



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO.131 OF 2002

IBRAHIM MUSA MOHAMED.....APPELLANT/APPLICANT

=V E R S U S=

THWAKE AUTO TYRES.....RESPONDENT

R U L I N G

The applicant's application is dated 7.8.2002. It is a terribly confused application in that the reliefs sought are mixed up and disjointed, giving an impression of total either deliberation or total lack of knowledge of the manner applications should be set out or drawn up. That having been said, the much this court can finally gather from the totality of the application is that the applicant prays for the following reliefs:-

- a) That this court sets aside the lower court order dated 5.8.02 which reinstated the Respondent to the suit premises known as Mombasa Plot No.486/XVII/MI.
- b) Stay of execution be granted pending this appeal.
- c) This court issues an order compelling the Respondent to vacate the suit premises aforementioned pending the hearing of this application inter-partes.
- d) Costs.

Mr. Sifuna brought and argued this application for the applicant/appellant while Mr. Omwenga represented the Respondent/Landlord.

Careful examination will confirm that the first prayer is in relation to a substantive order made by the lower court, after taking into account the evidence produced before it orally or by affidavits. If the applicant herein was aggrieved by the same, he could only proceed to appeal against the orders. Under what procedure or law the applicant could come before this court and ask this court to set the substantive orders aside Mr. Sifuna did not choose to reveal. Is the counsel seeking such a relief in such a manner labouring under ignorance of the law, or is it mischief? Be that as it may, I find that the prayer has no merit and I refuse it.

Turning to the 3rd prayer, he seeks for orders of this court to compel the Respondent to vacate the suit premises pending the hearing of this application. I believe the applicant may have earlier sought for this relief as an interim relief so that if it was granted, it could serve some purpose before the application could be heard inter-partes. The reality now is that the prayer has been overtaken by events after the inter partes prosecution of this application. I therefore say no more about it as that would not serve any purpose.

The only other remaining prayer in this application, apart from the prayer for costs, is the one for stay of execution pending the hearing and the determination of the appeal. The applicant has brought the application under Section 3A of the Civil Procedure Act and Order 41 Rule 4.

I have considered the arguments and the material in the affidavits placed before the court. This court will order for stay on good or sufficient cause being shown. Sufficient cause has been interpreted to mean **(a) that if the stay is not granted the appeal if successful eventually will be rendered nugatory (b) that the appellant's appeal is not frivolous and has good chances of success or put differently, that it is an arguable appeal.**

Will the appeal be rendered nugatory if the appellant is not given a stay? In this application the dispute is about a tenancy and what is in dispute is possession of the rented premises. The appellant is the landlord who wants vacant possession. He got an order in the lower court throwing the Respondent/tenant out of the rented premises under an ex-parte judgment and decree. Later the judgment and decree were, for apparently good reasons, set aside. As a result of the setting aside those orders, the lower court found it not only logical but lawful to reinstate the tenant/respondent into the premises. The original suit in the lower court is still pending and unpursued, although pleadings are now possibly closed and a hearing date could be obtained. But the appellant/landlord is aggrieved and has appealed. If he succeeds eventually, he will get vacant possession. There is prima facie evidence on the record that rents are being paid punctually by the Respondent. How then could be rendered nugatory? It is my view that the appellant will not lose anything. The appeal even if it eventually succeeds, will result in the appellant obtaining vacant possession.

Turning to the other limb of the principle under discussion, I have made perusal of the memorandum of appeal and the lower court record. It is my view on the face of it, and without deciding the appeal, that it has no good grounds that are likely to succeed. In other words, the appeal is frivolous and has little likelihood of success.

Under these circumstances this application has no merit and must fail. It is hereby dismissed with costs to the Respondent. Because this application was totally unnecessary and clearly intended to delay the justice of the case, I allow the Respondent to proceed to tax the costs immediately without waiting for the appeal to be determined. It is so ordered.

Dated and delivered at Mombasa this 2nd day of October, 2002.

D. A. ONYANCHA

J U D G E

Delivered in the presence of:-

Jengo - for Sifuna -for Applicant/Appellant

Omwenga - for Respondent