

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT

MACHAKOS

Civil Appeal 31 of 2003

DAVID NGUKU MUTWEIA APPELLANT

VERSUS

JOEL KITONYI NZIOKIRESPONDENT

R U L I N G

Before me is the Notice of Motion dated 2/3/04 seeking to stay the orders of the lower court made in Machakos CMCC 132/02 on 31/3/03 pending the hearing and determination of an appeal; an order of injunction restraining the Respondent, his servants or agents from harassing the applicant through wrongful arrests until the appeal is heard; the Respondent or his Advocate Mr Mung'ata do refund to the applicant Kshs.4,000/= unlawfully demanded from the applicant on 1/2/04 and lastly, the applicant prays for costs of the application.

The application is expressed to be brought under Order 41 Rule 4 (1) 2 (b) and (6) of the Civil Procedure Rules and Section 3A Civil Procedure Act. Under Order 41, 1 and 2 Civil Procedure Rules, the onus is on the applicant to satisfy the court that there is sufficient cause for the issuance of an order of stay pending appeal. Even when such cause is shown there is a caveat imposed by sub rule 2 so that the applicant has to go further and satisfy the court that substantial loss may result to the applicant if the order is not granted; that the application is made unreasonable delay; that security for due performance of the decree or order is given.

I will give a brief background of this case before I can go ahead to consider the issues at stake in this application. The applicant who is the defendant in Machakos CMCC 132/02 has been sued by the Respondent/plaintiff, for damages for defamation. The case was adjourned twice. On the 2nd the adjournment of 6/11/02, Mrs Nzei acting for the applicant/defendant in seeking an adjournment said that they had been served late as her client resides in Germany and she needed time to communicate with him. Soon after that on 9/1/03 the plaintiff's counsel presented an application dated 8/1/03 under Certificate of Urgency under Order 38 Civil Procedure Rules seeking to have the defendant/applicant arrested and brought to court to show cause why he could not furnish security for his appearance. After the application was heard the court allowed the application and ordered the defendant/applicant to deposit with the court a security of property worth Kshs.200,000/= within 30 days or deposit Kshs.200,000/= in an interest earning account in the joint names of both Advocates. An application dated 1/3/04 seeking to have the said orders stayed, was dismissed. That dismissal provoked the filing of this application. The applicant has deponed in the supporting affidavit that he has filed an appeal against the said ruling of the lower court. The appellant claims to have been arrested and asked to pay Kshs.4,000/= to the advocate on 9/1/04 without a court order and that he will suffer irreparably if the order of stay is not made.

On the other hand, it is argued for the Respondent that this application has been brought with inordinate delay, that the applicant will not suffer any loss as the 200,000/= is already with his advocate and that the orders sought are not deserved as the applicant intentionally refused to deposit the money as ordered by the court.

I have considered the application, affidavits on record, submissions of all counsels and it is my view that

this application has been brought with inordinate delay. The order sought to be stayed was made on 31/3/03. There was no application to stay it till an application of 14/1/04 which was made after the applicant's arrest on 9/1/04. The first application of stay was made 9 months after the order of 31/3/03. No explanation has so far been given by the applicant as to why such a delay. The delay is indeed unreasonable in the circumstances.

Order 41 Rule 1 is very clear. The filing of an appeal does not operate as stay. Though an appeal had been filed the court had made the order of 31/3/03 requiring the applicant to deposit security for his appearance in court. He did not do so. It is irrespective of the fact that the applicant was dissatisfied with that ruling. If the applicant wanted to thwart any efforts to arrest him, then he should have moved with haste to have a stay. He did not do so. He was, therefore, open to arrest as it did occur on 9/1/04. Though he was open to arrest, yet I do find the counsel's charge of 4,000/= is not justified as the applicant was never taken to court nor was it paid pursuant to a court's order. The Respondent or Mr Mung'ata have to refund the same forthwith.

It is the applicant's case that they have an arguable appeal because the court did not comply with provisions of Order 38 Civil Procedure Rules. The court cannot go into the merits of the ruling at this stage but only find that so far there is no decree and the court should not have ordered a deposit of the security in a fixed account in the joint names of both counsels. I wish to observe at this stage that the applicants do admit to have had the cash but intentionally refused to obey the lower court's order to await this court's ruling. That was blatant disobedience of the court's order and that is why the applicant cannot be heard to complain of the subsequent arrest. There was no stay of the courts orders. Though the applicant contends that they will suffer substantial loss and the appeal rendered nugatory if stay is not granted, the applicant never attempted to demonstrate what loss would be suffered. The money is available, with counsel. The applicant also attempted to show that they have an arguable case because the suit is time barred but that is not the substance of the appeal.

The applicant also sought an order of injunction to stop the Respondent from arresting the applicant. I think I have already considered this issue. There was no stay of the orders of the court since the applicant ignored or refused to make a deposit of 200,000/= as ordered by the court. An injunction cannot, therefore, issue unless that order of 31/3/03 is complied with.

All in all, I find no merit in the application by the applicant to warrant the exercise of the court's discretion to grant the orders prayed. All I would like to state and correct here is that, since there is no decree in the lower court case, the proper place for the deposit of the 200,000/= to be made is with the court and I accordingly dismiss the application dated 2/3/04 but only correct the order of the lower court to have the money deposited in the court within 7 days hereof in default of which the order of stay vacates. Costs to be in the cause.

Dated at Machakos this 25th day of January 2005

Read and delivered in the presence of

R.V. WENDOH

JUDGE