REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII
Civil Appeal 25 of 2002

FREDRICK NYAMWEYA NYANGWESO…….....….APPELLANT

VERSUS

DESH MORAA NYAMWEYA

CHRISANTUS MAUTI……...……..RESPONDENTS

JUDGMENT

This an appeal arising from the ruling of the learned Senior Resident Magistrate which was delivered on 26.2.2002 stating that as the costs had been assessed as drawn it meant the court had exercised its discretion on the issue of costs.

The background to this appeal emanates from a suit which was filed in the subordinate court by the appellant herein against both respondents for certain reliefs.

The respondents decided to defend the suit and a defence in that court was filed. That suit has not been heard, apart from a couple of applications. Then on 18th September 2001, the appellant herein filed in the subordinate court a Notice of withdrawal of suit pursuant to Order 24 Rule 1 of the Civil Procedure Rules.

On 18th September 2001, the Principal Magistrate then marked the suit as withdrawn. Mr. Ondika then filed his Bill of costs on 20.9.2001 which was fixed for -taxation on 26.11.2001. Both counsels appeared before the magistrate on this date and agreed that the taxation be held on 27.11.2001 nobody knows what happened on 27.11.2001 as the record is silent on that date.

On 28.11.2001 both counsels once against appeared before the magistrate and they agreed that the taxation be done on 4.12.2001.

On 4.12.2001 only Mr. Ondika appeared before the magistrate in the subordinate court and the Bill of Costs was ordered taxed as drawn.

It appears in the meanwhile Mr. Ondika applied execution proceedings and a Notice to Show Cause was issued and was scheduled for 11.2.2002.

This cause of action triggered a series of action. On 12th 2.2002 an application was preferred in that court and a stay of execution order was issued and it was ordered that the application be heard inter partes on 22.2.2002.

The main application itself was for the review of the Order taxing or assessing the defendants costs on the

grounds that there had been no order made for costs when the suit was withdrawn.

On the date that application was scheduled for hearing, it was dismissed for want of prosecution.

On 26.2.2002 another application was presented in that court by appellant herein asking for the reinstatement of the application dated 12th February 2002 as the failure to attend court on 22.2.2002 was due to an inadvertent mistake.

In the meanwhile on 25.2.2002 the appellant herein had been arrested and taken to court under a warrant of arrest.

Mr. Ondika then rightly applied to have the appellant, then a judgment debtor be committed to civil jail for failure to pay shs. 166,000/=.

Mr. Otiso then made an explanation informing the trial magistrate that he had extracted the order and thought the hearing of the application of 12.2.2001 had been set for 26.6.2002 and further contented that what they were trying to set aside was an order given irregularly.

Mr. Ondika in reply explained that he had been served with that application for hearing on 22.2.2002 and as neither the applicant nor his counsel were present in a court on 22.2.2002 the said application was dismissed for want of prosecution.

The learned Senior Resident Magistrate then reserved her ruling to 26.2.2002 which was delivered as promised.

That ruling has prompted the current appeal in which the applicant has set up six grounds of appeal in his memorandum of Appeal namely:-

1. The learned trial magistrate erred in law in proceeding with execution proceedings while there was a pending interlocutory application challenging the propriety of the order/decree being executed.

2. The learned trial magistrate erred in law in holding that a court could assess costs even without a specific order awarding the same.

3. The learned trial magistrate erred in law in dealing with matters/issues that were not placed before her by either of the parties.

4. The learned trial magistrate misapprehended the law relating to Notice to Show Cause and in particular the provisions of Order 21 rule 35 of the Civil Procedure.

5. The learned trial magistrate erred in determining an application without first hearing the appellant.

6. The learned trial magistrate's ruling and order offend the rules of natural justice.The most pertinent issue which the trial magistrate made a ruling on is on the question of stating the dismissal of the application dated 12.2.2002 was proper.

An application to reinstate that application had not been filed nor argued before the trial magistrate and making a comment on it was quite prejudicial to the appellant as he has been condemned unheard.

Of course Mr. Ondika says the ruling was proper as he had properly moved the court. But had the court confined itself the issues related to the Notice to Show Cause, there would have been no complain.

On the issue whether the trial magistrate misapprehended the provisions of Order 21 Rule 35 of the Civil Procedure Rules, I do not think that is what happened.

At the end of the ruling the trial magistrate said:-

"Where the JD/plaintiff is arrested pursuant to a Notice to Show Cause the procedure is to invite the JD/Plaintiff to make proposals on how he intends to liquidate the costs allowed. The JD/Plaintiff is hereby asked to make his proposal."

That is the standard procedure, which allows the court to start the process of investigation and eventually make a decision on whether to commit the judgment debtor or not.

Depending on the outcome of this appeal it may not be prudent to dwell at length on what happens to the question of costs once a plaintiff has withdrawn his suit under the provisions of Order 24 of the Civil Procedure rules.

That is a point which can best be canvassed in the primary court if at all the review proceedings will be heard and for me to make a decision now will result in prejudicing the mind of that courtAs I have said earlier on, it was wrong for the learned Senior Resident Magistrate to have made a decision on which the appellant could not be heard, on that ground the appeal succeeds and the same is allowed.

The ruling dated 26.2.2002 is hereby set aside and the parties are at liberty to set down any pending applications in that court for hearing.

As the appeal has succeeded I award the appellant the costs of this appeal.

I must commend both advocates for the able manner they have conducted their arguments before this court and if that could be extended to the entire spectrum of the case much time could be saved in looking for a solution to the remaining issues. Dated and delivered at Kisii this 5th day of September 2002

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO.25 OF 2002

FREDRICK NYAMWEYA NYANGWESO..... APPELLANT

VERSUS

DESH MORAA NYAMWEYA

CHRISANTUS MAUTI..... ACCUSED

RULING

By a Notice of Motion dated 1st March 2002 brought under the provisions of Order 41 Rule 4 (1) and (5) of the Civil Procedure Rules, and Section 3, 3A and 63(e) of the Civil Procedure Act, the applicant herein is seeking for two main reliefs and these are:-

1. The Honourable court be pleased to grant an order of stay of execution of the Ruling and order of the Senior Resident Magistrate issued on 26th day of February 2002.

2. The Honourable court do stay further proceeding in Kisii C.M.C.C.C.N0.375 OF 2001 pending the determination of the appeal herein.

The grounds upon which this application is based are:-

a). The Appeal herein raises serious and pertinent issues of law to the extent that the magistrate assessed costs without there being an order for same.

b). The liberty of the applicant is in danger as warrants of arrest have been issued against the applicant.

c) If the applicant is committed to jail on the basis of an order that is under challenge, the applicant shall suffer irreparable loss and damage.

d) The applicant is ready and willing to offer whatever security the Honourable Court may Order.

e). The application is made without undue delay.

f). It is in the interest of justice the application herein be allowed.

The said application is also supported by the affidavit of Fredrick Nyamweya Nyangweso which was sworn on the 1st day of March 2002, the pertinent points raised therein, being that, he had filed civil suit Number 375 of 2001 at the Chief Magistrate's Court at Kisii which has never been heard formally and on 18th day of September 2001, he filed in that court a Notice of Withdrawal of that suit, and pursuant to that Notice, the suit in the Chief Magistrate's Court, (i.e. Kisii C.M.C.C.C. N0.375 OF 2001) was ordered withdrawn on 21.9.2001.

The applicant further contends that when the Order of Withdrawal was recorded by that court, none of the parties to the suit had been condemned to pay costs.

However from the remaining contents of the applicant's affidavit it is now shown that the issue in controversy are the costs that were assessed in the subordinate court on 4th day of December 2001 which later became the subject of the execution proceedings.

It is not in dispute that when the Notice to Show Cause why the applicant should not be committed to civil jail was served on him, unless he pays the assessed cost of the suit in the Lower Court, the applicant filed an application immediately in that court asking for an Order of stay of execution of the warrant of arrest issued on 11th day of February 2002 and for an Order of review for the taxing or assessing the costs aforesaid, and also for the review of the order issued on 11th day of February 2002 wherein the learned Senior Resident Magistrate issued a warrant of arrest against the applicant herein.

That application was however dismissed for non attendance on 22nd day of February 2002, meaning, things then stood as they were on 11th day of February 2002.

When the applicant was brought to the subordinate court was brought before that court on 25th day of February 2002 under a warrant of arrest, the applicants counsel appeared in that court and argued in justification why he did not appear in court on 22.2.2002 to prosecute the application that was before that court.

His justification was that, he thought and had diarised the application for 26.2.2002 that even the extracted Order bore the date of 26th February 2002.

The arguments which were advanced before the learned Senior Resident Magistrate, prompted her to reserve her ruling to the following day i.e. 26.2.2002.

When the ruling was delivered on 26.2.2002, a part from stating what was the true position in regard to the correct date the application for stay of execution and for the review of the two court orders in that court had been, proceeded to analyse the reasons why the applicant had filed this application in the first place and made out a ruling on what a situation is when a suit has been withdrawn.

The applicant's reaction to what was going on in the subordinate court was to file an application on 26.2.2002 for the reinstatement of the dismissed application which is still pending in that court and to file an appeal in this court, which was filed on 3rd March 2002 challenging the portion of the learned Senior Resident Magistrate's ruling on the issue of the costs that had been assessed without an express order of

that court having been made or applied for and granted.

The question of how a party goes about to secure the costs in a suit which has been withdrawn by the plaintiff remains to be dealt with at the hearing of the appeal herein as that aspect was dealt with in the ruling of the learned Senior Resident Magistrate on 26th day of February 2002, suffice it to say that Order 24.r.3 of the Civil Procedure Rules demands that a defendant affected by the withdrawal of a suit should request the court in writing for a signed judgment for costs I think the applicant had these provisions in his mind when he filed the appeal in this court and proceeded to make an application for stay of execution of the Orders of 26th February 2002 and, stay of proceedings in Kisii C.M.C.C.C.N0.375 OF 2001 pending the hearing and determination of the appeal in this court.

Order 41 Rule 4 (1) provides the appellant an avenue to apply for stay of execution. It states:-

(1) "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 of 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, an 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.

(2) No order of stay of execution shall be made under subrule (1) unless

a) The court is satisfied that substantial Loss may result to the applicant unless the Order is made and that the application has been made without unreasonable delay; and

(b) such security as the court Orders for the due performance of such decree or Order as may ultimately be binding on him has been given by the applicant.

There is no doubt that the ruling was delivered on 26th February 2002, and the appeal was preferred in this court on 4th March 2002 and the current application was filed in this court on the same date i.e. 4th March 2002.

The applicant has therefore moved to this court promptly and he cannot be accused of any indolence.

An appeal has already been filed in this court and that satisfies one of the conditions that must be present before an order of stay is granted.

What however, the applicant must demonstrate to this court is that he has sufficient cause to justify the granting of the stay of execution or stay of proceedings orders.

He has stated that as he is challenging the assessment of costs, he will suffer substantial loss if execution proceedings are allowed to go and if he pays out the assessed costs, or he is sent to jail he will suffer an irreparable loss and damage.

It is not lost to this court that the quantum of the assessed costs is in the region of shs. 164,720 which by any standards is large enough.

The respondent has not made any allusion that he is in a position to restitute the applicant should the appeal be held in his favour.

This is an appeal where the complete provisions of Order 24 of the Civil Procedure Rules have to be interpreted as to when the costs have to be paid on a withdrawn suit.

It is for this reasons that I think and hold that the applicant has shown sufficient reasons why an order of

stay of execution and stay of proceedings should be issued in his favour.

One last point on an application of this nature is that, the court may order a successful applicant to offer security for the due performance of the decree that may ultimately be binding upon the applicant.

I notice that in the subordinate court parcel Number Nyaribari Chache/B/B/Boburia/5930 in the name of Samwel Machana Nyaanga, and the Bank Account court with Kenya Commercial Bank Limited, Kisii Branch in the name of Peter Irungu Kariuki had been offered as security, and I think those can be taken as adequate securities which can be held by this court pending the hearing and determination of the appeal.

The application therefore succeeds and the same is allowed as prayed with costs.Dated and delivered at Kisii this 14th day of May 2002.

P.K.K.A BIRECH

COMMISSIONER OF ASSIZE