



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

CIVIL APPEAL NUMBER 88 OF 2015
BOARD OF GOVENORS NAMBALE

SECONDARY SCHOOL.....1ST APPELLANT

NAMBALE SECONDARY SCHOOL.....2ND APPELLANT

VERSUS

MAURICE ALABA ETYANG.....RESPONDENT

(Appeal from the ruling in Eldama Ravine Principal Magistrate's case Number 86 of 2013 at Ravine by Hon. M.N. Maroro, Acting Senior Resident Magistrate delivered on 24th June 2015).

RULING

1. The applicant by his application dated 30th October 2015 seeks Review of the court orders issued on the 28th October 2015 on grounds of some apparent error on the face of the record. It is premised on the provisions of **Order 45 rule 1(1) and 50 rule 1 of the Civil Procedure Rules**. The main grounds of concern are:

1. That no order for provision of security was made pending the hearing and determination of the appeal.
2. That the appeal is incompetent as having been filed without leave of the court.
3. Service of summons to enter appearance and plaint.

2. The application is opposed by a replying affidavit sworn by the first Appellant's secretary on the 30th November 2015. It is deposed that the appeal is against the refusal by the trial Magistrate in **Eldama Ravine PMCC No. 86 of 2013** to grant a stay of execution order and that there was no leave of court to file the appeal against the said refusal order as none was required, that the appeal was filed without any delay. It is further deposed that the appellant will suffer substantially if orders sought are granted. The appellant's did not attend court to argue their objection when the application came up for hearing on the 21st January 2016 though served with the application and hearing notice.

3. The applicant urged that the order subject of the appeal hereof is the refusal of the lower court to grant

interim stay of execution order pending inter parties hearing of the application for setting aside exparte judgment in the lower court, under the provisions of **Order 22 Rule 22 of the Civil Procedure Rules**, which require that leave to appeal against such order ought to be obtained. On the 28th October 2015, the court directed that the order subject of the appeal and application ought to be extracted and filed. The order has not been extracted and filed in terms of **Order 42 rule 2 of the Civil Procedure Rules**.

4. I have revisited the trial courts proceedings and particularly the application dated 23rd June 2015 before the trial court and application before me dated 1st July 2015 and my ruling dated 28th October 2015.

First, I want to clarify what orders are subject of the appeal hereof. The two parties have agreed in their affidavits that the order appealed from is the trial court's order of refusal to grant an interim order of stay of execution pending interpartes hearing of the application dated 23rd June 2015 now pending before the trial court. The application had been brought under **Order 22 Rule 22**, it reads:

22(1) "The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay execution of such decree for reasonable time to enable the judgment -debtor to apply to the court by which the decree has passed, any court having appellate jurisdiction in respect of the decree or the execution thereof for an order to stay execution or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby or if application for execution has been made thereto."

The appellants was denied that order prompting filing of the appeal, without leave of the court.

5. **Order 43 1(1) of the Civil Procedure Rules** itemises Order that are appealable as of right, without leave of court. On execution proceedings, these are **Order 22 Rule 25, 57, 61(3), and 73**. **Order 22 rule 22** is not among orders appealable as of right. By implication, any order granted or denied under the provisions of **Order 22 rule 22** and a party is aggrieved, the party ought to seek leave of the court to file an appeal therefrom.

6. I agree with the applicants submission that an appeal from an order granted pursuant to provisions of **Order 22 rule 22** filed without leave of court is incompetent and any appeal filed without such leave is null and void.

To that extent, the court agrees with the applicant that there is an error on the face of the record that requires a review order. In its ruling dated 28th October 2015, the court under a mistaken but honest belief based its ruling on the refusal of trial court to grant an order of stay of execution pending hearing of an application to set aside the exparte judgment whose results are completely different as may be seen above. That being the case then, it is the court's finding that the appeal hereof, being against the ruling in **Eldama Ravine PMCC No. 86 of 2013** delivered on the 24th June 2015 was filed without leave of court and therefore incompetent, in line with holding in **Jane Wangari Misheck -vs Margaret Wambui and others (2015) KLR and Others -vs- Alice Muthoni ELC C.A No. 717 of 2013 Kerugoya**.

7. On the second limb of the application, that no order for provision of security was made pending the hearing and determination of the appeal, the court in the ruling dated 28th October 2015 was alive to the requirement of provision of security as provided under **Order 42 rule 6 of the Civil Procedure Rules**.

Paragraph 12 of the ruling states that the appellant is a public school and that the respondent had not shown that the school and its Board of Governors (management) may not be able to satisfy the trial courts decree should the appeal not be successful.

That in the court's considered view was to be construed that the school ought not have given security for the due performance of the decree should the appeal be unsuccessful.

8. At **Paragraph 13 of Page 7** of the courts ruling under review, the court stated that the school Board

of management would have no serious difficulties in repaying the decretal sum of Kshs.300,000/= if appeal was unsuccessful and relied on the case **ABN AMRO Bank N.V. -vs- Le Monde Foods LTD C.A Application N. Nai 15 of 2002.**

The courts view is that it addressed itself sufficiently on that issue for provision of security and an order of review would not be appropriate in the circumstances.

9. The third aspect of the application is based on the service of the initial summons to enter appearance the plaintiff and hearing notice upon the appellant. The applicant seeks directions as to whether service was effected upon the appellant and duly received and stamped.

In its ruling dated 28th October 2015 the court rendered itself that no evidence of service was exhibited in the application then before the court.

In the present application, the applicant has referred the court to an affidavit sworn on the 14th July 2015 by Rubua Ngure Advocate where a copy of the plaintiff, summons, and a notice of change of Advocates are exhibited and stamped as such documents having been stamped and signed by the Appellant School-Nambale Boys Secondary School.

The plaintiff is not stamped as having been received and signed for.

10. The summons to enter appearance are stamped, and dated 2nd January 2014. They are not signed. The notice of change of advocates is very faintly stamped but signed on the 10th February 2014. As stated, the plaintiff bears no stamp of the defendant school not a signature of the recipient, if any. The affidavit of service sworn on the 13th January 2014 by George Isogol, a Process Server shows that service of the summons to enter appearance together with the plaintiff were serviced on the 2nd December 2013 upon the secretary, one Victoria. As I stated above, the stamp of Nambale Boys Secondary School shows receipt of the summons on the 2nd January 2014 which is completely different to what is stated in the affidavit of service. Based on the above, the court held that there was no proof of sufficient service.

I find no reason to review that order. There is no sufficient evidence of service of the summons to enter appearance and the plaintiff upon the appellant. None of the conditions set out under **Order 45 of the Civil Procedure Rules** have been met in respect of this prayer.

11. The court has made a finding that the appeal as filed is incompetent. It is struck out.

In the premises, the application dated 30th October 2015 is allowed, and the ruling of the court dated 28th October 2015 is reviewed in the following manner:

Prayer 2 – disallowed

Prayer 3- allowed, and appeal struck out as incompetent

prayer 4 -disallowed.

12. For the above reasons, the appeal filed herein is struck out with costs to the applicant. The appellants may proceed to set down for hearing their application dated 23rd June 2015 and pending before the trial court, or take whatever action it may deem necessary.

Dated, signed and delivered in open court this 9th day of February 2016.

JANET MULWA

JUDGE