



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIV APP 13 OF 04[1]

ANWARALI & BROTHERS LTD MUTHOKA

MUKITI.....APPELLANTS

VERSUS

JACINTA WAMBOI KANAGI.....RESPONDENT

RULING

Anwarali & Brothers Ltd and Muthoka Mukiti, who I shall refer to as the applicants are back to this court. This time they seek the following orders: - “ 1.That there be interim stay of physical removal and sale of the proclaimed goods being motor vehicles registration numbers KAQ 495T Trailer ZB 9405, KAP 367T Trailer ZB 9407 and KAN 385 Trailer ZB 8971 pending interparte hearing and final determination of this application. 2. That subject to the depositing of the whole decretal sum in an interest earning account with either standard Chartered Bank or Barclays Bank of Kenya Limited in the jo int names of the Advocates on record or in such manner as the court may order , there be stay of physical removal and sale of the proclaimed/attached goods in execution of the decree herein pending the hearing and determination of the appeal.”

They also pray for costs. They have moved the court under orders XLIV of the Civil Procedure Rules and they base their application on the several grounds, but mainly that the appeal will be rendered nugatory as the respondent will not be in a position to reimburse the decretal sum should she be required to. The application is opposed. Mr. Mogaka relied on several Court of Appeal decisions where the main gist of the holding was that where the respondent is not able to demonstrate that he has the ability to pay, the court is usually inclined to grant the orders being sought. Of course, it is at that level of appeal, where the appellant is required to demonstrate that he has an arguable appeal (South Nyanza Sugar Company Ltd versus Samuel Osowe Ochillo CA No. NAI. 79/03 (UR 42/2003) and Nairobi Deluxe Service Ltd versus Erick Onyango Ndege CA No. NAI 64/1992 (UR NAI 24/92) At this stage however, contrary to Mr. Mureis’ submissions, all that this applicant has to satisfy what is contained in Order XLIV rule 4 which stipulates as follows:

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have order set aside”

(2) No order for stay of execution shall be made under subrule (1) unless: - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant". (emphasis mine)"

I find that the application was filed within reasonable time. By her own admission, the respondent has been rendered destitute, and that is a clear indication that her ability to refund the decretal sum is highly questionable, in which case, the appeal would be rendered nugatory. It is a real pity that her financial position is as a result of the accident from which this appeal arises. The applicants are willing to deposit the sum in an interest bearing joint account with any bank, which this court or the parties may appoint. On the above grounds, the applicants have satisfied the above requirements and the orders now being sought should be granted with any additional orders if necessary, as the court would deem fit. But Mr. Murei took issue with the intentions of the applicant genuine. It was his submissions that they are not genuine and that their efforts have amounted to an abuse of the process, which should call for the dismissal of their application with costs.

Admittedly, this is the third application before this court, all being filed within four weeks and all seeking orders of stay. The applicants initial successful, application was made at the first instance in the subordinate court and just before the period of stay expired, the applicant moved this court on 17/2/2004 in an application for stay, which was filed under certificate of urgency and was to be heard on 2/3/2004. They then filed another application on 8/3/2004, while the earlier one was pending hearing, and yet again filed another application in the subordinate court a day before their second application in this court was due to be heard. On 9/3/2004, this court dismissed that second application for being an abuse of the process.

Mr. Mogaka who has been on record all this time, and who concedes that the other two applications were an abuse of the process of the court however urges the court not to shut out his client, who, he submits should not suffer because of the mistakes of his counsel. I am well aware that a litigant should not be penalized for the mistakes of his counsel. I am also aware that it will depend on circumstances of each case, and the mistakes emanating therefore from. But I am guided by the principle as laid down in the case of Elizabeth Kamene Ndolo versus George Matata Ndolo CA No. NAI 104/1995 (unreported) where the court of appeal held "it is settled law that where an appeal has been struck out for incompetence as opposed to where it has been dismissed there is nothing to stop the appellant filing a fresh Notice of Appeal and a fresh appeal. We repeat that is now settled Law"

The above principles should apply to proceedings in the other courts, and it is clear from the above decision that had the previous applications in this application been struck off, then a repeat application filed within time and seeking similar orders would be in place. In all the instances, the applicants have been represented by the same counsel and though in the two prior occasions he requested another to hold his brief, he is still the counsel on record. As stated earlier his application was dismissed by this court, while another awaited hearing and determination. What, then would have been the applicant's recourse; was it to file a third application? Mr. Murei's submission is that they should not have done so and I am inclined to agree with him.

I am therefore of the humble opinion that since the earlier application was dismissed by this court, a second application for similar orders, should be not entertained. Admittedly the application of 12.2.2004 was withdrawn on the same day when this application was filed, but that does not cure the defect because as aforementioned, on 9/3/2004 this court dismissed that other application for stay. A party cannot file several applications one after another, in which he seeks similar orders for it that were to be allowed, for it would amount to an abuse of the process, and litigation would never end. In the circumstances, this application is dismissed with costs.

Dated and delivered at Eldoret this 19th day of March 2004.

JEANNE GACHECHE

JUDGE

Delivered in the presence of: -