



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gachuhi, Apaloo JJA & Gicheru Ag JA)

CIVIL APPLICATION NO NAI 30 OF 1988

BETWEEN

ADALA..... APPELLANT

AND

ANJERE.....RESPONDENT

*(Application for a stay of execution in an intended appeal from an order of the High Court at Nairobi,
Amin J)*

RULING

July 6, 1988, **Gachuhi, Apaloo JJA & Gicheru Ag JA** delivered the following Ruling.

The applicant in his amended application filed on 16th March 1988 sought leave of the court to stay execution of the orders granted in the High court in Miscellaneous Civil Application No. 360 of 1982 pending the hearing of an intended appeal to this court or until further orders of the court.

The background of this matter is that the applicant acted for the respondent in an accident claim that occurred in 1979 in which the applicant received Shs. 800,000/- as damages. He paid over Shs. 740,000 to the respondent and retained the balance as to Shs. 50,000/- towards fees and Shs. 10,000/- being disbursements he had incurred. The retention of Shs. 60,000/- resulted into a dispute which was taken to the Disciplinary Committee of the Law Society. Eventually the appellant was ordered to tax his bill. It was then that Miscellaneous Application No. 306 of 1982 was filed. The bill was taxed in the sum of Shs. 22,553/-. The appellant was ordered to pay Shs. 37,447/- to the respondent. The applicant objected to this figure.

He wrote to the Deputy Registrar of his intention to appeal to a Judge against the ruling on taxation. The matter of appeal has not moved any further.

The respondent complained to a Judge in his Chamber summons filed on 13th January 1988 under Order 35 rule 1(a) and Order IXA rule 8 of the Civil Procedure Rules that judgement be entered for Shs. 37,447/- as per ruling of the Senior Deputy Registrar on taxation and as ordered by the Disciplinary Committee of the Law Society. On that application upon which the applicant did not file a replying affidavit, judgement was entered in terms of that application on 26th January 1988. The applicant filed notice of appeal against the High Court order on 5th February 1988. It is against this High Court Order that the application is made for stay of execution pending the hearing of the intended appeal.

There has been an unexplained delay in the matter. We understand the feeling and the bitterness of the respondent over this matter particularly the delay in getting the appeal, if any, finalised on the ruling by the Senior Deputy Registrar. He blames the applicant in not initiating the move to finalise the matter. He feels that the delay is causing unduly problem to him, as he is suffering financial hardship.

That being the position, this court has to observe that rules of the court are complied with. In one party to a litigation does not take steps to prosecute its case, it is open to the other party to take steps to have those proceedings struck out. The respondent in taking steps to speed up the finalisation of the matter filed a Chamber summons under Order 35, of the Civil Procedure. This rule provides for obtaining judgement summarily. We cannot find any procedure where a judgement can be entered in the absence of pleading which set out the plaintiff's claim.

Order XXXV rule 1 reads in part.

“1 (1) In all suits where a plaintiff seeks judgement for:-

(a) a liquidated demand with or without interest; or

(b) where the defendant has appeared the plaintiff may apply for judgement for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits”.

There is no procedure whereby a claim of any sort can be commenced by Chamber Summons. Applications are for interlocutory matters in the suit. Any claim has to be commenced by a plaint or where the rule provides, by an originating summons. The defendant has to file a defence or an affidavit in answer to that claim. It is only then that Order 35 can apply for summary judgement where the defendant has entered appearance but has not filed a defence. The application for summary judgement has to be served on the defendant who can chose to attend at the hearing to show cause why judgement should not be entered as he may have a defence to the claim. These are the steps the respondent should have taken rather than applying wrong procedure as he did. We feel that the High Court was wrong, while trying to sympathise with the respondent accepted the wrong procedure for entering judgement upon which execution could follow.

In the result, the application is allowed with costs in terms of prayer one of the application in accordance with Rule 5(2) (b) of the Court of Appeal Rules.

Dated and delivered at Nairobi this 6th day of July , 1988

J.M GACHUHI

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JUDGE OF APPEAL

F.K. APALOO

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JUDGE OF APPEAL

J.E. GICHERU

Ag. JUDGE OF APPEAL

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

DEPUTY REGISTRAR