



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
Civil Case 37 of 2000

SAMWEL MUTITU NDUMIA APPLICANT/RESPONDENT

VERSUS

1. DAVID MUIGAI KINYANJUI.....1ST RESPONDENT/APPLICANT

2. MARGARET NJERI..... 2ND RESPONDENT/APPLICANT

RULING

1. The Notice of Motion dated 4.3.2004 seeks Order under Order XLIV Rule 1 of the Civil Procedure Rules and under Section 3 A of the Civil Procedure Rules and under Section 3A of the Civil Procedure Rules as well as the usually popular but unhelpful statement, “***and all other enabling provisions of the law***” for orders that;

- i) there be a stay of execution of the Orders made on 27.2.2004.
- ii) the orders made on 27.2.2004 be reviewed and/or set aside.

2. In a Supporting Affidavit filed by Kennedy Chweya Onsembe, Advocate sworn on 4.3.2004, it is deponed that on 2.2.2004 and 6.2.2004 when the matter was listed for hearing of an Application he could not attend court because there was a nation-wide matatu strike and he had no means to travel to this court for the hearing aforesaid. Further, that on the latter date, the Application by the Plaintiff’s Advocates for leave to execute the preliminary decree in the suit was heard and in 27.2.2004 the orders sought were granted.

3. Counsel for the Applicants argues that the Application proceeded ex-parte and had the court been informed of two important matters, it would not have allowed the Application aforesaid. The two matters are firstly, that the Applicant had already obtained a stay of execution of the decree pending Appeal. The second is that there was before court a Preliminary Objection which had not been disposed of. For these reasons I am asked to review the Orders of this court and if not, set the said orders aside.

4. In opposition, Counsel for the Respondent argues that the Applicants have not brought themselves within Order XLIV Rule 1 and therefore no review orders can issue. As regards the order for stay of execution, the same is a nullity and an illegality as a Magistrate purported to grant the orders instead of a judge. He urges me to dismiss the Application with costs.

5. The first issue that I must dispose of is the aspect of setting aside of the order of 27.2.2004. Although mentioned in the Application, little is said of it in the Affidavit and it was argued as if it was an alternative prayer yet it was not crafted as such. Counsel for the Applicants in fact in reply to Submissions by Counsel for the Respondent clutched onto it when he quite correctly realised that he was not convincing as regards the orders for review. In any event, I shall not grant that part of the Application. No reasons have been advanced for setting aside the order. Counsel for the Applicant said that the order was granted ex-parte when it was not. His client chose to respond to it inspite of the absence of Counsel. That was not an ex-parte Application and the Court heard parties and made a Ruling based on what was said in Submissions . Okwengu, J. who heard the Application said as I much when she stated; ***“I have considered the Application and the entire court record..... It is only fair that the Plaintiff be allowed to execute the Preliminary Decree.”*** That is the much I can say about the prayer, if there was one, for setting aside the orders made by Okwengu, J.

6. Turning now to the prayers for review of the orders aforesaid, when Counsel for the Applicant had finished his Submissions, I asked him to look at Order XLIV Rule 1 of the Civil Procedure Rules and point to me what ground he was basing his Submissions on. Counsel replied that there was new material which was being placed for this Court’s consideration and in any event, there was sufficient reason to review the Orders as prayed. I disagree.

7. As I have said above, Okwengu, J. took the record of court into account in rendering her decision. What else is new? That Counsel was stopped from coming to court because of the matatu strike? That with respect is not a ground for review of a Court Order. There is no new and important matter that was not within the knowledge of the Applicants at the time of the hearing of the Application. There is no mistake apparent on the face of the record. There is no other sufficient given as to say that every reason given to seek review is sufficient would make nonsense of the whole of Order XLIV Rule 1.

8. The Application is incompetent and I so hold. I would however fail in my duty if I said nothing about the alleged stay of execution purportedly granted pending Appeal. The Order referred to is in this very same file and it was made on 22.4.2003 by one W.Muiruri, SPM and signed by him as ***“Senior Magistrate (sic), Meru.”*** It was an ex-parte Application, and the Orders given were;

“ 1. That there be a stay of execution of orders made on 5th day of December (sic) 2002, pending the Appeal.

2. *Inter-partes hearing on 15.5.2003 before the Hon. Judge.”*

9. It would not take much thought to see that the order was made unprocedurally and any party relying on it is standing on fickle legal and procedural grounds. That is the position of the Applicants in this matter. There is no Order of Stay of Execution and for avoidance of doubt, I shall declare the Orders of Muiruri, S.P.M made on 22.4.2003 void for all purposes of the law.

10. As it is, I shall dismiss the Application dated 4.3.2004 with costs to the Plaintiff in this suit.

Orders accordingly.

Dated and delivered in open court on this 15th day of December 2004.

I.LENAOLA

JUDGE

Ruling read in the Absence of all parties.

I.LENAOLA

JUDGE