

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Case 99 of 2004

MASIKA MUTIE PLAINTIFFS

VERSUS

KANYIVA NZUNU

MUKUKAI KANYIVA DEFENDANTS

RULING

The application before the court is dated 22/9/2005. It seeks for a stay of execution pending an appeal. The application was filed about 10 months ago. The judgment which is grieving the applicant was apparently delivered in his absence since the proceedings which resulted into it were conducted ex parte. The applicant stated that he had filed an application dated 5/11/2004 seeking leave to defend the ex parte suit but that it was dismissed on 29/11/2004. It would appear that it was upon the trial court's refusal to allow the applicant to defend the case, that led him to file an appeal. In the meantime the lower court proceeded ex parte to hear the matter in respect of which it purportedly refused the applicant leave to defend, until it delivered a judgment on 20/12/2004.

In reply however, the respondent said that the applicant was misleading the court. What happened, he said, was that when the applicant who was the defendant was served, he properly filed his defence and the case was later fixed for a hearing. That on the hearing day the defendant/applicant failed to turn up in court where upon the court proceeded to hear the case to its conclusion and then reserved it for a judgment which the court fixed on 20/12/2004. That in the meantime the applicant filed an application seeking that the court does stop or stay delivering the judgment coming on 20/12/04. At the end of the hearing of the application, the court also reserved the ruling to 1/11/2004. On this latter date, the court apparently delivered its ruling by rejecting the stay to deliver the judgment on 20/12/04. The applicant promptly appealed against the ruling. Later, on 20/12/04, the judgment in the main suit was delivered. It is the judgment being executed and which the applicant wishes to stay. In response, the respondent argued that since there is no appeal against the decree being executed, the applicant has no basis upon which he would seek, let alone, obtain, a stay.

Further more the respondent points out that an appeal against an interlocutory order requires the trial court's leave before it can be filed as provided under Order 42 of the Civil Procedure Rules.

I have carefully perused the application and the documents annexed thereto. I have also considered the documents and the arguments advanced before me from both parties.

There is no denial of the fact that there is no appeal against the decree and orders now being executed by the Respondent, and sought to be stayed. A relief of stay under Order 41 Rule 4 comes or is available only to those who have appealed or intend to appeal against the decree or order being sought to be stayed. Such a stay can only be first granted by the court appealed from. The applicant herein as the court understands, neither appealed against the said judgment nor even sought a stay of execution of the same at the lower court. In so far as the said judgment is concerned therefore, the court sees no stay relief being available to him, at least under Order 41, Rule 4.

Mr Nyakweba, did not point out any other provision under which this court could grant such relief and for the time being, this court is not aware of any.

If the court understood Mr Nyakweba, he gave an impression that even if he had not filed an appeal against the decree being executed, he nevertheless did file some appeal in the suit and the same has not been heard. He could accordingly argue that the appeal could be rendered nugatory if the stay sought is not granted. I have examined the argument. But it is on record that the respondent did not seek leave to appeal against the ruling refusing to stay the delivery of judgment and was not allowed to be heard in his defence. The respondent pointed out that under Order 42 of the Civil Procedure Rules, orders made under Order 50 Rule 1 and 2, require leave of court before an appeal is filed. I have considered the issue and have come to the same conclusion. The respondent should have sought leave to appeal against the ruling either orally or by formal application. This he failed to do. The result of it is that the appeal filed is incurably incompetent. Thus, it is not an arguable appeal but one which is liable to striking out.

This court finally, but not least, observes that the decree and/or order being appealed from was not extracted nor annexed to this application for stay. The applicant only annexed the ruling which is not the same as the “decree or order” required to be annexed. This makes the application before the court, in addition, incompetent and liable for striking out.

In conclusion, therefore, whether this court were to proceed to strike this application out, or dismiss it as having no merit, the application will not yield the relief of stay to the applicant. It is struck out and dismissed with costs to the respondent.

Dated and delivered at Machakos this 18th day of November 2005

D.A. ONYANCHA

JUDGE