



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NYERI

CIVIL APPEAL NO. 30 OF 2020

CHINA WU YI CONSTRUCTION CO. LTD.....APPELLANT/APPLICANT

VERSUS

JOSEPH MUCHINA MUCHEMI.....1ST RESPONDENT

KENYA WILDLIFE SERVICE.....2ND RESPONDENT

RULING

1. The Notice of Motion dated 05/08/2020 seeks for orders for stay of execution orders of the learned magistrate orders striking out the applicant's application issued on 24/02/2020 in CMCC No. 420 of 2013. The motion is supported by the affidavit of Josphat Onsongo and by the grounds on the face of the application
2. It is deposed that following the judgement in CMCC No. 420 of 2013 which the applicant was aggrieved, he instructed his former advocate to file an appeal. However, the said firm failed to apply for certified copies of proceedings or take any other action in regard to the instructions given to them. The applicant then instructed the firm of Ogola Okello LLP to represent him. The said firm had a challenge in having a consent under Order 9 Rule 9 of the Civil Procedure Rules executed by the former advocates who had then become uncooperative thus causing delay in prosecuting the application for stay before the learned magistrate.
3. The applicant filed a Notice of motion under certificate of urgency seeking stay of execution on 24/06/2020 after the respondent commenced execution which was later struck out for lack of consent under Order 9 Rule 9.
4. This application dated 05/08/2020 seeks for orders for stay pending hearing and determination of the intended appeal. It is deposed that if orders for stay are not granted, the applicant's goods will be sold in satisfaction of the decree amounting to over 1,200,000/= thus rendering the appeal nugatory. The applicant therefore stands to suffer substantial loss should the execution proceed. The reason for the striking out the application by the learned magistrate was because the advocates who filed the motion were not properly on record for lack of the requisite consent which the former advocates were reluctant to execute.
5. The applicant further argues that his intended appeal has high chances of success since the learned magistrate made several errors of law.
6. The 1st respondent in its grounds of opposition, opposed the application on grounds that it is an abuse of the due process of the court in that the court was right to strike out the application for non-compliance with Order 9 Rule 9. It was argued that the applicant's advocate ought to have sought leave to come on record which he failed to do. Further that the consent to come on record was only executed on 13th July 2020 and would not have cured the incompetent application before the lower court. Up to date, the firm of Ogola Okello & Company advocates are still not properly on record contrary to the provisions of the law. It is noted that the said firm received instructions on 13th March 2020 following the 2nd defendants being served with execution proceedings and with certificate of costs.
7. The respondent further argued that the applicant failed to demonstrate that he will suffer substantial loss should the application be refused. The respondent argued that the respondent be ordered to deposit security of the decretal amount, before stay is granted. The respondent further stated that the application lacks foundation since no appeal has been filed against the lower court judgement.
8. Finally, the respondent argued that this application was filed with unreasonable delay of about twelve(12) months.
9. The parties agreed to dispose of this application by way of filing written submissions with the applicant and the 1st respondent filing and highlighting their submissions.
10. The court herein proceeds to address the competency of the application in the first instance.

11. This application was attacked on two grounds:-

Firstly that it lacks foundation since no appeal has been filed against the lower court's orders

Secondly, that the firm of Ogola Okello & company is not properly on record for the applicant

12. I have looked at the draft memorandum of appeal which is based on the grounds that the magistrate made serious errors in law in dismissing the application. The applicant did not attach a copy of the ruling he is appealing against but only annexed the orders made by the learned magistrate. However, on perusal of the pleadings of the parties in this appeal, I have no doubt that it is crystal clear that the magistrate struck out the application on grounds that the applicant failed to comply with provisions of Order 9 Rule 9 of the Civil Procedure Rules. The draft memorandum leaves no doubt that the subject of the intended appeal is the effect of non-compliance with Order 9 Rule 9.

13. This application has been challenged on its alleged incompetency on the same ground of non-compliance of Order 9 Rule 9 and on the 2nd ground that it lacks foundation since no appeal has been filed for stay to be sought under Order 42 Rule 6.

14. The issues for determination is whether this application lacks foundation since no appeal has been filed.

Section 79G of the Civil Procedure Act provides that an appeal against an order or judgement of the lower court shall be filed in court within thirty (30) days. The applicant was late to file the application within the times stipulated by the law. Section 79 G gives this court the discretion to extend time provided the applicant satisfies the court as to sufficient cause.

15. The application dated 24/06/2020 before the lower court that was struck out sought for orders for extension of time to file the appeal. Upon striking out the application for extension of time, the applicant cannot lawfully file an appeal which by its very existence would have given the current application for stay foundation. If this current application was to be struck out for the reason that there is no existing appeal, would the interests of justice be served? The answer is in the negative. If the application is struck out, the applicant who is already aggrieved by the striking out of his application and is desirous of lodging an appeal would go home without a remedy. This is a court of justice that must balance the rights of the parties and ensure that justice is served upon them.

16. The most urgent need for justice to be served in this application is for an appeal to be filed so that the process of interrogating the orders of the learned magistrate can be set in motion. This court is aware of the provisions of Article 159(2)(d) of the constitution that enjoins courts to administer justice without undue regard to procedural technicalities. The situation at hand is such that the applicant's hands are tied in that he cannot file an appeal for he has no leave to do.

17. It is my considered view that this court in the interest of justice has power to invoke Article 159 herein so as to cure the procedural technicality before it in the interests of justice. The applicant requires leave to lodge his appeal so that he can challenge the orders of the lower court.

18. Due to the nature and facts of this application, this court will not go into the merits as per the provisions of Order 42 Rule 6.

19. I hereby grant the following orders:-

a) Leave to the applicant to file his appeal within seven(7) days in default of which these orders will stand vacated.

b) Stay of execution for a period of fourteen(14) days pending filing of the appeal and a fresh application for stay.

20. Costs of Kshs.10,000 to be paid to the respondent within 14 days.

21. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 11TH DAY OF MARCH, 2021.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 11th day of March, 2021.