



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
Civil Case 2 of 2005
FRANCIS WAINAINA KARIUKI.....PLAINTIFF

VERSUS

SAMUEL KIONGO NDEGWA.....DEFENDANT

R U L I N G

On 10/9/2006, Honourable Lady Justice Khaminwa gave orders staying the hearing of this suit until another suit in Nyeri filed by the same parties over the same subject matter was heard and determined. She did so pursuant to Section 6 of the Civil Procedure Act.

The suit in Nyeri court was heard and an appeal against the orders of the Chief Magistrate Nyeri in respect of the same suit was dismissed on 16/10/2008.

The disposal of the suits in Nyeri which had prompted the stay orders issued by Justice Khaminwa therefore meant that her orders had lapsed and were no longer in effect.

Counsel for the defendant nonetheless moved this court by his application dated 15/12/2008 asking the court to vacate the said orders but brought in another prayer for striking out the defendants defence under Order VI Rule 3(d). A date was given for the hearing of that application but on the assigned date, counsel for the applicant did not attend court. The said application was therefore dismissed on the application of counsel for the defendant. In the same breath, counsel for the defendant asked the court to allow their ex-parte application dated 5/6/2009 which the court was informed was ex-parte and was only meant to bring on board a 3rd party counsel addressed the court as follows;

Mr Mugo “ *We ask that the application dated 5/6/2009 which is a ex-parte to enjoin a 3rd party be allowed.*”

Trusting the Senior counsel as an officer of the court, I did not rummage through the file to refer to the said application. I trusted that it was only seeking orders to enjoin a third party and it was ex-parte. So I allowed it.

As I was writing this ruling however, I studied the entire file and that is when I noticed regrettably that indeed Mr. Mugo misled this court. The application dated 5/6/2009 had another prayer for extension of the stay of proceedings- which had been granted by Judge Khaminwa and which he said were still inforce. This second prayer was not based on any of the provisions of law cited in the chamber summons. I nonetheless allowed the application on the mistaken belief that it only sought to include the 3rd party.

As I was going through this file however, I have stumbled on an order, dated 23/6/2009 which was ostensibly extracted from my order allowing the application dated 5/6/2009. The said order reads.

“ *That stay of execution be and is hereby granted pending hearing and determination of this suit.*”

I did not grant any such order and indeed no such order was sought for vide the application dated 5/6/2009 which I was misled to allow. The stay sought was for the proceedings which was in any event said to be still in force. Before I therefore proceed to consider the merits or otherwise of the application dated 8/7/2009, I wish to correct the record and particularly the error on its face by canceling and thus expunging from the record order No.2 of the order dated 17/6/2009 purportedly issued by myself. There are no orders for stay of execution in this matter and due to the deceit and apparent underhand manipulations detectable in this matter between my registry and some interested parties, I will not grant any orders of stay herein.

Having said so, I now come to the application dated 8/7/2009. From the court record, the date for hearing of the application was taken by counsel for the applicant. He served counsel for the Respondent but he failed to appear in court to prosecute his application. This court was not privy to what could have transpired at the registry or to the assurance given to counsel that the file could not be taken out. His non- appearance has in my view not been properly explained and I am unable to set aside those orders on the basis of that ground alone.

I have nonetheless considered his application and noted that the said dismissal is actually inconsequential and will not cause his client any prejudice. I say so because as stated earlier, the orders of stay he sought to have vacated or set aside lapsed the day the cases in Nyeri were finalized as section 6 of Civil Procedure Code ceased to apply.

I would also not have struck out the defendant's defence given the draconian effect of such a striking out and also in view of my sentiments recorded in the court file on 13/7/2009 where I said that *"the parties should have the main suit listed for hearing once and for all instead of filing application after application."*

The application dated 8/7/2009 is therefore dismissed with costs in the cause.

W. KARANJA
JUDGE

Delivered, signed and dated at Embu this 2nd day of March 2010.
In presence of:- Ms Wainaina Kariuki – Present,
N/A for Respondent.