



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Civil Appeal 67 of 2004

MATHEW MUREITHI

MAITIMA.....APPELLANT/APPLICANT

V E R S U S

SAMUEL MUTUA.....

RESPONDENT

R U L I N G

1. The Applicant herein Mathew Mureithi Maitima was the Defendant in PMCC 26/2004 Succ 26/2004 and PMCC 27/2004 all in Isiolo Law Courts. The Appeal now before this court is premised on three different Rulings in each of those files wherein the learned trial magistrate refused to set aside judgments entered against the Applicant in each of those matters and the reason given in the Ruling delivered within PMCC 26/2004 was that the Applicant was duly served with summons but refused to enter appearance and the suits proceeded in his absence. That therefore, the Judgments were proper and should stand.

2. This background is important for reasons I shall shortly revert to but the Application presently before me is for stay of execution of the decrees in each of the above suits pending hearing and determination of the Appeal. The Application is said to be brought under Order XLI Rule 4(1) and Order XXI rule 22 of the Civil Procedure Rules. Before advertng to the application itself, the appeal as drawn has problems. I say so because I have perused the lower court record in respect of each of the three files subject of the Appeal. In none of those files is there a clear order of consolidation of the suits for the Applicant to bring one Appeal to this court. The order that the Ruling delivered in PMCC 26/2004 should apply to PMCC 27/2004 and PMCC 29/2004 does not in my view amount to an order of consolidation as envisaged by and in the language of Order XI of the Civil Procedure Rules. The proper procedure as I understand it is for the Appellant to file separate Appeals and seek their consolidation by this court since they would in the ultimate be predicated on one singular Ruling.

3. If the Appeal is amorphous and ambiguous, I do not see that any Application arising from it can stand and would have to be struck out as I will shortly do.

4. Assuming however, that I was wrong and the Application for stay of execution was to be heard, I would say this; in respect of PMCC 26/2004, I would have certainly granted a stay of execution because although the decree is a money decree, the judgment is one that can properly be called a non-judgment. Although the matter had been concluded by way of formal proof, the judgment sum of Ksh.120,000/- is unexplained, the special damages of Ksh.2680/- is equally unexplained and the whole judgment looked at in its entirety (it is 11 lines long!) would have necessitated that the Applicant be granted an opportunity to challenge it by depositing the decretal sum in court as a condition for stay of execution pending hearing

of his Appeal. I would have made this order because where a court causes injustice by the format of its final decision, then clearly substantial loss would have been occasioned to the party. Further, no delay has been shown on the part of the Applicant in bringing forth the Application and because of his alleged conduct in not defending the proceedings before the lower court, the interests of justice and fairness would have been served if an innocent Respondent would have the decretal amount safely in court pending the Appeal. In effect, I am saying that the Applicant but for the incompetence of his Appeal has met the conditions and expectations of order XLI Rule 4 (2) of the Civil Procedure Rules and would have been entitled to a stay of execution on condition that he deposits the whole decretal amount in court. But those shall not be my orders.

5. As the Appeal is improperly before court for reasons that I have given, the Application itself cannot be grounded on any one order to which a stay of execution can be granted. As ambiguous and amorphous as it is all I can do is order that it be struck out with costs. As to the Appeal itself, let the parties in view of what I have said above choose which way each should handle it depending on their interests.

6. Orders accordingly.

Dated, signed and delivered in open court at Meru this 26th Day of September 2006

ISAAC LENAOLA

JUDGE

In the presence of

N/A Advocate for the Appellant/Applicant

Mrs Ntarangwi for Mr. Mwenda Advocate for the Defendant/Respondent

ISAAC LENAOLA

JUDGE