REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Appeal 7 of 2006

DAVID KIMEU…….…….....……...……..APPELLANT

VERSUS

PHILLIP MUNDA NTHAMA…….....…….RESPONDENT

RULING

This application was dated the 24.2.06 and sought a stay of a decree issued in Kangundo SRMCC No.167 of 2004 on 24.1.05. This appeal was itself filed on 27.1.06. It was brought to the attention of this court that a warrant of attachment had been issued and a proclamation of sale made.

The appellant/applicant believed that he had an arguable appeal with good chances of success. The main ground of appeal apparently is that an expert witness's evidence was introduced into the case with the expert – a doctor – not giving evidence in person.

The applicant also believes that if execution takes place chances of recovering it if the applicant succeeds in the appeal, are meagre, in which case the applicant is likely to suffer irreparable loss. It is for those reasons that Mr. Chahenza for the applicant/appellant thought they were entitled to a stay pending appeal.

But Mr. Kamau for the decree holder was of a different view. He argued that the appeal and this application are both incompetent and bad in law. He said the judgment in question was delivered on 24.6.05 and the decree drawn on 26.10.05. That this appeal which was supposed to be filed within 30 days thereof, was not filed until expiry of 90 days. That no extension of time was sought or obtained. That therefore what is called an appeal before this court amounts to no appeal in law.

Furthermore, the decree-holder/respondent argued, the decree in question was based on an exparte judgment which the applicant's application to set it aside, was dismissed on 16.2.06.

The appeal filed on 27.1.2006, it is indicated, was challenging the judgment they intended to set aside and in respect of which an application to set it aside was dismissed on 16.2.06.

I have carefully perused the grounds of appeal. They indeed are substantive grounds attacking the merit of the judgement entered on record by the lower court on 24.6.2004. There is clear evidence on record including the court receiving rubber-stamp, that the appeal was filed on 27.1.2006. This is a period of six months since the judgment was entered in the file. The appellant is not heard to deny or challenge this fact. While the record also show that the appellant originally challenged the entry of this judgement by an application to set aside the exparte judgment, and whereas the said application to set aside was dismissed on 16.2.2006, there is no evidence that the applicant appealed or was appealing against the dismissal itself. Indeed, even if the appeal filed would be assumed to be appealing against the dismissal of the application to set aside the exparte judgment, the appeal would be incompetent because it was filed one month after the dismissal.

There is also a second aspect to the appeal and the application to set aside.

In my view a party is not at liberty to attack an order of court by both the application to set it aside and to appeal against it. There is always a choice which a party has liberty to make but once such choice is exercised, a party loses the second alternative.

In this case the applicant had a choice to apply to set aside the exparte judgment, which he exercised. He also had the second choice, to appeal. When he implemented the first one to set aside, he lost the second one to appeal. In this circumstances it is the courts view and ruling, that the appeal on that ground alone was incompetent and invalid. Secondly, the appeal would be incompetent and invalid because it was filed six months or so after the relevant judgment was validly entered after the appellant failed to file defence or attend court during the hearing.

Having come to the above conclusions, it follows that the application for stay execution of decree arising from the judgment discussed above, is also incompetent and invalid. The application is accordingly dismissed with costs to the decree-holder/respondent. It will be left to applicant to decide whether this appeal should be withdrawn from court with notice to the other party or not. In view however, that this appeal has not been admitted, and can be summarily be dismissed, this appeal will be mentioned after 30 days to give the appellant a chance to decide what to do with it.

Dated at Machakos this **28th** day of **September, 2006.**

D.A. ONYANCHA

JUDGE