



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
CIVIL APPLI 79 OF 2007(UR52/2007)

NDUNGU KINYANJUI APPLICANT

AND

KIBICHOI KUGERIA SERVICES 1ST RESPONDENT

STEPHEN BORO 2ND RESPONDENT

(An application for a stay of execution pending the hearing and determination of the intended appeal from the ruling of the High Court of Kenya)

Nairobi (Aluoch, J.) dated 9th February, 2007

in

H.C.C.C. NO. 849 OF 2004)

RULING OF THE COURT

This is an application by *Ndungu Kinyanjui*, (the applicant) for an order of stay of execution of the ruling and order of the superior court in its Civil Case No. 849 of 2007, made on 9th February, 2007. The application is expressed to be brought under *rules 5 (2) (b) 42 and 47* of the Court of Appeal Rules.

This Court has repeatedly stated in previous decisions, among them, David Thiong'o T/A Welcome General Stores v. Market Fancy Emporium, Civil Application No. NAI. 47 of 2007, cited to us by Mr. Kimiti for both respondents, that in an application under *rule 5(2) (b)* for stay of execution, where the court whose order is sought to be stayed, has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum, there would be nothing arising out of that decision for this Court to enforce or to restrain by injunction.

In the application before us the superior court dismissed with costs its Civil Case No. 849 of 2007 for three reasons. Firstly, that it was *res judicata* as a similar suit between the same parties had earlier been dismissed under **O. IXB rule 4** of the Civil Procedure Rules. Secondly, that under **section 8** of the Civil Procedure Act, and **O. IXB rule 7(2)** of the Civil Procedure Rules the applicant was barred from

instituting the suit. Thirdly, that the suit was frivolous, vexatious and an abuse of the process of the Court.

Subsequently the applicant moved that Court under **O. XLIV** of the Civil Procedure Rules for orders of review of that decision. The matter was heard by Aluoch J. who had made the dismissal order. After hearing counsel for the parties she delivered a ruling on 9th February, 2007, dismissing that application. She concluded her ruling thus: -

“Finally, I stand by my Ruling of 23rd September, 2004, that the plaintiff’s suit (HCCC NO. 849 of 2004) is an abuse of the process of the Court which I rightly dismissed.”

She made no order as to the costs of the application. It is against that order that the applicant intends to appeal, and pending the filing, hearing and determination of that appeal, he prays that we stay that order.

Mr. Nabutete appeared for the applicant at the hearing of the application. We understood him to be saying that what the applicant really wants stayed is the order on costs made in the ruling of 23rd September, 2004. In his view the applicant was entitled to a stay to enable him pursue his appeal. He fears that unless we grant him a stay, execution will issue and thereby render the success of the applicant’s appeal nugatory.

Mr. Kimiti for the respondents did not think the order of 9th February is capable of being stayed. As we stated earlier he cited authority to support his submission. In his view there is neither an appeal nor intended appeal against the ruling of 23rd September, 2004, with the result that this Court lacks the jurisdiction to grant a stay relating to that order.

We have no doubt in our minds that this application is unmeritorious. The applicant did not file any Notice of Appeal against the decision given on 23rd September, 2004. On that ground alone we have no jurisdiction to interfere with that Order. **Rule 5 (2) (b)**, above, states, in pertinent part, as follows:

“5 (2) subject to the provisions of sub-rule (1), the institution of an appeal shall not operate to suspend or to stay execution, but the Court may –

(b) In any civil proceeding, where a notice of appeal has been lodged in accordance with rule 74 order a stay of execution; on such terms as the court may think just.”

We have a notice of appeal on record regarding the decision of the superior court dated 9th February, 2007 but none relating to the decision of 23rd September, 2004. Consequently, Mr. Nabutete’s submission in that regard is a mere red herring. Mr. Nabutete, who was probably aware of that hurdle, further submitted that because Aluoch J. alluded to the earlier decision, then that decision was adopted in her ruling of 9th February, 2007. With due respect to learned counsel, that submission is tenuous and we have referred to it merely to reject it.

The decision of 9th February, 2007 in no way ordered any of the parties to do anything or to abstain from doing anything or to pay any sum of money. Consequently, it is incapable of execution. Accordingly no order of stay can properly issue relating to it.

In the result it is our view that this application lacks any merit. It is accordingly dismissed with costs to the respondent.

Dated and delivered at Nairobi this 9th day of November, 2007.

S.E.O. BOSIRE

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JUDGE OF APEPAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OFAPPEAL

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

DEPUTY REGISTRAR