



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Misc Appli 698 of 2004

A. N. NDAMBIRI & CO. ADVOCATES.....
.....APPLICANT/ADVOCATE

VERSUS

MWEA RICE GROWERS MULTI-PURPOSE CO-OPERATIVE SOCIETY LTD.....
....RESPONDENT/CLIENT

R U L I N G

On 10th June 2005 the court entered judgment for the Applicant/Advocate under section 51 (2) of the Advocates Act, Cap. 16 for his taxed costs. The Respondent/Client has now come to court by chamber summons dated 14th March, 2006 seeking two main orders as follows:-

“1

2.

3. ***That this court be pleased to stay the execution of the decree dated 10.6.2005 and all subsequent orders of execution issued herein pending the hearing and determination of Court of Appeal Civil Application No. NAI 313 of 2005 (UR 192/2005) still pending.***

4. ***That the warrants of attachment issued by this court on 2.3.2006 to Front Bench Auctioneers of P.O. Box 416, Ngara, seeking to attach all the applicant’s movable properties, be set aside and the said Front Bench Auctioneers be stopped from seizing, carrying away, advertising for sale or in any other way interfering with the applicant’s proclaimed movable properties pending further orders of this court and the Court of Appeal.***

5.”.

The application is stated to be brought under section 3A of the Civil Procedure Act, Cap. 21 and also under Order XXI, rule 22 (1) of the Civil Procedure Rules. There is a supporting affidavit sworn by one MUNENE MUREITHI, the general manager of the Respondent/Client. It discloses that the Respondent/Client lodged Civil Appeal No. 200 of 2005 before the Court of Appeal against the judgment entered for the Applicant on 10th June, 2005, and that the said appeal is pending hearing and disposal.

In response to the application the Applicant/Advocate filed a notice of preliminary objection dated 16th March, 2006 upon the grounds:-

1. ***That the application is incompetent and fatally defective.***

2. ***That the application offends the express provisions of the Civil Procedure Act and Rules.***

3. ***That the application is otherwise an abuse of the process of the court as the orders sought are incapable of being enforced.***

I heard the preliminary objection on 20th March, 2006. The learned Applicant/Advocate submitted that the court has no jurisdiction to entertain the application as there is already another application seeking the same relief which is pending before the Court of Appeal. In the opinion of the learned counsel, there being another similar application pending before a higher court, this court has no jurisdiction to deal with the same matter, and the court is *functus officio*.

Learned counsel for the Respondent/Client replied that the submission of the learned Applicant is not based on any law. He further submitted that under section 3A of Cap. 21, and also under Order XXI, rule 22 (1), the court has power to order stay of execution to allow a party to file an application in the Court of Appeal to stay execution, or where such application is already pending, to allow such application to be determined. He also submitted that there were certain orders that were made by the Court of Appeal on 13th December, 2005 which the Applicant has not brought to the attention of the court, and which the Applicant did not comply with. Those alleged orders of the Court of Appeal were not placed before this court, and I will say no more about them.

I have considered the submissions of the learned counsels. Section 3A of Cap. 21 cannot be invoked where there is some specific provision of the law or procedure in respect to the matter at hand. Applications for stay of execution pending appeal are provided for under rule 4 of Order XLI of the Civil Procedure Rules. The Respondent/Client therefore ought to have proceeded under that rule. It has not done so. Instead it has come to court under section 3A of Cap. 21, and also under rule 22 (1) of Order XXI. That rule provides:-

“22. (1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.”

This rule is not applicable. The decree in question is of this court; it has not been sent to this court by another court for execution. This is the court of first instance. So, the application cannot lie under this sub-rule.

I therefore hold that the application as brought under section 3A of the Civil Procedure Act and under Order XXI rule, 22(1) of the Civil Procedure Rules is incompetent and untenable. It must be struck out, but not for the reasons given by the Applicant in his preliminary objection. His submission that this court would not have jurisdiction to entertain an application for stay of execution merely because there is a similar application pending before the Court of Appeal is not supported by law or authority. Had the Respondent/Client come under Order XLI, rule 4 of the Civil Procedure Rules the court would have entertained its application. It would have jurisdiction to do so.

But in the event, and for the reasons given above, the application by chamber summons dated 14th March, 2006 be and is hereby struck out. Parties shall bear their own costs. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF JUNE, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 23RD DAY OF JUNE, 2006.