

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL APPEAL NO. 28 OF 2002

ALICE WANGARI NDUMO.....APPELLANT

Versus

PATRICK NGUMI GITHAE)

AGNES MUTHONI NGUMI).....RESPONDENTS

RULING

On the face of the Notice of Motion dated 27th October 2004, the Applicant seeks orders for a stay but what she wants be stayed is not clear. The order the Applicant wants be stayed is not specified and therefore that, in my view, makes that application bad. It may be argued otherwise but the reality is that if this Notice of Motion is granted and as a result the relevant court order is extracted, the person extracting the order will do it in terms of the wording in prayer 1 which states:

“That the execution proceedings against the applicant herein in respect to this matter be stayed until the hearing and determination of the Applicant’s appeal in the Court of Appeal.”

Even after reading the supporting affidavit and until Counsel for the Respondents interjected towards the end of submissions by Counsel for the Applicant all that was apparent was the idea that in the High Court judgment the Applicant had been ordered to give something to the Respondents an order pregnant with execution and therefore with the execution proceedings the Applicant wants be stayed. It was much later that it became clear that the execution proceedings sought to be stayed are proceedings to execute the order for costs already made. Clearly that kind of thing is unlikely to be in the extracted court order after this application is granted as I do not see anybody keen enough to ensure that is done. That is why I am saying prayer number 1 in the Notice of Motion should have been specific as to what exactly is to be stayed. As it is, that prayer is vague and therefore bad in law.

Having said the above, I propose to be brief from here onwards. The history of this case is a warning that the Applicant does not deserve the orders he is praying for. If he could not prosecute his own suit, how will he bother to move the Court of Appeal to the hearing of his appeal after he has obtained a stay of execution of the order for costs?The answer to that question is that he will not be bothered as the appeal may be filed for the sole reason of delaying ends of justice.

Further, the explanation given by the Applicant as to why he delayed filing this application is not convincing. Further still the applicant is trying to conduct the matter as if he was not aware of the taxation for costs yet the order for costs was entered by consent which consent included a stay of execution for 30 days.

Moreover the Applicant has not proved to this court that if her appeal in the Court of Appeal succeeds, Respondents will not be able to refund the costs. Mere allegation is not sufficient. She made the allegation that Respondents will not be able to refund and therefore had the duty to prove that allegation. She cannot make allegations and leave it to Respondents to do the rest for her.

From what I have been saying above therefore, this Notice of Motion dated 27th October 2004 is hereby dismissed with costs to Respondents.

Dated this 7th day of December 2004.

J. M. KHAMONI

JUDGE