



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 15 OF 2003

H.P.MAKHECHA T/A MAKHECHA AND CO. ADVOCATES.....APPELLANT

VERSUS

MANGU NGOLO RESPONDENT

RULING

From what has been brought to my attention during the hearing of this Notice of Motion dated 14th January 2003, there is no doubt, as can be seen in prayer, number two, that the Applicant wishes to have stay of execution of the Senior Resident Magistrate's order issued on 23rd December 2002. The memorandum of Appeal filed in the appeal in which this Notice of Motion is filed makes it beyond reasonable doubt that the appeal is against the Senior Resident Magistrate's decision or order delivered on the 23rd day of December 2002. The decision or order or ruling in question is found at page 98 of the Applicant's bundle of documents in which this Notice of Motion is contained.

It is clear that what prompted that decision or order or ruling was the Applicant's application seeking review of the lower court's Ruling dated 21st November 2002 granting summary judgment and costs of the application.

The lower court dismissed the Application for review on 23rd December 2002. Hence this appeal against that dismissal dated 23rd December 2002.

It means therefore that there is summary judgment against the Applicant in this matter. The Applicant has not appealed against that summary judgment dated 21st November 2002. Instead he has appealed against the dismissal of the application for review which dismissal is dated 23rd December 2002.

It is the summary judgment dated 21st November 2002 which is executable and may be executed. The dismissal of the application or review or the decision or order or ruling thereof needed no execution as it is not executable and cannot be executed. If it must be executed, and bearing in mind its nature, then that decision or order or ruling was instantly executed and nothing remains to-day to be executed later to make it possible for that later execution to be humanly stayed.

The above being the position, I do not think, with all due respect, that the provisions of the law and the authorities cited in this Notice of Motion empowers the court to stay the execution of a judgment, like the judgment in this matter dated 21st November 2002, against which no appeal has been filed.

I do not think the grounds advanced by the Applicant in support of this Notice of Motion are tenable. Those grounds would be tenable only in support of a proper application for a stay of execution of the

judgment when there is an appeal against that judgment. They are not tenable where there is no appeal against the judgment as in this Notice of Motion. Look at what Order XLI Rule 4 (1) of the Civil Procedure Rules is saying:

“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 such order set aside”.

Emphasis are mine and it can be seen that it is only the decree or order appealed from that may be stayed. Order XLI Rule 4 (1) or any other rule of the Civil procedure Rules do not give the court power to stay execution of a decree or order not appealed from and their propriety of applying section 3A of the Civil Procedure Act does not arise as this is a situation where provisions of Order XLI Rule 4 (1) of the Civil Procedure Rules were, rightly, seen to be appropriate and sufficient.

On the whole therefore, this Notice of Motion is not maintainable. Accordingly, it is hereby dismissed with costs to the Respondent.

Delivered, dated and signed at Nairobi this 23rd Day of May 2003.

J.M. KHAMONI

JUDGE

Present:

Mr. Wagara for the Applicant.