REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appli 61 of 2005

1. NYOKABI KARANJA

2. SAMMY MACKENZIE

3. PENINAH WANGARI

4. SAMUEL KORONYO ……..…..…….....APPLICANTS

AND

KAMUINGI HOUSING CO. LIMITED …….....RESPONDENTS

(An application for stay of execution against the ruling of the High Court of Kenya at Nairobi (Ransley, C.A) dated 12th February, 2002

in

H.C.C.C. NO. 1508 OF 1994)

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RULING OF THE COURT

For several reasons which will shortly become apparent, the notice of motion dated 2nd February, 2005 is for dismissal. The four applicants, who were the plaintiffs in the superior court, seek an order under ***rule 5(2) (b)*** of the rules of this court:-

"***That there be a stay of execution of the whole ruling (sic) of the High Court of Kenya at Nairobi by Honourable Justice Ransley C.A delivered on the 12th February, 2002 in Nairobi High court civil suit No. 1508 of 1994."***

In the ruling alluded to, Ransley, Commissioner of Assize (C.A) (as he then was) refused to set aside an earlier order he made on 16th October, 2001 dismissing the plaintiff's suit under ***Order 9 rule 4*** of the ***Civil Procedure Rules*** due to failure by the plaintiffs to attend court for prosecution of their suit on the hearing date. The learned Commissioner of Assize was not satisfied by the explanation given for non-attendance and by the conduct of the plaintiffs who had enjoyed the benefits of an interlocutory injunction for a period of eight years without taking action to prosecute the suit. He was of the view that the claim made by plaintiffs in that suit made little sense and was not meritorious. The dispute was between the plaintiffs and the respondent, which is a land- buying company in which they pleaded they were shareholders and claimed entitlement to a share of a parcel of land registered in the name of the company

by virtue of such shareholding. Nothing in the pleadings showed any agreement between the applicants and the company in respect of any land and therefore, in the Commissioner's view, their remedy lay elsewhere.

A notice of appeal was filed nine days after the ruling on 21st February, 2002. One year later, on 14th March, 2003, the applicants filed an application identical to the one now before us. No appeal had been filed at the time. With reference to that application, the applicants here authorised the 2nd applicant, **SAMMY MAKENZIE**, to swear as follows:-

"**15. THAT I am informed by our Advocates on record which information I verily believe to be true that a similar application for stay of execution was filed on our behalf in this Honourable Court on 14th March, 2003 being Court of appeal Civil app. No. 64 of 2003 and which application is yet to be heard since no dates has (sic) been allocated for the hearing of the same. Annexed hereto and marked "SM5'is a copy of the said application."**

Learned counsel for the applicants Mr. Owang also repeated those facts in his submissions before us. If that was the case, it would, on the face of it, be an abuse of court process to maintain two parallel and identical applications on the same matter. As it turned out however, the averments made on oath by the applicants and the support lent to them by Mr. Owang were blatant lies! On information given by learned counsel for the respondents, Mr. Kagiri, that the alleged pending application had in fact been withdrawn at the instance of Mr. Owang himself, we called for the court record on the matter and established that indeed the application was withdrawn on 19th May, 2004 before a different bench of this Court. The feeble attempt made by Mr. Owang to feign ignorance of the order was to say the least despicable, and unworthy of counsel to mislead the court. We say so because it was Mr. Owang himself who made an attempt to seek adjournment of the current application on the ground that the appeal filed on 21st January, 2005, being **Civil Appeal No. 8** of **2005** was patently incompetent for having been filed out of time and the applicants intended to apply for extension of time before the hearing of the application. He was aware before the application dated 14th March, 2003 was withdrawn on 19th May, 2004 that the intended appeal had not been filed for more than two years since the ruling intended to be challenged was delivered, and that therefore an application for extension of time was necessary. There is no denying, and Mr. Owang concedes, that there has been no application made to regularize the intended appeal or the appeal as filed up to date. The conduct of the appellants and their counsel, we must say, does not endear itself to a court of equity.

While it is the position in law that our jurisdiction under ***rule 5(2)(b)*** arises upon the filing of a notice of appeal, we cannot, where an appeal has been filed before the hearing of an application under that rule, close our eyes to a concession that the appeal is patently incompetent. Courts do not act in vain. It is one of the settled principles in considering such applications that the applicant must show that the intended appeal is arguable or is not frivolous. But we are told in this matter by the applicants themselves, and the respondent so submits, that the appeal is of doubtful competence. We agree, and find that there is no proper basis for exercise of our discretion.

As stated earlier, the application is for dismissal and we so order. Costs of the application shall be borne by the applicants.

Dated and delivered at Nairobi this 26th day of May, 2006.

S.E.O. BOSIRE

…….

JUDGE OF APPEAL

P.N. WAKI

……..

JUDGE OF APPEAL

W.S. DEVERELL

…….

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR