



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL MISCELLANEOUS APPLICATION NO. 307 OF 2000

1. DANIEL MATHEKA MUATINE :::::::::::::::::::: 1 ST APPLICANT

2. MARY MUTUA :::::::::::::::::::: 2 ND APPLICANT

VERSUS

1. REDEMPTA NDUMI KYALE :::::::::::::::::::: 1 ST RESPONDENT

2. MARY MBITHE MUTHEE :::::::::::::::::::: 2 ND RESPONDENT

Coram: J. W. Mwera J.

Mativo Advocate for Applicants
 Kitonga for Mutunga Advocate for Respondents
 C.C. Muli

R U L I N G

By a notice of motion dated 30.10.2000 and brought under O.41 r 4 (1) (2) (6) Civil Procedure Rules the applicants in KANGUNDO RMCC Nos. 1027, 1029 of 1999 pray for a stay of execution in those 2 files that apparently were consolidated and 20 disposed of together.

The grounds on which Mr. Mativo argued the application were that his client did not know what was going on in the two cases which were being handled by an advocate who was appointed by his insurer. He only came to know of what transpired when execution and attachment surprised him.

That the applicant was intending to appeal and argue that the awards in the two suits were excessive and that a minor was involved in CC.1029/99 yet there was no compliance with O.31 Civil Procedure Rules i.e. the usual accompanying consent to the plaint was omitted.

That the applicant had filed and served a notice of appeal and was ready with 10 certified proceedings to draft and file the appeal(s). A copy of notice of appeal dated 15.8.2000 was annexed as Exh. B but it was not shown that it was served on the Respondent’s lawyers. A draft memorandum of appeal was exhibited – MAMEED “C”. Further that the applicants would deposit a reasonable part of the decretal sums in court.

Mr. Kitonga only put up one point – O.41 r X Civil Procedure Rules envisaged that for a stay to fall to be considered, an appeal ought to be in existence. That there was none in existence here and thus this application was premature.

With all respect to Mr. Mativo's valiant attempts to get the stay orders, this court is minded to incline to Mr. Kitonga's standpoint. There is no appeal in existence and that is what O.41 r. 1 envisages. It says in pertinent parts:

"4(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from"

So an appeal must be in place. A notice of appeal, if one is properly filed only operates when the matter is going to the Court of Appeal see O.41 r.4(4)

"(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that court notice of appeal has been given."

In sum this application is dismissed with costs.

Orders accordingly.

Delivered on 22nd March 2001

J. W. MWERA

JUDGE