



Roy Parcel Services Limited v Ojuro t/a Jenks Auctioneers (Miscellaneous Civil Application E045 of 2023) [2023] KEHC 23283 (KLR) (29 September 2023) (Ruling)

Neutral citation: [2023] KEHC 23283 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION E045 OF 2023
MS SHARIFF, J
SEPTEMBER 29, 2023**

BETWEEN

ROY PARCEL SERVICES LIMITED APPLICANT

AND

KENNETH ODHIAMBO OJURO T/A JENKS AUCTIONEERS .. RESPONDENT

RULING

1. This ruling is in respect of the applicant's Notice of Motion dated April 6, 2023 in which it seeks the following reliefs;
 - a. Spent.
 - b. The court be pleased to grant the applicant herein leave to file the notice of appeal and the memorandum of appeal out of time against the decision of the Auctioneers Licensing Board dated December 8, 2022, dispatched on February 20, 2023 and reached the applicant on February 28, 2023.
 - c. The court be pleased to issue an order of temporary injunction restraining the respondent, his assigns or representatives, employees or agents or any such person(s) acting under its command and or instructions from in any way whatsoever, using for profit, leasing, advertising for auction, selling or in any manner contrary to the owner's rights to usage and consent as to use by a third party, motor vehicle registration number KBA 266T until the hearing and determination of the intended appeal or until then that the court shall so decide on an application by the applicant.
 - d. The honourable court be pleased to issue an order of stay staying the taxation before Kisumu Chief Magistrate's court Miscellaneous Application Number E24 and E25 of 2023; Kenneth Odhiambo Ojuro t/a Jenks Auctioneers V Roy Parcel Services Limited that is scheduled for ruling on April 25, 2023 pending the hearing and determination of the intended appeal.



- e. The court be pleased to issue an order of stay staying any proceedings in the manner and form of taxation or assessment of the respondent's costs in Kisumu auctioneers licensing board disciplinary cause no. 38 of 2022; Roy Parcel Services Limited V Kenneth Odhiambo Ojuro t/a Jenks auctioneers pending hearing and determination of the intended appeal.
- f. Costs of the application be in the cause.
2. The application is supported by the affidavit of Tehseen Omar who deposes to of the following facts; that the respondent has sneaked out from his yard motor vehicle registration number KBA 266T he had illegally attached in execution of decrees in Kisumu CMCC E45 and E46 of 2020 which is at risk of being disposed of and or put into the respondent's use to the detriment of the applicant.
 3. That the applicant had been a defendant in Kisumu CMCC E45 and E46 of 2020 which judgement was passed against them and pursuant thereto, they paid the decretal sum through 2 cheques for Kshs. 325,000/- and 319, 905/- respectively effectively settling the decretal sum. That however, the respondent illegally attached one of the vehicles registration number KBA 266T they had sold to a third party though not forming the proclaimed assets.
 4. They thereafter moved the auctioneers licensing board seeking a declaration that the respondents conduct was illegal and an order that the motor vehicle be released. The board determined the matter without the applicant's participation and a decision delivered.
 5. That the respondent has also moved court vide Kisumu CMC Miscellaneous application numbers E24 and E25 in which he wants to realize from the sale of motor vehicle which matter is coming up for ruling on April 25, 2023.
 6. That the time for lodging an appeal has since lapsed because the auctioneers licensing board did not communicate its decision until February 28, 2023 when the applicant received the same via post.
 7. That since the board has become functus officio, it lacks jurisdiction to order stay of execution and this court thus has jurisdiction by way of an appeal from the board.
 8. The respondent filed a replying affidavit sworn on April 19, 2023 deposing inter alia that; upon getting the decision from the board arrived at on December 5, 2022, he filed a bill of costs in misc. application number E024 and E025 of 2023 and an advocate duly entered appearance on the applicant's behalf. Directions were taken and a ruling date given. That it is not therefore true that the applicant did not participate in the bill of costs.
 9. That the applicant has not explained what transpired between the time it received the board's decision and the time it filed the instant application. That Lily Parcel which took over from the applicant had moved court vide Misc. Application Number 1009 of 2022 which was dismissed and also filed objector proceedings in ELRC 45 & 46 of 2020 claiming ownership.
 10. He deposes that he engaged one of the applicant's staff and settled on a settlement of Kshs 1, 200,000/- which he promised to pay. That he was instead served with the instant application instead of the cheque and that the applicants are not acting in good faith.
 11. Thereafter, the application was disposed of by way of written submissions. Only the applicant complied and their submissions dated May 10, 2023 are on record. The same have been considered.
 12. This matter was placed before the court on 13/4/2023 and the prayer seeking leave to lodge appeal out of time was granted leaving the prayer of temporary injunction and stay of taxation pending determination.



13. On the prayer for temporary injunction, the applicant depones that the respondent attached the subject motor vehicle KBA 266T which was not part of the proclaimed movable assets. That the subject vehicle had been sold to a third party, Lily Parcels Services Ltd. At the time of filing the application, the motor vehicle was under the respondent's custody.
14. On his part, the respondent depones that the applicant's operations were taken over by Lily Parcels Ltd who participated in the proceedings.
15. An applicant seeking injunctive reliefs is required to establish the principles set out in *Giella v Cassman Brown & Co Ltd (1973) EA 358* that; whether the applicant shall suffer irreparable injury which cannot be compensated by damages; and if the court is in doubt, it can decide the application on a balance of convenience.
16. The applicant's main contention is that the attached motor vehicle was not part of the assets proclaimed by the respondent. The copy of the proclamation annexed to the application lists 3 motor vehicles and the attached motor vehicle is not one of them. The complaint was brought before the board which absolved the auctioneer on grounds that the vehicle was branded Roy parcel services limited.
17. I have also seen the annexure of the motor vehicle log book which shows that the subject vehicle is registered in the name of Lily Parcel services limited, a fact acknowledged by the respondent that that the applicant's operations were indeed taken over by the said Lily parcel services ltd.
18. If this is the case, there is no doubt that the vehicle is Lily's which is not a party to these proceedings. Proper execution against Lily parcel services ought to be brought in separate proceedings other than this. The applicant have shown that the motor vehicle was attached in settlement of liability in proceedings involving the applicant and the respondent and not Lily Parcel Services Ltd.
19. In the circumstances, I find that the subject motor vehicle being owned by a third part, there is need to protect the third party's rights over the asset through an interim injunction pending the determination of the intended appeal from the decision of the board.
20. The other prayers sought are stay of the taxation proceedings pending in the subordinate court between the applicant and the respondent.
21. It is trite law that a party seeking stay of proceedings must lay a basis for the grant of such orders. In this case, the applicant argues that there are taxation proceedings pending in the subordinate court.
22. The grant of such orders were discussed in [Kenya Wildlife Service v James Mutembei \[2019\] eKLR](#) where the court held that: -

..... Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent..."
23. *In Re Global Tours & Travel Ltd HCWC No 43 of 2000*, Ringera J held that:

"...As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors



as the need for expeditious disposal of case, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously...”

24. Looking at the nature of the proceedings sought to be stayed, the same are taxation proceedings where the respondent was awarded costs which in any event have to be paid at the end of the day. The applicant has not shown any harm or injustice it stands to suffer if the taxation is continued. On the other hand, staying such proceedings would stifle the respondents right to fair trial and speedy disposal of suit.
25. In the end, I find no merit in the prayer for stay of proceedings pending the hearing and determination of the intended appeal.
26. On the balance, I find merit in the prayer seeking temporary injunction restraining the respondent from using for profit, leasing, advertising for auction, selling or in any other way parting with the possession of motor vehicle registration number KBA 266T pending the hearing and determination of the intended appeal. The prayer seeking stay of proceedings is devoid of merit and is therefore rejected.
27. The applicant is directed to file his appeal within 21 days of this ruling.
28. Costs of this application shall abide the outcome of the intended appeal.

DELIVERED, DATED AND SIGNED AT KISUMU THIS 29TH DAY OF SEPTEMBER, 2023.

MWANAISHA S. SHARIF

JUDGE

