



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Appeal 852 of 2006

FANICE LUCHERA OLWANDE..... APPELLANT

VERSUS

GAUDENZIA BUTSENWA AMBILI..... RESPONDENT

RULING

1. By a Notice of Motion dated 29th June, 2009, Gaudenzia Butsenwa Ambili, who is the respondent to this appeal (hereinafter referred to as the applicant), has moved this Court under Order L Rule 1 of the Civil Procedure Rules, section 79B and 3A of the Civil Procedure Act, seeking to have the memorandum and record of appeal struck out, or in the alternative the Court to peruse the lower Court file in respect of CMCC 2032 of 2005 in Milimani, and proceed to reject the appeal summarily. The applicant also seeks to have the order of stay of execution which was granted on 15th day of March, 2007 vacated, and a sum of Kshs.196,000/=, being part of the decretal sum plus interest accrued thereon, deposited at the Co-operative Bank of Kenya Limited, released to the applicant/respondent.

2. The application is premised on the following grounds:

(a) That the record of appeal dated 25th February, 2009 filed on 26th February, 2009 by the firm of Ashimosi Shitambasi & Associates Advocates is improperly on record contrary to Order III Rule 9A of the Civil Procedure Rules.

- (b) That there is no sufficient ground for interfering with the decree and order appealed against.
- (c) That the appeal was intended to deny or to delay and/or deny the applicant/respondent fruits of successful litigation wherein the appellant adduced no evidence to controvert the applicant/respondent's testimony.
- (d) That having failed to testify in the lower Court, the appeal is an afterthought without substance or basis in law whatsoever.
- (e) That the appeal has no merit or chance to succeed in the absence of cogent evidence.
- (f) That the appeal is fatally defective, incompetent and without any chance of success.

3. It is also supported by an affidavit sworn by the applicant, in which the applicant explains, that the intended appeal has no merit or chances of success, and that the respondent has inordinately delayed to file a record of appeal, and to make appropriate steps to prosecute the appeal.

4. During the hearing of the application, an unsuccessful attempt was made on behalf of the appellant/respondent for adjournment, on the grounds that the appellant/respondent had instructed another counsel to take over the matter. That application for adjournment having been rejected, there was no appearance for the appellant/respondent during the hearing of the application. No replying affidavit was also filed in response to the application.

5. I have given due consideration to this application. I have also carefully perused the Court record. Firstly, the applicant's prayer for the striking out of the memorandum and record of appeal, only succeeds with regard to the striking out of the record of appeal which was filed by Ashimosi Shitambasi & Associates Advocates, a firm of advocates which came on record irregularly, without leave of the Court, contrary to Order III Rule 9A of the Civil Procedure Rules.

6. As regards the memorandum of appeal, it is premature at this stage for this Court, to go into the merits of the appeal. The Court having admitted the appeal to hearing under section 79B of the Civil Procedure Rules, the powers of the Court with regard to summary dismissal of the appeal, are already spent. If the applicant is aggrieved by the failure of the appellant/respondent to prosecute the appeal, or the failure of the appellant/respondent to facilitate the speedy disposal of the appeal, the applicant can only seek a remedy under Order XLI Rule 31 of the Civil Procedure Rules, for dismissal of the appeal for want of prosecution. Prayer (a) and (b) of the Notice of Motion therefore fail.

7. With regard to prayer (c), it is evident that an order for stay of execution was issued on the 15th March, 2007 pending the hearing of the appeal. The appellant/respondent has not exhibited any seriousness in procuring the speedy disposal of this appeal. It is evident that the order for stay of execution pending appeal is being used as an abuse of the Court process to continue to delay the applicant from enjoying the fruits of his litigation. That is neither fair nor just. This Court has an obligation to protect the interest of both parties.

8. For the above reasons and in exercise of this Court's inherent powers, I will grant the applicant's prayer No.(c) and vacate the order of stay of execution which was issued on 15th March, 2007. I further order that the sum of Kshs.196,000/= which was deposited into an interest earning account, at Co-operative Bank of Kenya Limited be released to the applicant's advocates. The appellant shall pay the costs of this application.

Dated and delivered at Nairobi this 3rd day of November, 2009.

H. M. OKWENGU

JUDGE

In the presence of: -

Advocate for the appellant/respondent, absent

Jaoko for the respondent/applicant

Eric, court clerk