REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS
Civil Appeal 58 of 2004

MUKIO KIVONDO

NDOLO KIVONDO ……..…….. APPELLANTS

VERSUS

R.M. MATATA ADVOCATES …… RESPONDENT

R U L I N G

Before me is an application dated 18/10/04 taken out pursuant to Order 41 Rule 4 (1), (2), (3) Civil Procedure Rules and Section 3A Civil Procedure Act seeking an order of stay of execution of orders granted on 9/6/04 by the Resident Magistrate Machakos CMCC 140/04 pending hearing and determination of HCC APP 58/04. The application is entitled "Chamber Summons" which I do agree with Mr Matata counsel for the Respondents that it is the wrong procedure. The application should have been made by away of Notice of Motion. Though Mr Matata urged the court to strike out the application on the basis of that anomaly, it is my view that defect is about the form other than the substance of the application and I will prefer to deal with the substance of the application.

Under Order 41 Rule 4, the applicant has the duty to satisfy the court that there is sufficient cause to warrant the issuance of an order of stay pending appeal. Under sub rule 2, however, there are conditions to be met by the applicant before an order of stay is granted even after sufficient cause has been shown. The applicant has to show that substantial loss may result if an order of stay is not granted; that the application is filed without undue delay and that security for due performance of the decree or order is given.

This dispute arises from HCC 145/01 which is said to be pending before the court. The Respondent is an advocate who is said to have represented the applicant in the said matter but applicant withdrew instructions. The advocate had his bill of costs taxed which the appellant challenged, but the Deputy Registrar declined to set it aside. It is the taxed amount upon which execution is proceeding. It is the applicant's contention that the applicant will suffer double jeopardy as two matters are now before court relating to the same issue. It is the applicant's contention that the applicant moved to court expeditiously and he has meritorious application. As regards the question of security, it is contended that the applicant is a man of straw and was not able to pay the sum of Kshs.35,000/= but that they are willing to deposit a title deed worth over Kshs.600,000/= in order to be heard.

In opposing the application, Mr Matata argued that sufficient cause had not been shown by the applicant for the order to be made. That the applicant had failed to show that he would suffer substantial loss since the bill of costs had been filed procedurally; the applicants had been present at the taxation and did not object to the taxation and that he is prohibited from appealing by virtue of Section 68 Civil Procedure Act.

The Respondent also argued that the applicant has not furnished security as there is no evidence of the title deed or to whom it belongs to. Finally, it is argued that there was inordinate delay in filing this application from 16/6/04 when the Memorandum of Appeal was filed and this application was filed on 18/10/04, four months after the ruling on 9/6/04. Though the order from which stay is sought was not annexed to the application but proceedings of the lower court are exhibited.

I have considered the application, the authorities cited, *KINGSWAY MOTORS LTD versus ALLIED*

PRODUCTS LTD HCC 485/01, submissions of both counsels and in my view the applicant did not even attempt to show that the appeal has overwhelming chances of success and that it was an arguable appeal. For the court to be able to exercise its discretion to grant the order of stay under rule 2 of Order 4, the provisions of that sub rule have to be satisfied.

From the record before me, after the ruling of 9/6/04 the applicant filed an application dated 5/7/04 for stay of the orders.

That application was dismissed on 8/10/04. It is then that the applicant moved to this court for stay which he has a right to do under Order 41 Civil Procedure Rules. This application was, therefore, filed without undue delay.

No security has been offered. It is the counsel who states from the bar that the applicant has a title deed which he can deposit as security but the court has no details as to whether it exists or not. Further to the above, no substantial loss has been alluded to and this court is unable to exercise its discretion in favour of the applicant and the application is hereby dismissed with costs.

Dated at Machakos this 27th day of January 2005

Read and delivered in the presence of

R.V. WENDOH

JUDGE