

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 12 OF 2002

NAFTALY MURUNGI.....APPLICANT/APPELLANT

VERSUS

JULIUS MUTWIRI.....RESPONDENT

R U L I N G

This application was filed on 30th July, 2004. It seeks for stay of execution. The order to be stayed is one awarding the Respondent costs up on the striking out and dismissal of the applicant/appellant's suit at the lower court for want of jurisdiction.

It would appear that the applicant herein filed Meru CMCC No.1139 of 1999. When it came for a hearing, that court on perusing the pleadings, became satisfied that the suit, which was a land suit, should have been filed at the Land Disputes Tribunal. The court went out of its way to warn Mr. Kioga that it had no jurisdiction to hear the case and that Mr. Kioga should seek for an order of transferring or reference of the case to the Tribunal otherwise the court would have no alternative but to strike it out and dismiss it. Mr. Kioga decided to ignore the advise, as he was indeed not under any obligation to accept it. The court finally made a reasoned out ruling striking out the case on the basis that it had no jurisdiction to hear it. The court as well made an order for costs in favour of the Respondent herein who was the defendant at the lower court.

Later the costs were assessed exparte at Kshs.45,000/=. This figure and assessment was set aside at the instance of the applicant herein and the court ordered for the costs to be assessed afresh and interpartes. On reassessment the lower court arrived at the same figure of 45,000/= which it confirmed.

The applicant appealed against the striking out orders and sought and obtained the first stay of execution orders on 22nd February, 2002 before the original order of costs of Kshs.45,000/= was granted. When the lower court reassessed the costs at the same figure on 2nd March, 2004, the applicant filed a second application for stay of execution to prevent the Respondent from recovering the said sum of costs. This application was however refused on 28th June, 2004. That is when the applicant filed this follow-up application in this court on 30th July, 2004.

The applicant argues that he is poor and cannot manage to pay or settle the sum of costs aforementioned. He further argued that even the Respondent will not be able to refund the decretal sum if paid in the event applicant's appeal succeeds, thus rendering the appeal nugatory. Finally he also argued that he has a good appeal with high chances of success.

I have carefully considered all the arguments before me from both sides. The applicant's claim in the lower court, in the finding of the honourable trial magistrate, amounted to a trespass whose jurisdiction under Section 3(1) of the Lands Disputes Act (1990), was only under the Tribunal constituted under the Act and not under the jurisdiction of the ordinary courts. A quick perusal of the memorandum of Appeal, without deciding the appeal, would show that the appeal is virtually against the honourable magistrate's above decision on jurisdiction. I have considered the decision. I have come to the conclusion that the appeal may not have high chances of success as it has no arguable grounds. In other words, it is a frivolous appeal.

I have also noted that the stay of execution sought is mainly to stop the Respondent from recovering his costs assessed at Kshs.45,000/=. In accordance with the finding of the Court of Appeal in **Francis kabaa -vs- Nancy wambui & Another**, Court of Appeal Civil Appeal No. 298 of 1996 (UR), a stay of execution will not be granted in respect of costs alone. It is my view and finding that on that ground also, this application is not meritorious.

And finally, I have examined the period taken by the applicant to bring this very minor appeal to an end. My view is that the applicant is using the continued existence of the appeal to avoid settling the case once and for all. For example, this is the third application for stay. The end result is that this application for the various reasons above which include the facts that the appeal is frivolous, there was inordinate delay in bringing this application, and the fact that the applicants appeal will not be rendered nugatory if execution takes place, this application should not be allowed. It is hereby dismissed with costs to the Respondents. Orders accordingly.

Dated and delivered at Meru this 13th day of April, 2005

D. A. ONYANCHA

JUDGE