



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 103 OF 2002

PETER KIMANI NJIRIRIAPPELLANT

VERSUS

PRISCILLA NALIAKA WELIKHERESPONDENT

RULING

One Robert Nyongesa Sisia died in a road traffic accident along Kitale – Webuye road during 1994. His legal representative Priscilla Naliakha Welikhe filed a suit otherwise known as Chief Magistrates Court Civil Case No. 3497 of 1996 at the Milimani Commercial Courts Nairobi claiming damages in respect of his death.

Judgment was delivered in the case *exparte* on 16/2/99 the defendant having failed to enter a defence, and an award of Kshs.310,000/= was made in general damages plus costs and interest.

The defendant then filed an application in the same court for setting aside the *exparte* judgment on 12th November, 2001. The application was heard and a ruling thereof delivered granting the order sought on condition that full decretal amount was deposited into court.

The defendant could not meet these terms and then filed an appeal in this court on 18.3.2002 majorly to challenge the conditions imposed on the order to set aside the *exparte* judgment

On 14th June 2002 an application was filed in this court under a certificate of urgency to seek a stay of execution of the warrant in possession of the warrant in possession of the 2nd respondent pending determination of the application, and in the same application the applicant made an offer of Kshs.125,000/= which he asked the court to accept as sufficient to allow him to file a defence in the lower court and that such sum of money be deposited in joint account where counsel for both parties are signatories.

The application also prayed for stay of execution of the lower courts orders dated 18th February and 17th May 2002.

Grounds on which the application was based are set out in the body thereof and also in the supporting affidavit. They are mainly that the appeal has overwhelming chances of success, that it will be rendered nugatory, that the appellant will suffer substantial damage as the execution will cripple him and he has no evidence that the plaintiff whom the applicant has never met will be able to reconstitute should the appeal “fail” and that there has been no unreasonable delay.

A replying affidavit filed in court on 20th June 2002 avers that this application is actually intended to dispose off the appeal.

Counsel for the parties appeared before this court on 2nd July 2002 to present and/or oppose the

application with counsel for the applicant repeating that his client wishes to deposit Kshs.125,000/= as sufficient security and that the terms imposed by the lower court were harsh and that if the appeal succeeds it will be hard for the money to be recovered.

Counsel for the respondent opposed the application and said the applicant neither fulfilled the terms imposed by the lower court nor applied for an extension of time. That after the period granted for deposit of decretal amount in court had passed this appeal was filed.

That then the applicant went to the lower court for the application for stay of execution pending appeal and that after this application was dismissed then there was the present application.

He prayed for the dismissal of the application with costs. These are the submissions I have heard and recorded from counsel for the parties for consideration and decision.

In the first place, I do not know why the 2nd respondent has been added to this application it having not been party to the lower court case nor is it a party to the appeal or what procedure was applied to make it such party to the application!

I note it has not filed any papers in the application but I do not find any basis of making the second respondent a party to the application. I strike out the name of the 2nd respondent from this application.

As regards the application against the first respondent I note the appeal filed is against the order giving terms for stay of execution since there was no refusal.

In that event, I would expect leave to have been sought and/or obtained from the lower court to lodge the appeal subject to this application but there is no evidence on this record that such leave was sought and or obtained.

If this be the case then the competency of the appeal is in question and so is the competency of this application.

Moreover, in applications of this nature, it is the exercise of the court's discretion which is in question and it is incumbent upon the complaining party to show that the magistrate exercised such discretion improperly but in the present application, no such averments or submissions have been made.

The only reason the applicant gives in this application is that he has been unable to raise the decretal amount for depositing in court within the required period and it is after such period has lapsed that he goes to that court for stay of execution after lodging the appeal to this court.

Then after his application has been dismissed he comes to this court for a similar relief. This was an unreasonable move as the applicant clearly shows he was buying time to rush to the lower and this courts with applications under certificate of urgency.

This is not a litigant in favour of whom the court can exercise its discretion, and I am not prepared to do so.

I dismiss this application with costs.

Delivered this 11th day of July 2002.

D.K.S. AGANYANYA

JUDGE