



Emolot v Josephat Nyachoti t/a Minimax Auctioneers (Civil Appeal E136 of 2022) [2023] KEHC 19482 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEHC 19482 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL E136 OF 2022
RPV WENDOH, J
APRIL 27, 2023**

BETWEEN

MICHAEL NICKSON EMOLOT APPLICANT

AND

JOSEPHAT NYACHOTI T/A MINIMAX AUCTIONEERS RESPONDENT

RULING

1. This ruling is in respect to the Notice of Motion dated November 14, 2022. The applicant seeks the following orders: -
 - a. Spent;
 - b. Spent;
 - c. This court be pleased to grant an order of stay of execution of the ruling and order of this court dated October 27, 2022 vide Rongo Misc 20 of 2022 pending the hearing and determination of this appeal;
 - d. Costs of this application do abide the appeal;
 - e. Such other orders as this court may deem just and expedient be granted.
2. The grounds upon which the application is premised are found on its face and the supporting affidavit of the applicant, Michael Nickson Emolot, dated November 14, 2022. The applicant deposed that the trial court allowed the respondent's preliminary objection without allowing him a chance to be heard via a ruling dated October 27, 2022; that he is dissatisfied with the court's ruling and he filed an appeal; that the court did not issue a stay of execution and the respondent has already advertised his motor vehicle for sale; that the respondent will not be able to refund/repay him the value of his motor vehicle and the appeal herein will be rendered nugatory and a mere academic exercise; that he will suffer



substantial and irreparable loss if the orders are not granted; that he is ready and willing to furnish and abide by any conditions that this court may deem fit to grant in the circumstances.

3. In his further affidavit, the applicant deposed that the orders granted in the lower court were for repossession of the motor vehicle which is the subject of this appeal; that there was no order for sale of the motor vehicle to a third party; that the respondent has not provided the letter of instruction that was issued to him to repossess the motor vehicle and there was no court order to be executed; that there is also no evidence of what amount the motor vehicle was sold for as provided for under the Rules of the Auctioneers Act; that if there was any sale, it did not meet the threshold as provided for under the Auctioneers Rules 17(5), 18(4); that this court should grant the order of stay as prayed.
4. The application was opposed. The respondent swore an affidavit dated December 22, 2022. He stated that the court in Rongo delivered a ruling on October 27, 2022 upholding the preliminary objection of the respondent in the presence of Counsel for the applicant and the respondent in person; that the court did not issue an order of stay of execution nor did Counsel for the applicant apply for the same; that the court issued orders on March 28, 2022 for police assistance for an ongoing execution process in line with the Auctioneers Rules.
5. The respondent deposed that he advertised for the sale of Motor Vehicle registration number KCX 190R in the Star Newspaper dated November 2, 2022 scheduled on November 10, 2022; that the sale took place and a certificate of sale was issued and the highest bidder took possession immediately; that on November 24, 2022 he was served with a mention notice and an application both dated November 17, 2022 and November 14, 2022 respectively without any order; that the orders being sought are in vain since the sale has taken place and will affect a third party who is not before this court. The respondent further deposed that this application is an afterthought and the applicant will not suffer loss since the sale was for settling his debt and any damages can be settled in a substantive suit.
6. Parties filed their respective submissions. The applicant filed submissions dated January 7, 2023 and outlined the conditions to be met before an order of stay pending appeal may be granted under Order 42 Rule 6(2) of the Civil Procedure Rules. The respondent filed undated submissions on March 1, 2023. In his submissions, he urged this court to find that the application dated November 14, 2022 is overtaken by events.
7. I have duly considered the application, the affidavits in support and in opposition and the submissions by both parties..
8. Order 42 Rule (6) (1) and (2) of the Civil Procedure Rules 2010 makes provision for stay pending appeal as follows: -
 - (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 - (2) No order for stay of execution shall be made under subrule (1) unless-
 - a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and



- b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
9. The four (4) salient ingredients that the applicant should establish for orders of stay of execution orders to issue are: -
- a. Substantial loss will be suffered if stay is not granted;
 - b. That the application has been filed without unreasonable delay;
 - c. The applicant is willing to furnish security for the due performance of the decree;
 - d. The applicant has an arguable appeal.
10. Whether substantial loss shall be suffered if stay order is not granted. The applicant contended that the substantial loss he is likely to suffer is, the sale of motor vehicle registration number KCX 190X, since the respondent cannot replace the said motor vehicle.
11. The importance of demonstrating how substantial loss is likely to be suffered was emphasized in *Kenya Shell Limited v Benjamin Karuga Kibiru & Another* (1986) eKLR Plat Ag JA, stated:-
- “The affidavit in support has not set out any information to show that the appeal will be nugatory. It is loud in its claim that the appeal will fail. But no reasons are given why the appeal will be rendered nugatory...if there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.”
12. It was further stated in the case of *Kenya National Highways Authority v Ahmednasir Maalim Abdullahi* (2020) eKLR:-
- “It must be clear to an applicant seeking stay of execution that the law places a duty on him to demonstrate to the satisfaction of the court that he will suffer something special and that he may not be put back to the original position he was in before execution and, therefore, deserves exercise of the court’s discretion in his favour.”
13. In his replying affidavit, the respondent annexed ‘JN1’ a copy of a certificate of the sale agreement dated November 10, 2022, which shows that the suit motor vehicle was sold to one Issa Hassan Wario. The applicant controverted this position by stating that as of January 17, 2023, the suit motor vehicle was still in his names as per the records in the National Transport and Safety Authority (NTSA). I have perused the annexures produced by the applicant and the respondent. The search certificate from the NTSA shows that the suit motor vehicle is registered in the name of the respondent and Momentum Credit Limited.
14. Section 8 of the *Traffic Act* provides:-
- “The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”
15. The rebuttable presumption is that the registered persons or any other entity who appears in the logbook is the owner of the motor vehicle unless evidence to the contrary is availed. This is to mean that; the name of a person or an entity appearing on the logbook, is not conclusive proof of the



actual ownership of the motor vehicle. In *Samwel Mukunya Kamunge v John Mwangi Kamuru Civil Application No 34 of 2002 HM Okwengu, J* as she then, stated: -

“It is true that a certificate of search from the Registrar of motor-vehicle would have shown who was the registered owner of the motor-vehicle according to the records held by the Registrar of motor vehicle. That however is not conclusive proof of actual ownership of the motor vehicle as section 8 of the *Traffic Act* provides that the contrary can be proved. This is in recognition of the fact that oftentimes vehicles change hands but the records are not amended.”

16. In as much as the applicant has produced a search showing that the suit motor vehicle is still in his names, there is another piece of evidence of the sale of the vehicle to a third party which has not been controverted. The applicant has not demonstrated that he is still in possession of the suit motor vehicle. There is an admission on his part that the suit motor vehicle had been already advertised for sale. The applicant has not demonstrated that the sale did not materialize and there is a likelihood that the suit motor vehicle is still in the respondent’s possession. Therefore, there is nothing for this court to preserve since the subject matter has already changed hands. The court cannot issue orders in vain. If there was substantial loss (if any) to be suffered by the applicant, the same has already been suffered. The application has already been overtaken by events. In any event, a vehicle can easily be replaced by purchase of another.
17. Whether the application was filed within reasonable time; The applicant filed his memorandum of appeal on October 31, 2022 a period of 4 days after the impugned ruling of October 27, 2022 was delivered. The applicant was therefore well within time as per the provisions of Section 75 of the *Civil Procedure Act* on the timelines for appeal from the lower court. The applicant then moved this court on November 14, 2022. The applicant did not delay in filing this application.
18. Whether the applicant has an arguable appeal: The applicant contends that the learned Magistrate considered an issue in the interim pending the hearing of a substantive application. The applicant also faults the Magistrate for granting orders which had not been prayed for. The applicant also contends that the Magistrate based his ruling on a provision of the law which had already been amended. These grounds are arguable.
19. In the end, I find that the application lacks merit as the substratum which is the vehicle has been sold and there is nothing to stay.
 - a. Costs of this application to abide the appeal.
 - b. The applicant to file and serve the appeal within sixty (60) days hereof and mention before the Deputy Registrar on 3/7/2023 to confirm compliance.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 27TH DAY OF APRIL, 2023

R. WENDOH

JUDGE

Ruling delivered in the presence of:-

No appearance for the Applicant.

No appearance for the Respondent.

Nyauke Court Assistant.

