



REPUBLIC OF KENYA

COURT OF APPEAL AT NAIROBI

civil appl no. nai.108 of 98

HARBHAJAN SINGH SEMBIAPPLICANT AND

LAKELAND MOTORS LIMITED)

NATHAN ONDEGO t/a PAVEMENT AUCTIONEERS)RESPONDENTS

ALFRED OKUNA & 51 OTHERS)

(Appeal from the Judgment/Orders of the High Court of Kenya at Kisumu (Hon. Justice Wambilyangah) dated 30th April, 1998

in

H.C.C.C No. 227 of 1997 and H.C.C.C No. 45 of 1998)

RULING OF THE COURT

By a Notice of Motion dated the 12th of May, 1998 and brought under Rules 5(2), 19, 42, 43, 45, 49 & 52 of the Court of Appeal Rules, the applicant, Harbhajan Singh Sembi has moved this Court for two orders namely:-

1.That the court be pleased to grant to the applicant a stay of the superior court's order made in Kisumu H.C.C.C No. 227 of 1997 on the 30th April, 1998, pending the hearing and determination of an intended appeal, and

2.that there be a mandatory injunction against the interested party directing him to deposit the approval of the statements of sale and sum of Ksh.10,937,810.00 in court.

The application was filed and argued before us by Mr. Lutta Kasamani. We must say at the very outset that Mr. Kasamani has somehow contrived to make an otherwise simple application for stay and an injunction so complicated that the three of us are not clear as to what the complaint of the applicant is. We have failed to see what benefit an applicant in such a motion can derive from a record running into over 230 pages, excluding the proceedings before the superior court. The Motion itself is supported by an affidavit of 47 paragraphs sworn by counsel himself. Almost each of the paragraph has an annexure. We can hardly comprehend the relevance of most of the paragraphs in the affidavit. We are of the view that an applicant can derive no benefit from such unneccessary sathye 1p5etdha notfr y.M ay 1998, a similar application brought by Alfred Okuna and 3 others who are now amongst the three respondents in this Motion was struck out by this Court. In striking out the Motion, the Court had this to say:-

"The relevant notice of appeal is restricted to such part of said decision (i.e the decision of 30th April 1998) that decided that Sembi should be paid a sum of Ksh.4,000,000/=.

It is not in dispute that no leave to appeal was sought. Such leave is necessary under section 75 of the Civil Procedure Act. As no such leave has been obtained, no appeals lies to this Court, and therefore, quite clearly there can be no stay pending `appeal".

In the light of this order, Mr. Kasamani told us that the Ruling of 30th April, 1998, even covered their application for review under order 44 of the Civil Procedure Rules and that they do not need leave to appeal under that order. We agree that there was before the superior court an application for review as contended by Mr. Kasamani, but the learned Judge of the superior court did not deal with that application at all.

At the very end of his ruling of the 30th April, 1998 the learned Judge specifically says:-

"These orders render other efforts totally futile and unnecessary".

We understand "other efforts" to include the application for review under order 44. That must have been the view taken by this Court in the application referred to above.

In the result, we think that the Motion before us does not lie and the same is struck out with costs to the respondents.

Dated and delivered at Nairobi this 4th day of December, 1998.

J. E. GICHERU

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JUDGE OF APPEAL

R. S. C. OMOLO

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR