



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO.203 OF 1998

WAYUA MUTISYA KINOTHYA PLAINTIFF

VERSUS

RUEBEN M. MUSYOKI DEFENDANT

RULING

The plaintiffs who are respondents to this application have a judgement in their favour delivered by this court dated 28.11.2001. This court has been informed that an appeal was preferred against that judgement assigned number 3 of 2002 which is scheduled to be heard on 15.12.2003. The applicant then filed civil application no. Nairobi 301/02 seeking stay of the execution of the decree herein pending the hearing of the appeal filed.

The said application is still pending for hearing and it is stated to be coming up for hearing on 8.10.2003.

In the mean time the plaintiff respondents filed an application dated 11.10.2002 seeking orders to enforce the judgement herein.

That application was opposed by the current applicant and the matter was heard inter parties and then this court gave a ruling dated 29.5.2003 allowing that application.

In pursuance to that ruling the applicant defendant was removed from the premises and the plaintiffs put in possession on 23.6.2003. This move prompted the current applicant to file the application under review by way of chamber summons under order XLI rule 4(1) of the civil procedure rules dated 18.6.2003 seeking among others an order for stay of execution of the decree herein until the hearing and determination of civil application no. Nairobi 301 of 2002 (UR 149 of 2002) The grounds are set out in the body of the application supporting affidavit and oral submissions in court. The major ones are that:-

- 1.The facts of the case are not in dispute.
- 2.That there are 2 sets of proceedings pending in the court of appeal being a civil appeal and an application for stay pending hearing of that appeal.
3. That the dominant order in the decree is eviction and if eviction is carried out then the pending application as well as the pending appeal will be rendered nugatory.
4. That this court should not allow those proceedings to be rendered nugatory.
5. It is conceded that applicants properties were thrown out of the premises on 23.6.2003 but this court has powers to order restitution of the property in the premises pending the hearing of the application for stay.
6. That if the orders sought are not granted the applicant will be greatly prejudiced.
7. That there is merit in the application and this court has the jurisdiction to grant the orders being sought.

The respondent on the other hand has opposed the application on the basis of the grounds in the replying affidavit, annexures and oral submissions in court and the major ones are that the application cannot hold because:-

1. It is Resjudicata of as the points for determination were the same ones raised in opposition to the respondents application which gave birth to the ruling of 29.5.2003.

2. The application has been over taken by events as the execution sought to be stayed has already been carried out and so the court is being asked to issue orders in vain.
3. That the pendency of an appeal and an application for stay pending in the court of appeal cannot operate as an order for stay herein.
4. That the applicant does not have any arguable ground before the court of appeal.

On the court's assessment of the facts herein, it is clear that the decree herein was issued in the year 2001. No stay orders were obtained before this court's ruling of 29.5.2003 and so this court was entitled to make the orders it made in that ruling. It is correct that the issue of the proceedings pending before the court of appeal were raised during the argument which gave rise to that application but the same were not upheld solely because there were no stay orders in place. That ruling as well as the decree has been given effect to. There are no stay orders of the ruling of 29.5.2003 and in the absence of any order for stay being sought in respect to the ruling of 29.5.2003 there is no way this court can be asked to issue orders of stay as there is no review and variation sought for the orders of 29.5.2003.

Further it is not in dispute that those orders have been effected. This court has been told that it has powers to order restoration of the applicant into the premises.

The jurisdiction no doubt exists but in the circumstances of this case that can only be possible if the orders of 29.5.2003 are reviewed and set aside.

2. If there is a prayer for restoration or reinstatement into the premises.

None of which are being sought in the application subject of these proceedings.

As regards the rendering of the court of appeal proceedings nugatory that is not correct because unless and until those proceedings are disposed off or struck out the court of appeal will have to deal with them substantively and being a superior court any orders issued by that court will have to be obeyed by this court.

In view of the foregoing it is therefore the considered opinion of this court that the orders sought cannot issue. The applicant will have to await the orders to be issued in the application for stay pending before the court of appeal and if they are in his favour he will be at liberty to move this court for reinstatement into the premises. For now he stands removed from there in and has to await the outcome of the application pending for stay. The application dated 18.6.2003 is hereby refused with costs to the respondents.

Dated, read and delivered at Machakos this 23rd day of September, 2003.

R. NAMBUYE

JUDGE