



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appli 37 of 2009 (UR 21/2009)

MANJIT SINGH BRAR.....APPLICANT

AND

SATWINDER SINGH BHOGAL.....1ST RESPONDENT

JASWINDER KAUR BENAOWRA.....2ND RESPONDENT

SUNDIP SINGH.....3RD RESPONDENT

(An application for stay for further proceedings in the H.C.C.C.S. No. 165 of 2001 and a stay of execution of the decision of the High court (Ang'awa, J.) dated 11th June, 2004

in

H.C.C.C. NO. 1615 OF 2001)

RULING

On 17th February, 2009 I declined to certify as urgent the notice of motion filed herein on the same day. The motion seeks two substantive orders; firstly, a stay of execution of the decision of the superior court (Angawa, J.) made on 11th June, 2004 in **HCC Application No. 1615/01**, and secondly, a stay of further proceedings in the same suit, until the applicant's intended appeal is heard and determined. It was apparent to me that the record of the application was either prepared in a hurry or lackadaisically, thus omitting the judgment of Angawa J. which is intended to be challenged. The omission deprived me of one of the basic factors I have to consider in the exercise of my discretion. I was also not satisfied upon perusal of the documents on record that a strong case had been made out for stopping all other business of this Court in order to hear and determine the application. In my view that is the essence of urgency.

The applicant now returns before me under **rule 47 (5)** of the rules of this Court for the hearing of the matter *inter partes*. There are three respondents in the matter represented by two learned counsel who were both served with the hearing notice but only counsel for the 1st respondent appeared. It is envisaged, I think, that the *inter partes* hearing would be considered on the same facts on which the application was refused in the first place. An affidavit filed by the 1st respondent in response to the main

application would therefore be irrelevant for purposes of this ruling.

In the hearing before me, learned counsel for the applicant Mr. Simani rehashed the contents of the affidavit in support of urgency, stressing that a temporary injunction granted by the superior court for a period of 45 days expired on 18th February, 2009 and it was therefore open to the respondent to proceed with execution. Mr. Simani further confirmed that an order made by the superior court for deposit of the decretal amount in an interest earning bank account, jointly with the respondent's advocates, is being opened despite a delay occasioned by a disagreement on the actual figure which has now been resolved. There was nevertheless a fear that execution may well proceed in which event the decretal amount, in excess of Shs.4 million, would not be recoverable if the intended appeal is successful and the intended appeal would thus be rendered nugatory.

For his part, Mr. Wekesa, learned counsel for the 1st respondent, found no reason to certify the matter urgent. In his view, there was no notice of appeal filed with the application and therefore there was no jurisdiction to consider the matter in the first place. I think, in passing, that view is erroneous since there is in the record before me a "*notice of appeal*" filed by the applicant herein on 21st June, 2004. Whether it was served on the respondents in accordance with the rules or at all, is another matter which the respondent may deal with in another forum. I am satisfied that I have the jurisdiction to consider the matter. Mr. Wekesa further submitted that the judgment intended to be challenged was not made available to the Court although it exists. He said he had no problem with the deposit of the decretal sum being made in a joint bank account, although it is now outside the time limit set by the superior court, but that did not prevent the 1st respondent, who was the successful party from proceeding with execution of the decree as he is entitled to the fruits of his judgment. There was no basis for the fear that the decretal sum would not be refunded if the appeal succeeds since the administrators of the estate of the deceased, the successful party, were capable of doing so, Mr. Wekesa concluded.

I have considered the matter fully but I am afraid I have not seen or heard anything new from both counsel to warrant the change of the view I took in the matter initially. The judgment of Angawa, J. is still missing and there is no explanation for it. There is no evidence of imminent execution of the decree apart from the fear of it. Execution is a process and it is unlikely that the judgment debtor will be taken by surprise. This Court, as I have previously observed, has a heavy burden of undecided appeals and applications, many of them certified "*urgent*". It is also common knowledge that the court is operating at about half its judicial capacity. In the circumstances only the most deserving cases must necessitate the interruption of the normal court schedules. This is not one of them.

The certificate is refused. The costs shall abide the result of the notice of motion.

Dated and delivered at Nairobi this 13th day of March, 2009.

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR