REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE
MISC C. APP. 72 OF 2003

KOGO MUGANDA VINCENT …….. APPLICANT

VS

JOHN MBUGUA KUNGU …….. RESPONDENT

R U L I N G

The applicant herein, Kogo Muganda Vincent took out a Notice of motion pursuant to the provisions of Section 79 G of the Civil Procedure Act and under Order XLIX rule 5 of the Civil Procedure Rules. The motion seeks for enlargement of time within which the applicant may file an appeal against the ruling of the Senior Residents Magistrate, Kitale delivered on 22.6.2001 in Kitale S.P.M.C.C. No 85 of 2001. The motion also seeks for an order of stay of execution of the aforesaid orders arising from the ruling which is sought to be upset. The motion is supported by the affidavit of Kogo Muganda Vincent sworn on 16th July 2003.

The Respondent filed grounds of opposition and a replying affidavit of John Mbugua Kungu sworn on 10th December 2003 in response to the applicant's motion.

It would appear from the annexures presented to this court by both parties that the Respondent herein had filed an action against the applicant by way of a plaint and the applicant responded by filing a defence which was later on struck out pursuant to an application for summary Judgment filed by the Respondent. It is that ruling which the applicant now seeks for leave to appeal against out of time.

The main ground put forward in support of the motion is that the applicant was badly let down by his advocates, M/S Arang'a & Co. Advocates. The applicant complains that the aforesaid firm of advocates failed to attend court on 14.6.2001when the application for summary Judgmentcame up for interpartes hearing. The aforesaid firm of advocates also failed to file a replying affidavit or grounds of opposition and finally that his advocates failed to notify him of the outcome of the ruling the subject matter of the intended appeal. It is also stated by the applicant that he came to know the outcome of the ruling after the period provided by law had lapsed. The applicant therefore urged this court to excuse him due to mistake of his counsel which he should not suffer it.

The respondent resisted this ground by stating that the applicant came to know about the ruling even before the expiry of the period provided for appeal. To fortify this argument, the respondent annexed a copy of a plaint showing that the applicant had commenced a fresh suit before the High Court vide Kitale H.C.C.C. No 107 of 2001 just 11 days after the delivery of the ruling with a view of staying the execution of the orders granted on 23.6.2001 in Kitale S.P.M.C.C. No 85 of 2001.

I have keenly perused the material placed before me and I have found out that the hearing date of the application dated 11.4.2001 which gave rise to the ruling now in contention was fixed by the consent of the advocates for the parties herein. However when the matter came up for inter partes hearing on

14.6.2001, the applicant's advocate Mr. Arang'a did not turn up. The respondent's advocate Mr. Kiarie sought to proceed ex parte and was granted leave to do so. Two things happened here. First that, it is true that the applicant's advocate did not turn up to argue his client's case. This fact lent credit to the applicant's assertion that he was thoroughly let down by his advocate. Secondly, that the trial magistrate was perfectly right to allow the respondent's advocate to proceed ex parte in view of the fact that there was no one to oppose the application and even if the applicant's advocate was present it may not have assisted because the court may have exercised its discretion under order L rule 16 (3) of the Civil Procedure rules which provides:

> *"If a respondent fails to file a replying affidavit or a statement of grounds of opposition, the application may be heard ex part e."*

The other aspect which has been raised by the respondent herein which has crossed my mind is that it is alleged that the applicant came to know the outcome of the ruling even before the expiry of the period limited by law. The relevant period which concerns me in this matter is the one provided for under section 79 G of the Civil Procedure Act, which is a period of 30 days from the date of the decree or order appealed against. In this application the order in contention was made on 22.6.2001. Going by the provisions of Section 79 G of the Civil Procedure Act, the time to appeal other factors remaining constant would have been on 21st July 2001. I wish to reproduce the contents of Paragraph 7 of the affidavit of Kogo Muganda Vincent, the applicant as follows:

> *"That I only became aware of the ruling when the Respondent attempted to evict me."*

The applicant has not stated the date when the Respondent attempted to evict him. I can only discern from the material placed before me. The relevant material is the plaint dated 3.7.2001 which was annexed to the replying affidavit of John Mbugua Kungu sworn on 10th December 2001. The annexure is not contested nor denied by the applicant. Hence I have no reason to doubt that is genuine document. The contents of paragraph 20 of the above mentioned plaint states:

> *"The plaintiff is still in occupation of the disputed paces of land despite the third defendant's (respondent herein) attempt to evict him on or about 1.7.2001 at about 6.30 p.m."*

It is therefore clear that the application herein came to be aware of the outcome of the ruling now in dispute on 1st July 2001. I agree with the submissions of Mr. Kiarie for the Respondent that the applicant has not been candid in the whole saga. I am also persuaded to agree that the more reason why the applicant filed Kitale H.C. Civil suit No. 107 of 2001 was with the aim of stalling execution of the orders granted on 22.6.2001. The applicant has therefore not told the truth. He was aware of the ruling before the time allowed to appeal had lapsed. His erstwhile advocate Mr. Arang'a had let him down but he replaced him immediately he discovered the misery he had been put in. consequently this ground is dismissed.

The applicant's second ground in support of the motion was that the intended appeal has high chances of success. The applicant further stated that the trial court disregarded his defence and struck it out yet the same had good and triable issues. He annexed in his affidavit a letter of allotment as evidence that he had real interest in the suit premises. The respondent's response was lethal. The respondent stated that the applicant had no right to appeal as a matter of right hence without leave to appeal there was no point to grant leave to extend time to file appeal out of time. It was further submitted by the respondent that the applicant had not given good and sufficient reasons why he failed to file an appeal in time. The applicant was also stated to have good defence in view of the fact that the respondent possessed a certificate of lease as opposed to a letter of allotment opposed by the applicant.

I have considered the submissions of both counsels over this ground. I think I need to examine the provisions of order XXXV rule 1 (I) (b) of the Civil Procedure rules under which the application which gave rise to the ruling of 22.6.2001 was premised. It is not disputed that the order for summary Judgment was given when the applicant and his advocate failed to attend court. It is also clear that the application was not contested as there was no grounds of opposition filed nor a replying affidavit as expected. Under Order XXXV rule 10 of the Civil Procedure rules it is provided as follows:

"Any Judgment, given against any party who did not attend at the hearing of an application under this order, may, on application be set aside or varied on such terms as are just."

It is obvious that the law anticipated such an occurrence and hence the existence of this rule. The law does not envisage a party aggrieved by a decision under order XXXV rule 1 (1) (b) to appeal against such a decision without exhausting the provisions of rule 10. However, this is what the applicant herein wants to do despite the glaring existence of a safety valve. I think the applicant cannot appeal as a matter of right. This is clearly expressed under Order XLII rule 1 (1) (V) of the Civil Procedure rules which is reproduced as follows:

"An appeal shall lie as of right from the following orders and rules under the provisions of Sectio n 75 (I) (h) of the Act

(a) ……;

(b) ……;

(c) Order XXXV, rules 5,7, and 10

The applicant must therefore seek for leave to appeal first which I doubt whether it will be granted in view of the existence of an alternative remedy. I am therefore inclined to agree that this application has no merit at all.

At this stage I will consider the aspect as to whether there was a good defence before trial or not. I will not also go into the arena of considering whether the intended appeal has any chances of success or not. My basic reason for declining to decide on the matter is simple. The protagonists in this matter did not annex the pleadings which were before the trial court namely: the plaint, defence and a reply to defence in any. The applicant did not also annex the proposed memorandum of appeal. The applicant has been so mean and economical in divulging vital information. The Respondent at least has shed some light by offering more information to this court. I think I am convinced that the applicant intentionally concealed vital facts at the ex parte hearing to avoid prejudicing his case. Had that information been disclosed I would obviously have declined to grant the ex parte hearing to avoid prejudicing his case. Had that information been disclosed I would obviously have declined to grant the ex parte stay of execution orders.

I share the statement of law made by **WARRINGTON L.J** in the case of **REPUBLIC VS KENSINGTON INCOME TAX COMMISSIONERS, EX PARTE PRINCESS EDMOND DE POLIGANAC (1917) 1 K.B. 486**

At page 509 where he said:

"It is perfectly well settled that a person who makes an ex parte application to the court -that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under obligation to the cou rt to make the obligation to the court to make fullest possible dislosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprive d of any advantage he may have already obtained by him. That is perfectly plain and requires no authority to justify it."

The court of appeal of Kenya restated this statement amongst others and adopted the same in the case of **THE OWNERS OF THE MOTOR VESSEL "LILIAN S" VS CALTEX OIL (K) LTD CIVIL APPEAL NO. 50 OF 1989.**

Here the court of appeal discharged ex parte orders granted for failure on the part of the applicant to disclose material facts at the ex parte stage. I think the same fate should befall the applicant in this case.

The applicant both at the exparte and interpartes stages sought for an order of stay of execution, without citing the relevant provisions of the law under which such orders may be prayed for. Ordinarily such an omission is undesirable but it is not fatal in view of the provisions of order L rule 12 of the Civil Procedure Rules which provides that:

> *"Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily bestated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule."*

The applicant also cited the provisions of order XLIX rule 5 of the Civil Procedure rules. However I have scrutinized the above provisions and formed the opinion that the same is not applicable in this case. It is only applicable in cases where time is fixed by the rules, summons notice or by an order of the court. Therefore the most relevant provision of the law is under Section 79 G of the Civil Procedure Act.

In the final analysis therefore I have come to the conclusion that the applicant's Notice of Motion dated 16th July 2003 lacks merit and amounts to an abuse of this court's process. Consequently the motion is ordered dismissed with costs to the Respondent. The ex parte orders of stay of execution granted are hereby discharged.

READ AND DELIVERED THIS 19th DAY OF December, 2003

J.K. SERGON

JUDGE