bringing this very application, time be enlarged to accommodate it.
- ii) there be a stay of execution of a warrant of arrest issued in KSM CMCC NO. 449/2004 against the applicant, as well as staying proceedings in that cause.
- iii) similarly, execution of the ruling/order appealed from be stayed and,
- iv) in the alternative, a temporary injunction issue against the respondent in regard to executing the proceedings in KSM CMCC 449/04 aforesaid, and;
- v) necessary directions do issue.

The substance and direction of prayers; (iv) and (v) was not easily discernible but parties went on to argue that application - Mr. Siele for the applicant and Ms Pandit for the respondent.

Ms Pandit began by pointing it out to Mr. Siele, and the court, that this appeal appears incompetent because the ruling that gave rise to it was of such a type that the appellant had to seek leave first in accord with Order 42 rule 1 (2), Civil Procedure Rules. That under Order 16, Civil Procedure Rules, if an application is brought under Rule 5 (to dismiss for want of prosecution of a case), an appeal lies as of right and not for any other application under that provision of law as the case was here.

Mr. Siele started with pointing out that Ms Pandit's firm had not come on record properly as per Order 3 rule 9A of Civil Procedure Rules, there having been another lawyer from the lower court. And that the learned trial magistrate did give leave to appeal in her ruling being appealed against.

After hearing counsel and perusing the record of appeal, it is clear that the lower court had directed under Order 18 (2) of Civil Procedure Rules that the applicant/defendant be availed in 14 days to be examined on oath. On 25.8.2005, the defendant was not produced and as the learned trial magistrate had ordered in the event of such, the applicant's motion dated 18/4/2005, stood dismissed. While Mr. Siele seemed to concede that appealing against the ruling of 25/8/2005 required leave of the court, he nonetheless said that such leave was given on the very 25.8.2005 OR that this court can exercise its discretion to grant that leave so that the appeal proceeds any way.

Mr. Siele is not right in the latter part of what is reproduced immediately above. To appeal against the ruling of 25/8/2005, he had to obtain leave in accordance with Order 42 rule 2 of Civil Procedure Rules. He did not do so and so his appeal should as well be termed incompetent. This court has no discretion to allow the appeal to go on even after it has been shown that it is incompetent. Mr. Siele's plea that when on 25/8/2005 the learned trial magistrate stated to his client the **right** to appeal in 28 days, that amounted to **leave** to appeal against the ruling of the same date, he was abundantly in error. The right to appeal is not equal to leave to appeal. Every party has a right to appeal. That right is can be as of right or the party can only exercise it after applying for and getting leave to exercise it as the case and law may require.

It is, however, accepted that the firm that instructed Ms Pandit to appear in these proceedings is not properly on record and she seemed to concede that. The court heard that the firm of M/s Odhiambo Owiti & Co Advocates - Kisumu was on record for the respondent in the lower court. That a judgment was passed. On appeal that firm is presumed to still be representing the respondent (See Order 3 rule 6 CPR). Accordingly and that being so, the intended lawyers, M/s Nishi Pandit & Co. Advocates needed to have leave to come on record for the respondent via Order 3 rule 9A of Civil Procedure Rules. That that seemingly was not done renders that firm of lawyer strangers in the proceedings.

In sum, the proceedings here are a non - starter. No orders as to costs.

It is so ordered on 31.5.2006.

**J. W. MWERA**

**JUDGE**

***JM/hao***