



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 2 OF 2017

KUNGU MWANZI.....APPELLANT

VERSUS

SAMUEL KISAMWA KYOSE.....RESPONDENT

(Being an appeal from the Ruling of Mutomo Resident Magistrate's Court in Civil Case No. 28 of 2011 delivered on 7th October, 2011 by Hon. S.K. Mutai – R.M)

JUDGMENT

1. This Judgment is in respect to the Ruling of Hon. S.K. Mutai which was delivered in Mutomo RMCC No. 28 of 2011.
2. In the Memorandum of Appeal, the Appellant has averred that the learned Magistrate erred and misdirected himself: when he ordered stay of execution of the decree when there was no application before him; when he applied the provisions of Order 22 Rule 25 to proceedings before the Provincial Appeals Committee and when he failed to find that the appeal before the Appeals Committee had nothing to do with a court Judgment before him.
3. The Appeal proceeded by way of written submissions.
4. The Appellant's advocate submitted that the claim before the lower court was for a liquidated claim for Kshs. 167, 778; that the Respondent never challenged the Judgment but only the Notice to Show Cause why he should not be committed to civil jail and that the court granted an order of stay of execution pending the hearing of an appeal when that issue was not before the Magistrate.
5. The Appellant's counsel submitted that Order 22 Rule 25 of the Civil Procedure Rules does not apply to matters pending before Tribunals.
6. The Respondent's advocate submitted that the execution warranted a stay because the proceedings in RMCC No. 28 of 2011 were done ex-parte; that there was Appeal No. 21 of 2011 against the Tribunal's Award at Embu and that the Respondent executed a bond of Kshs. 50,000 as a condition for stay.
7. The Respondent's counsel finally submitted that the Record of Appeal is incomplete and therefore incompetent; that the following documents are missing: the proceedings in RMCC No. 28 of 2012, the Notice of Appeal to Embu Tribunal and the letter from the Commissioner.
8. The Respondent's counsel finally submitted that the court should apply the overriding objective to facilitate the just, expeditious, proportionate and affordable resolution of the appeal.

9. The Record of Appeal has the proceedings of the lower court in respect to what transpired on 7th October, 2011.

10. According to those proceedings, the Appellant's advocate informed the court that the Judgment Debtor (*the Respondent*) was in court in compliance with the Warrant of Arrest that had been issued by the court.

11. The Appellant's advocate informed the court that the Judgment Debtor should be committed to civil jail for a period of six (6) months.

12. The record shows that the Judgment Debtor (*the Respondent*) who was acting in person informed the trial court that he was not served with the Notice to show cause and that he needed time to engage an advocate.

13. The learned Magistrate, without being moved by the Respondent for an order of stay of execution, delivered a short Ruling in the following terms;

“I have perused the court record and I find that the basis of this matter is the proceedings of the land disputes tribunal for which an appeal has been preferred by the Judgment Debtor/Defendant. I hereby order stay of execution under Order 22 Rule 25 since there is a pending appeal at the land disputes Appeals Committee... meanwhile, the Defendant/Judgment Debtor to execute a personal bond of Kshs. 50,000 and expedite the hearing of the appeal in Embu, and status quo be maintained.”

14. The issue that was before the learned Magistrate on 7th October, 2011 was whether the Respondent, who had been arrested pursuant to the Warrant of Arrest, was to be committed to civil jail for non-payment of Kshs. 239,433.

15. Indeed, in response to the said Notice to Show Cause, the Respondent requested for more time to hire an advocate. There was no request by the Respondent, either formally or informally, for a stay of execution pending the hearing of an appeal.

16. Consequently, the learned Magistrate erred in law and fact when he delved into an issue that was not before him. Indeed, the learned Magistrate proceeded to grant to the Respondent the order of stay of execution without even granting the Appellant's advocate an opportunity to respond to such a prayer.

17. Having dealt with an issue that was not before him, and having proceeded to issue final orders on the issue of stay of execution without hearing the Appellant, I find the Appellant's Appeal to be meritorious.

18. I therefore allow the appeal and set aside the Ruling and order of the learned Magistrate dated 7th October, 2011.

19. The Respondent shall pay the costs of this Appeal.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 9TH DAY OF NOVEMBER, 2017.

O.A. ANGOTE

JUDGE