



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

Civil Appli 47 of 2007

DAVID THIONG'O T/A WELCOME GENERAL STORESAPPLICANT

AND

MARKET FANCY EMPORIUM RESPONDENT

(Application for stay of execution pending the filing, hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya Nairobi (Visram J) dated 28th February, 2007 in H.C.C.C. NO. 914 OF 2005

RULING OF THE COURT

This is an application under *Rule 5 (2) (b)* of the Court of Appeal Rules (Rules) for an order that:

“..... *the execution of the ruling and order of Hon. Mr. El Kindy delivered on 15th November, 2005 be stayed pending the lodging, hearing and determination of the intended appeal against the ruling and order of Hon. Mr. Justice Visram delivered on 28th February, 2007*”.

The applicant has been a tenant of the respondent on L.R. No. 209/2648 Muindi Mbingu Street, Nairobi.

In or about 2004 the respondent sued the applicant in the Principal Magistrate's Court at Milimani Commercial Courts, Nairobi – *Civil Suit No. 12611 of 2004* for vacant possession on the ground that the applicant had neither complied with the notice to terminate the tenancy nor filed a reference in the Business Premises Rent Tribunal. The respondent filed a Defence and subsequently filed an application for summary judgment which was heard by El Kindy, Ag. Senior Principal Magistrate, and allowed in a terse ruling on 13th March, 2005.

On 13th April, 2005 the applicant filed an application for setting aside the *ex parte* judgment but it seems that the same was dismissed on 15th November, 2005. On 18th November, 2005, the applicant filed *Civil Appeal No. 914 of 2005* in the superior court against the ruling of El Kindy dated 15th November, 2005. On the same day the applicant filed an application in the superior court in the same suit for stay of execution of the ruling and order of the trial magistrate. The application was heard by Visram J and dismissed on 28th February, 2007. The applicant was, however, granted leave to appeal.

The applicant has filed a Notice of Appeal indicating an intention to appeal from the decision of Visram J. The applicant now seeks an order of stay of the decision of the El Kindy delivered on 15th November, 2005 pending the hearing of the appeal against the decision of Visram J.

When the application came for hearing before us, we doubted whether we have jurisdiction to stay execution of an order of the subordinate court which is the subject of an appeal in the superior court. Mr. Majanja, learned counsel for the applicant submitted that *Rule 5 (2) (b)* does not limit our jurisdiction to orders under appeal before this Court and that this Court has jurisdiction to stay any order that may affect the appeal. Mr. Gitau Singh, learned counsel for the respondent, on the other hand, submitted that this Court has no jurisdiction to deal directly with orders of the subordinate court and has only jurisdiction to stay the orders of superior court.

We have considered the matter. The Court of Appeal Rules are made in pursuance of the Appellate Jurisdiction Act (Cap 9) which Act confers on the Court of Appeal jurisdiction to hear appeals from the High Court and for purposes incidental thereto.

Rule 5 (2) (b) of the Rules provides:

“5. (1)

5. (2) *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 –*

(a)

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

It is obvious from *Rule 74 (1)* as read with *Rule 74 (6)* that a Notice of Appeal relates to a decision of the superior court. Indeed the Notice of Appeal filed herein relates to the decision of Visram J dated 28th February, 2007. It is the lodging of the Notice of Appeal which gives this Court jurisdiction to grant any order of stay of execution under *Rule 5 (2) (b)* of the Rules. It follows therefore that the stay of execution can only relate to the subject matter of the Notice of Appeal which is the decision of the superior court – that is the decision appealed from. The case of *Western College of Arts and Applied Sciences vs. Oranga & Others* [1976] KLR 63 illustrates clearly that the jurisdiction of this Court to grant a stay of execution, an injunction or stay of proceedings can only be derived from its powers under *Rule 5 (2) (b)*. In that case, the superior court dismissed an action with costs. The applicant appealed and pending appeal, sought a temporary injunction restraining the respondents from operating a bank account until the determination of the appeal and a stay of execution. At the material, time the then *Rule 5 (1)* of the Court of Appeal Rules did not specifically give jurisdiction to this Court to grant an order of injunction pending appeal. This Court has now jurisdiction to grant an order of injunction pending appeal. Law V.P. delivering the leading judgment with which the rest of the members of the court concurred, said in part at page 66 paragraph D, E:

“In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing any thing, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for stay, to enforce or to refrain by injunction.

It appears to me therefore that what this court is now being asked to do is to order the issue of a temporary injunction in respect of a matter which is not directly connected with a stay of execution of judgment – the subject of the intended appeal”.

The decision of El Kindy, Ag. Senior Principal Magistrate is not the subject of the intended appeal. We would respectfully adopt the words of Mustafa, J.A. in that case, at page 67 paragraph C, that the stay of execution asked for does not relate to what the High Court ordered to be done or not to be done and

this Court has no jurisdiction to entertain it.

Lastly, El Kindy merely dismissed the application to set aside the summary judgment. By parity of reasoning in *Western College of Arts and Applied Sciences* (supra) El Kindy did not order any party to do anything or refrain from doing anything or to pay any sum. Therefore, there is nothing which can be executed from the dismissal order except the order for payment of costs.

Accordingly, the application is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 30th day of March, 2007.

P. K. TUNOI

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JUDGE OF APPEAL

E. O. O’KUBASU

.....

JUDGE OF APPEAL

E. M. GITHINJI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR