REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 49 of 2005

NJOROGE NGAGE "B"……APPEALLANT/RESPONDENT

VERSUS

MIKELINE NJOKI KAIRU…….....……..RESPONDENT/APPLICANT

RULING

Before me is a Notice of Motion dated 15th December 2005 filed by J.K. Ngaruiya & Company advocates, on behalf of MIKELINE NJOKI KAIRU. It is purported to be brought under Order XLI rule 18 and Order L rule 1 Civil Procedure Rules. It seeks for four orders, two of which have been spent that –

(a) (Spent)

(b) (Spent)

(c) This honourable court do re-hear the appeal which was heard ex parte on 30th November 2005.

(d) Costs of this application be provided for.

The application has grounds on the face of the Notice of

Motion and is supported by the affidavit of John Kirori Ngaruiya advocatesworn on 15th December 2005.

At the hearing of the application on 17/5/2006 Ms. Irura

appeared for the applicant, while Ms. Njuguna appeared for the respondent. Ms. Irura submitted that they were asking for stay of execution and also that the appeal be heard. She submitted that the appeal was determined against the applicant (respondent in the appeal), when the advocate for the applicant did not attend court due to confusion arising out of a different number given to the appeal. She sought to rely on the supporting affidavit to the application.

Ms. Njuguna for the respondent opposed the application. She submitted that the appeal number was changed from 104 of 2003 to 49 of 2005. The Deputy Registrar communicated the changes in the number of the appeal to the parties. No sufficient reason was given under Order 41 rule 18 Civil Procedure Rules for setting aside the ex parte decision in the appeal. She further submitted that the gist of the appeal was that the orders issued by the subordinate court were illegal. No merit had been shown for setting aside the order of the court. She sought to rely on the replying affidavit sworn on 21/12/2005 by Stephen Ndichu

Karago.

This application was brought under Order XLI rule 18 Civil Procedure Rues.

Rule 18 provides –

"18 Where an appeal is heard ex parte and judgment is pronounced against the respondent, he may apply to the court to which the appeal is preferred to re-hear the appeal; and if he satisfies the court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called for hearing, the court shall re-hear the appeal on such terms as to the costs or otherwise as it thinks fit to impose upon him".

From the submissions of both counsel for the parties and the affidavits filed, it is not in dispute that the appeal was heard and a decision made by Hon. Justice Koome ex parte. Counsel for the applicant (who was the respondent in the appeal} did not attend court. The court can, indeed rehear the appeal if good cause is shown as provided for under Order XLI rule 18.

Counsel for the respondent has argued that the order appealed against was illegal in the first place, so the application should not succeed. Having considered the provisions of rule 18, illegality is not a consideration for an application as the one before me. The chances of success of the appeal or merits of the appeal are not for consideration in this kind of application. What is important is for the applicant to satisfy the court that notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called for hearing.

As for service, there is no dispute that the applicant's counsel was served. Paragraph 7 of the affidavit sworn by John Koriri Nguruiya advocate on 15/12/2005 is very clear on this . It is depones –

"**7. That we were served on the 15th July 2005 with a hearing notice informing us of the hearing date of 30th November 2005 which hearing notice had the number Civil appeal No. 49 of 2005 annexed herewith and marked "JKN 2" is the copy of the hearing notice"**

It is clear therefore that the applicant's counsel was served, and was served in very good time. That is not the reason why counsel did not attend court for the hearing.

As to whether there was other sufficient reason for failure of Counsel for the applicant to attend court, there is an admission in the above paragraph of the affidavit that the new appeal number 49 of 2005 was served. It was served on 15/7/2005. The hearing was for 30th November 2005. However paragraph 8 of the affidavit avers that the clerk of the applicant's advocate failed to change the number of the office file to reflect the new appeal number 49 of 2005 on the file. The applicant's counsel has annexed to the supporting affidavit annex "JKN3" which shows the file cover. His contention is that he did no attend court at hearing because he went by the original number of the appeal which was 104 of 2004. When he did not see the number of the appeal on the cause list, he thought the appeal was not listed for hearing on 30/11/2005, only to learn later that the appeal was decided ex parte.

Having considered this matter, I am persuaded that the counsel for the applicant, through his clerk, made a mistake which prevented the said counsel from appearing in court. Consequently the appeal was decided against his client ex-parte. I am mindful that counsel is not the litigant, and that a mistake of counsel should not ordinarily be visited on his client. The applicant has satisfied me that his counsel did not attend court through sufficient reason, which was a mistake of the clerk of the law firm. In those circumstances I am persuaded to order that the appeal herein be re-heard. However, as counsel for the applicants office is to blame for all that happened, counsel for the applicant will bear the costs of the appeal and this application, save the costs of re-hearing the appeal which will be determined later by the court.

I therefore order as follows –

1. The application dated 15th December 2005 is allowed and the court will rehear the appeal which was heard ex parte on 30th November 2005.

2. Counsel for the applicant will personally pay the costs of the appeal and this application to the respondent, except the costs for rehearing the appeal, which will be determined by the court after hearing the appeal.

3. The applicant to set the appeal for hearing within 2006, otherwise the appeal will stand dismissed.--+*

Dated at Nairobi this 21st day of June 2006

George Dulu

Ag. Judge