



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

Civil Appli 138 of 2009 (UR 92/2009)

JOHN N. LIBOY.....APPLICANT

AND

THE BOARD OF GOVERNORS ST JOHN COLLEGE....RESPONDENT

(An application for stay under Rule 5 (2) (b) of the Court of Appeal Rules pending the hearing of an intended appeal from the Ruling/Order of the High Court of Kenya at Nairobi (Lessit, J) dated 6th February, 2009

In

H. C. Misc. Appl. No. 834 of 2006)

RULING OF THE COURT

In Paragraph 2 of his notice of motion dated and lodged in the Court on 15th May, 2009, **John N. Liboyi**, the applicant therein, asks the Court for an order:-

“THAT this Honourable Court be pleased to order a stay of execution of the Judgment/Decree of the High Court, Khamoni, J pending the hearing and determination of the Applicant’s intended Appeal against the Ruling of Hon. Lady Justice Lessit.”

The decision of Lessit, J mentioned in the motion was made on 6th February, 2009 though the decision itself indicates at its end that it was made on 6th February, 2008. Nothing, however, turns on that point in this application. There is really nothing that is capable of being stayed in that decision which simply dismissed an application for enlargement of time to bring certain proceedings under the Foreign Judgments (Reciprocal Enforcement) Act, **Chapter 43**, Laws of Kenya, and the Rules made thereunder. There would be no point in our staying the order dismissing the application for enlargement of time; such order of stay would not assist the applicant with anything.

What the applicant really wanted to be stayed are the orders which were made by Khamoni, J way back on 26th October, 2007. The orders made by Khamoni, J registered a judgment entered against the applicant by Portsmouth County Court in the United Kingdom. It appears that following the registration, the respondents, the Board of Governors, St. John’s College, are in the process of executing the judgment against the applicant.

The applicant did not file any notice of appeal against the orders made by Khamoni, J. Mr. Ochieng', learned counsel for the applicant, told us that no notice of appeal could have been filed because it was not possible to lodge a direct appeal against the orders of Khamoni, J. We will not quarrel with the wisdom of Mr. Ochieng' on that point, though for our part we do not quite appreciate the reason as to why no direct appeal from the orders was not possible.

Whatever may be the correct position, there is no pending appeal against the orders of Khamoni, J. The only notice of appeal before us is that dated 17th February, 2009 and lodged in the superior court on 18th February, 2009. That notice simply states:-

“TAKE NOTICE that JOHN N. LIBOYI, being dissatisfied with the Ruling of the Honourable Mr. (sic) Justice Lessit delivered at Nairobi Milimani Commercial Court on the 6th day of February, 2009 intends to appeal to the Court of Appeal against the said decision dismissing the application to set aside the judgment herein.”

There is no mention of the orders of Khamoni, J in the notice of appeal and Lessit, J did not enter any judgment against the applicant.

Rule 5 (2) (b) of the Court of Appeal Rules under which this motion is brought is in the following terms:-

“Subject to the provisions of sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution but the Court may:-

(b) in any civil proceedings, where notice of appeal has been lodged in accordance with rule 74, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”

The Court has held on occasions too numerous to recite in this ruling that it is the filing of the notice of appeal which confers on the Court the jurisdiction to grant an order of stay, an injunction or a stay of further proceedings. That is clear enough from the wording of the rule. There is no notice of appeal against the orders made by Khamoni, J and that being so, we have no jurisdiction to grant to the applicant the order for stay of execution,

“--- of the Judgment/Decree of the High Court, Khamoni, J -----,”

We pointed out these matters to Mr. Ochieng' at the very beginning of the hearing of the motion but he took no heed. As we lack jurisdiction to make the order the applicant seeks, we order that the notice of motion filed by the applicant is incompetent and must be and is hereby struck out. We award to the respondent the costs of the struck out motion. Those shall be the orders of the Court.

Dated and delivered at Nairobi this 29th day of May, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.