REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL MISC. APPLICATION NO. 365 OF 2001

REPUBLIC :: PLAINTIFF

VERSUS

SENIOR PRINCIPAL MAGISTRATE MACHAKOS ::::::::::::::::: DEFENDANT

R U L I N G

By the application dated 2.3.2004, the applicant prays for stay of execution pending hearing inter parties, that the order made by the court on 2.3.2004 lifting the stay orders which were granted on 13.12.2001 be set aside and stay be re-instated and costs be provided for. The application is based on ground that the order of stay was lifted following non attendance by applicants Counsel which was not deliberate; that the applicant will suffer irreparably if a stay order is not granted because the substantive suit is still pending for hearing and determination; that the applicant will suffer for no mistake of his own and the respondent will suffer no prejudice. The application is also supported by the affidavit of Counsel for applicant.

The application was opposed on ground that this being an application for Judicial Review, once the order of stay is lifted, the applicant can only appeal to the Court of Appeal and secondly that the affidavit does not support the application.

When this matter came up for hearing, Counsel for applicant made an application to make amendments to the application and affidavit. The court allowed Counsel to amend his application as it is within his right to do so.However he was not allowed to amend his affidavit as an affidavit is evidence and one can not amend his evidence.

In his application Counsel was asking court to reinstate the orders of 13.12.2001 but a look at the court record shows that no order was ever made on 13.12.2001 save that an order was made on 11.12.2001. He can not seek to reinstate what is not on record.

At paragraph 2 of his affidavit Counsel refers to application dated 29.10.2003 which application is also nonexistent.

In paragraph 3, the Counsel further claims that the application was scheduled for hearing on 2.3.2004 but there was no application filed for hearing that day. The application came up on 2.3.2004. From the foregoing it is apparent that the Counsels submissions are in total contradiction with the affidavit. The affidavit being evidence on oath takes precedence over submissions and the evidence and submissions are at total variance. The application is therefore unsupported and it must fail.

Another angle to the objection is that the application for reinstatement is unsustainable under Order 53 and the Law Reform Act. Though Counsel never referred the court to the specific provisions of law, Section 8 (1) of the Law Reform Act provides as follows “The High Court shall not, whether in the exercise of its civil or criminal jurisdiction issue any of the prerogative merits of mandamus, prohibition or certiorari.”

The initial application brought by the applicant is for Judicial Review under Order 53 Civil Procedure Rules. The order of stay was vacated when the applicant did not attend court on 2.3.2004. This being an application under Order 53, the court can not invoke provisions of the Civil Procedure Act to reinstate the order that was vacated. This is in light of Section 8 (1) Law Reform Act. The sum of this is that the only

avenue open to the applicant is to appeal to Court of Appeal as in effect this court would be sitting on appeal of orders made by itself.

Under the circumstances and for reasons given above the orders sought can not be granted and the application dated 2.3.2004 is dismissed with costs to the respondents.

Dated, read and delivered at Machakos this 29th day of April, 2004.

R. V. WENDOH

JUDGE