



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC. APPL. 59 OF 2015

INVESCO ASSURANCE COMPANY LIMITED.....APPLICANT

-VERSUS-

JOSEPH MORARA.....RESPONDENT

R U L I N G

Introduction

The genesis of the current application arose from the ruling by this court delivered on 3rd November 2015 at Nyamira High Court.

The application to which this ruling related was brought by Invesco Assurance Company limited through the firm of Maina Njuguna & Associates. It was dated 25th June 2015.

It sought the following orders:-

1. That the application be certified as urgent
2. That pending the hearing and determination of this application inter partes, this Honourable court be pleased to grant interim stay of execution of the lower court's judgment dated 9th June in **CMCC NO.235 of 2012**.
3. That upon hearing this application inter partes, this Honourable court be pleased to order a stay of 9th June 2015 in **CMCC No.235 of 2012** and all its consequential orders until the determination of the intended appeal.
4. Costs of this application [to] abide in the appeal.

The said application was supported by the affidavit of one **Rosemary Okumbe** on the following grounds:

- a. That the applicant has filed an appeal against the lower court's judgment dated 9th June 2015 in **CMCC NO. 235 of 2012**.
- b. That the applicants have a strong and arguable appeal capable of succeeding.
- c. That if a stay of execution is not granted, they will proceed to execute.
- d. That it is in the interest of justice and fair play stay be granted.

The second application dated 13th November, 2015 is now brought by the defendant as the applicant through the firm of Momanyi Aunga advocate. The application seeks to a review the orders issued on 3rd November 2015.

In general the application seeks four orders:

- a. **That the application be certified as urgent.**
- b. **The Honourable court be pleased to review its orders issued on the 3rd November 2015 touching the subject matter on the application herein,**

c. That the honourable dismiss the application and allow the 2nd respondent/applicant leave to execute the application as a matter of right.

d. That the cause for this application be costs in the cause.

The application is supported by the affidavit of Joseph Morara Omoke and other grounds which grounds were listed as follows:

1. That the Honourable court was misled to believe that the applicant had filed the alleged intended appeal.

2. That the whole application was a misrepresentation and non-disclosure of material facts which misled the Honourable court to issue orders of stay of execution.

3. That the applicant/respondent has since established through the Deputy Registrar that the applicant has never filed any appeal as alleged in the application to the Honourable court.

4. That even a casual perusal of the application filed will show that the intended appeal is not one of the annexures in the file.

5. That if the stay allowed by this court were not vacated and set aside and the applicant/2nd respondent allowed to execute the application, the order of stay would have been given in vacuum.

6. That the honourable court do dismiss the applicant's application for being frivolous, and an abuse of the court process.

Issues for determinations

1. was the intended appeal, the subject matter of the application dated 25th June 2015, actually on record and in the court file as at the said application was being heard for determination.

2. If the answer is in the negative, was the ruling on that application validly arrived at?

Submissions

a. The respondent submitted as follows:

That the conditions for granting orders of stay are set out under order **42 rule 6(2) (1) (a) and (b) of Civil Procedure rules**:

That on perusal the following primary documents necessary for appeal as envisaged under the above orders were not filed.

a. The intended appeal was not amongst the necessary document

b. No evidence on record that the memo of appeal was filed

c. No evidence of request to the lower court requesting to be supplied with the certificate and copy of the proceedings for the purpose of appeal.

d. No certified copy of the decree

e. The Deputy Registrar confirmed that there is no appeal file by the applicant.

f. That the intended appeal **No. 59 of 2015** refers to Robert Mike Kengere – an act of misrepresentation by counsel on record.

Therefore since these documents are mandatory under **Order 42 of the Civil Procedure rules** the court did not have jurisdiction to entertain the said application

The respondent relied on two legal authorities

i. **Kyuna –versus- Kyema [1988] KLR 185.**

ii. **Lawrence Nguthuru –versus- George Ndirangu, Civil Appeal No. 103 of 2012.**

The respondent urges the court to dismiss the application dated 25th June 2013 and accordingly lift order of stay of execution

The applicant submitted as follows:

That the court delivered its ruling on 3rd November 2015 and granted stay of execution pending appeal.

That the applicant paid into court Kshs.300,000 as security as directed by the court, and this complied with the order of the court.

That the respondent's application for review is without merit and that the court has inherent jurisdiction to order a stay of execution on the exercise of its inherent jurisdiction either respect to whether stay can be granted or not.

That the Respondent's Application is frivolous [and] without merit and intended to waste the court's time and delay the trial. That the issues raised are intended to prejudice the fair trial of action as the issues have already been addressed by the trial court.

That the applicant urge the court to dismiss the application on the interest of justice and appeal be heard as a matter of right.

THE LAW OF REVIEW

This is governed by Section 80 of the Civil Procedure Act and order 45 thereof.

Section 80 says:

“Any person who considers himself aggrieved-

- a. By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred, or
- b. By a decree or order from which no appeal is allowed by this Act, may apply for review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

Findings and determination

It appears that the applicant in the application dated 25th June 2013 had neither filed the intended appeal, neither were there annexed requisite documents in the application for stay. All requisite and mandatory documents envisaged **Under O.42** were not filed and they therefore not on the court record.

This has legal ramification on the said application dated 25th June 2013.

This court therefore finds that on considering its ruling delivered on 3rd November 2015, was laboring, unfortunately, under a misdirection and a mistaken belief that all the requisite and mandatory primarily documents envisaged **under 0.42** were filed and that they were in fact on record as at the time of the hearing of the said application and determination thereof.

I have read the authority of **Civil Appeal No.103 of 2012, Lawrence Nguthiru** have understood its **R.ccardahw –versus- George Ndirangu**, and consider this case as directly applicable to the case now considered.

Therefore I determine this application as follows:

I proceed to review my ruling delivered on 3rd November 2015 and give the following orders:

- 1. That the application dated 25th June be and is hereby dismissed, together with consequential orders arising there from.**
- 2. That, accordingly, the order to stay execution granted thereto be and is hereby lifted.**

It is so ordered.

Dated at Nyamira this 1st day of April, 2016.

C.B. NAGILLAH

JUDGE

In the presence of:-

Abobo hold brief for Applicant

Momanyi Aunga Respondent

Mercy - Court clerk