REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU Civil Appeal 94 of 2009

DAVID NJOROGE NJENGA……..APPELLANT

VERSUS

JEMIMAH NJUGUNA……RESPONDENT

RULING

The applicant's suit was struck out on a dated that is not indicated in the ruling but shown in the Memorandum of Appeal as 30th April, 2009. Being aggrieved, the applicant has preferred this appeal. However, the instant application has been brought for three substantive orders, namely, that leave be granted to the applicant to file a supplementary record of appeal and that there be a stay of execution of the decree issued on 30th April, 2008 pending the hearing and determination of the appeal herein. The third prayer was granted, being leave to the firm of Ojienda & Company Advocates to come on record for the applicant in place of Aziz & Company Advocates. It is the applicant's contention that he will suffer substantial loss if the stay sought is not granted as the respondent will proceed to destroy his property and evict him. That the delay in filing the supplementary record of appeal was caused by inadvertent error on the part of the applicant's erstwhile counsel. The application as well as the

hearing notice was duly served on the respondent who failed to attend court on the date the application was canvassed or file a replying affidavit.

The application is brought pursuant to Sections 3A and 79G of the Civil Procedure Act, Order 3 rule 9A and Order 41 rules 1A and 4 of the Civil Procedure Rules. I will deal only with the provisions of section 79G above and Order 41 rules 1A and 4 aforesaid. An appeal to this court must be filed within thirty (30) days from the date of the decree or order appeal against. However, the court retains the power to admit an appeal out of time if the appellant satisfies it that he had good and sufficient cause for not filing the appeal in time.

The ruling was delivered on 30th April, 2009 and this appeal filed 28th May, 2009 right within the prescribed time. What is sought to be admitted by way of supplementary record of appeal are the decree, Chamber Summons dated 24th October, 2008, affidavit in support, the plaint, and the respondent's replying affidavit dated 5th October,2008.

The instant application was brought on 18th August, 2009 and the only question that may be asked is whether the applicant has a good and sufficient cause for not filing these documents with the memorandum of appeal. The omission has been attributed to the applicant's erstwhile advocates, Aziz & Company Advocates, who are said to have

inadvertently failed to include the documents in the record of appeal. The applicant has averred in paragraph 6 of his affidavit in support as follows:

"***6. THAT my Advocates on record M/s. Aziz & Company Advocates informs me, which information I verily believe to be true, that at the time they were lodging the Record of Appeal, they inadvertently by error omitted to include in my record of Appeal filed on 28th May, 2009, the Appellant's chamber summons dated 24th October, 2008 brought under Certificate of Urgency, supporting Affidavit thereto, the plaint and the Respondent's Replying affidavit dated 5th October, 2008."***

The information that the above documents were not included due to inadvertent error has been attributed to the firm of Aziz and Company Advocates and not any particular advocate. Secondly there is no affidavit from whoever informed the applicant of the reason for omission to support that position. Forgetfulness is a state of mind that can only be explained by the person who suffered it. No good or sufficient cause has been shown why the documents were omitted.

I turn to the prayer for stay of execution. The learned magistrate made the following order:

"***On the application that the whole suit be struck out for failure to comply with provisions of section 6 and 7 of the L.C.B. (cap 302), I do agree with the defence counsel. This suit is fatally defective and going to hearing shall be an exercise in futility. The plaintiff is, however, entitled to claim amounts paid by him to the Defendant, if any. This suit is hereby struck out in its entirely with costs to the defendant."***

This is what the applicant is seeking to stay. Is it capable of being stayed?

The issue whether a dismissal or striking out of a suit, results in an order which is capable of execution was considered in **Western College of Arts and Applied Sciences** V. **Oranga & Others** (1976) KLR 63. Law V.P. said at page 66 paragraphs c, d:

"***But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. An execution can only be in respect of costs…… In the instant case, the High Court has not ordered any of the parties to do anything, or to restrain from doing anything or***

to pay any sum. There is nothing arising out of the High Court judgment for this court in application for stay to enforce or to restrain by injunction"

See also **Devani & 4 Others** V. **Joseph Ngindari & 3 Others**, Civil Application No. Nai.136 of 2004 in which the court found the application grossly incompetent and said-

"***By dismissing the Judicial review application, the superior court did not thereby grant any positive order in favour of the respondents which is capable of execution. If the order sought is granted, it will have the indirect effect of reviving the dismissed application.***

This court cannot undo at this stage what the superior court has done. It can only do so after hearing

the appeal. It seems to us that the application for stay of execution of the dismissal order was not brought in error. It was designed to achieve that result which regrettably is impracticable."

In the matter before me, the order striking out the suit is not capable of execution against the applicant hence cannot be stayed.

For all the reasons stated, this application fails and is accordingly dismissed.

Dated ad Delivered at Nakuru this 2nd day of October, 2009.

W. OUKO

JUDGE