



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL SUIT NUMBER 230 OF 2004

JOSEPH D. HALAKE.....PLAINTIFF/APPLICANT

VERSUS

YUNIS MALIK.....DEFENDANT/RESPONDENT

RULING

1. Judgment in the above case was delivered on the 18th October 2007 by the Hon. Justice L. Kimaru. In his words the:

“plaintiff failed to establish his case to the required standard of proof on a balance of probabilities. The plaintiff’s suit is therefore dismissed. In view of the peculiar circumstances of this case, I will exercise my discretion and make no orders as to costs.”

2. The judgment was not appealed from. The plaintiff proceeded and extracted a decree without approval of the defendant. Upon application by the Defendant dated 30th April 2008, the court (Justice M.J. Emukule, J) ordered the decree issued on the 9th December 2007 amended to reflect the judgment of the court.

The decree was amended. Yet again the plaintiff was not satisfied. By its application dated 28th June 2012, the defendant sought orders that:

(a) That the Honourable court be pleased to strike out the amended decree drawn by the plaintiff dated 1st August 2010 and issued on the 8th October 2010 as the same was drawn without the approval of the Decree Holder and is contrary to the judgment.

*(b) That this Honourable court be pleased to declare the contents of the judgment is accordance with **Order 21 rule 7 (1)**.*

The application was urged before Hon. Justice M.J. Emukule, who on the 18th September 2014 made the following orders:

(a) That the decree dated 1st August 2010 and issued on the 8th October 2010 is hereby set aside.

(b) A fresh decree shall be issued which shall contain the claim of the suit as per the plaint and the determination of the court that:

(i) that the suit is dismissed

(ii) each party shall bear its own costs.

(c) Each party shall bear its own costs for this application.

3. The plaintiff was not satisfied with the above ruling prompting filing of yet another application dated 2nd October 2014 the subject of this ruling, and a Notice to appeal dated 29th September 2014 and filed on the 2nd October 2014.

In the application before the court, the applicant seeks orders:

1. That the proposed Appellant (plaintiff) be granted leave to appeal against the Ruling of Hon. Justice M.J. Emukule delivered on the 19th September 2014.

2. That pending the hearing and determination of the intended appeal this Honourable court be pleased to stay extraction of the decree.

3. That costs of this application be provided for.

4. In his submissions the Applicant states that the ruling subject of the appeal was made under **Order 21 of the Civil Procedure Rules and Section 75 (1) of the Civil Procedure Act** where an appeal from such orders/ruling do not lie as of right. The applicant further states that the intended appeal raises weighty issues of law and as such, the process of extracting the Decree should be stayed pending the hearing and determination of the intended appeal. The supporting affidavit is sworn by Mr. John G. Kagucia Advocate for the applicant on the 2nd October 2014.

5. In opposing the application, the defendant/respondent swore an affidavit on the 31st December 2014, and deposes that the orders sought ought not be granted as extraction of a decree does not in any manner prejudice the applicant's rights under the Notice of Appeal.

6. Parties filed written submissions.

7. **The applicant submits** that extraction of afresh decree as ordered by the court would prejudice the subject matter and the intended appeal to the detriment of the plaintiff more so if it is executed. He seeks stay of extraction of the decree and its execution. Citing the case **Nairobi Industrial Cause No. 1715 of 2011 – Elena Doudoladora Korir -vs- Kenyatta University**, it was stated that it is at the discretion of the court to grant or refuse a stay order taking the circumstances of the case into consideration so as not to render the appeal negatory. It is a further submission that the intended appeal has high chances of success and the plaintiff was apprehensive that if it proceeds to extract a fresh decree in accordance with the ruling, the intended appeal and its outcome will be rendered negatory and urged an order of *status quo* to be issued and that such *status quo* is that the plaintiff is in possession of the suit land.

7. **The Respondent's** response to the applicants submissions is that the application has no merit nor the intended appeal arguable, the applicant having not appealed from the court's judgment, it is final and stay of extraction of the decree will not change that fact. It was urged that an application for leave to appeal to the court of appeal was dismissed by Justice Bosire J.A.(as he then was) on the 3rd October 2008 and a further application dismissed by Hon. Justice Onyango Otieno, J.A(as he then was) on the 6th November 2009. These orders by the Honourable Judges of Appeal were not provided to the court by the Respondent. The applicant too did not comment on the same.

8. Coming to the substantive application and upon consideration of the rival arguments and submissions it is not in dispute that a Notice of Appeal is filed as stated.

Under Order 42 Rule 2 of the Civil Procedure Rules, it is a mandatory requirement that a certified

copy of the decree or order appealed from be filed together with the Memorandum of Appeal or thereafter before the court can decide whether or not to admit or reject the appeal. The applicant asks the court to stay extraction of the decree.

9. **Order 21 rule 7(1) of the Civil Procedure Rules** states that the decree shall agree with the judgment.

Rule 8 provides that a draft decree shall be approved by both parties and if there is a disagreement, **sub rule (4)** provides that the registrar shall place the draft decree before the Judge for settlement with participation of parties to the court.

This is what the court (Hon. M.J Emukule,J) did in its ruling being appealed from pursuant to provisions of **Order 21 Rule 7**. An appeal against such ruling is by leave of the court. Ordinarily such leave should not be denied by the court upon application. However, the court must satisfy itself, that the intended appeal is arguable.

10. The applicant has not demonstrated by way of a draft Memorandum of Appeal or any other document the points of law or fact stated as weighty, upon which the intended appeal may be based and from which the court may determine whether the intended appeal is arguable. There must be demonstration of chances of success in the appeal.

It is trite law that an arguable appeal may not be one that may succeed, but it must be demonstrated that it is worth for the courts consideration and interrogation. See **John Mwangi Ndiritu -vs- Joseph Ndiritu Wamaitha (2016) KLR in HCA No. 2 of 2016 Nyeri**. Where the learned Judge after interrogating the grounds found no demonstration of an arguable appeal and proceeded to dismiss the application for stay of execution pending appeal.

11. In the application before me, the applicant seeks an order of stay of extraction of the decree pending hearing of an intended appeal and upon the court granting leave to the applicant to appeal to the court of Appeal.

It is instructive to note that the application giving rise to the order sought to be appealed from was instigated by the applicant by its application dated 28th June 2012. The court proceeded, upon interpartes's hearing, to declare the contents of the judgment accordance with **Order 21 Rule 7(1) of the Civil Procedure Rules**. The applicant has not laid a persuasive foundation for grant of the orders it seeks. As I have stated above, he has not demonstrated any arguable appeal nor what loss he would suffer if the order of stay of extraction of the decree is denied.

12. Having said so, the court finds that the application for leave to appeal against the order issued on the 18th September 2014 is meritless and is dismissed. Extraction of a decree in itself is an innocent act. It is harmless.

13. The applicant in his prayer No. 2 seeks a stay order of extraction of the decree pending hearing and determination of the intended appeal. A judgment was delivered on the 18th October 2007. There is no appeal against the judgment, eight years down the line. Pursuant to provisions of **Order 21 Rule 7 and 8 of the Civil Procedure Rules** a decree follows. The **Civil Procedure Act, Cap 21 Laws of Kenya, Section 2**, describes a **decree** as the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit.

14. For purposes of an Appeal, the decree that includes the judgment may be appealable notwithstanding that the formal decree in pursuance of the judgment may not have been drawn or may not be capable of being drawn up.

To that extent and for purposes of the intended appeal, and for which this court has denied leave, it matters not whether the decree is extracted or not. An order of stay of extraction of the decree is therefore of no practical use. It is also denied.

The court finds the application in its entirety, without merit and it is dismissed with costs.

Dated, signed and delivered in open court this 12th day of May 2016

JANET MULWA

JUDGE