

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 392 of 2005

DANIEL WAITHAKA NJORAPLAINTIFF

VERSUS

TITUS KINYUA NYAWIRA1ST DEFENDANT

ROYSAMBU HOUSING CO-OPERATIVE SOCIETY LTD.....2ND DEFENDANT

COMMISSIONER OF LANDS3RD DEFENDANT

RULING

By his Notice of Motion the applicant seeks an order that I review the order I made striking out this suit on the 26.4.2005 on the basis that there is an error on the face of the record.

Mr. Kairaria for the Applicant relied on the grounds in his application and the Applicant's replying affidavit. The Applicant at the time of filing his Complaint herein sought interim orders to stay proceedings in Milimani CM.CC. No.7365 of 2002 pending the hearing of this suit.

The said proceedings had been struck out and there was nothing therefore to stay. What was intended according to the Applicant was a stay of the order of taxation of the costs.

The ruling I made on the application was;

“The Applicant has two choices either to appeal against the order of the lower court or bring a Judicial Review application to quash the lower court's order. This suit is unsustainable and I strike it out with costs to Respondent.”

It is clear, however, that the suit brought is sustainable as it discloses a good cause of action. What was not sustainable was the application for stay of the proceedings in the lower court.

He relied on the case of **Regina v Patents Appeal Tribunal {1962} 2 QB page 647** where it was held that “the court was entitled to look not only at the tribunal's decision but also at the application which formed the basis of that decision.

Mr. Muriithi for the Respondent submitted that the application had been brought with undue delay having been brought some two months or so after I made my order and that there was no error on the face of the record. He relied on the case of **Housing Finance Company of Kenya Ltd. v Prudential Dry Cleaners Ltd. cc. No.774 of 1999** where it was held an error on a point of law does not enable a litigant to seek a review of an order but appeal to the Court of Appeal in respect of whether the trial judge's interpretation was correct or not.

My remark that the Applicant had two choices clearly related to the Applicant's remedy against the order of the striking out of the suit in lower court and not the application for a stay of proceedings. What was intended was that the application be struck out as there was nothing to stay.

My decision was not therefore based on an error of law but on an error as to what was to be struck out. It was unjust to strike out the suit. In the event I vary my order to read “***dismiss the application with costs***” instead of strike out the suit. The costs go to the Respondent.

Dated and delivered at Nairobi this 23rd day of November, 2005.

P. J. RANSLEY

JUDGE