NCBA Bank Kenya PLC v Ngoci & another (Commercial Suit E024 of 2021) [2022] KEHC 13 (KLR) (Commercial and Tax) (14 January 2022) (Ruling)

Neutral citation: [2022] KEHC 13 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL SUIT E024 OF 2021

A MABEYA, J

JANUARY 14, 2022

BETWEEN

NCBA BANK KENYA PLC .... APPLICANT

AND

SAMUEL NJOROGE NGOCI .... 1ST RESPONDENT

STANBIC BANK KENYA LIMITED .... 2ND RESPONDENT

RULING

1. By a Motion on Notice dated 25/3/2021 the applicant moved this Court seeking a stay of execution of the ruling delivered on 23/3/2021 by Hon. J. P. Omollo and any subsequent proceedings in MCCC/E7846/2020: SAMUEL NJOROGE NGOCI V NCBA BANK KENYA PLC & STANBIC BANK KENYA LIMITED ("the said suit") pending the determination of the appeal.
2. The application was predicated on the grounds that 1st respondent had instituted the said suit against the applicant and the 2nd respondent for the unconditional release of motor vehicle registration number KBS 800D ("the said vehicle") which had been repossessed by the applicant.
3. That the applicant holds the said vehicle as security for a credit facility of KES. 6,216,243.00 advanced to Alfred Kipkorir Mutai t/a Kipsigis Stores Limited (hereinafter "the borrower") by virtue of a Hire Purchase Agreement dated 29/6/20I2 which vehicle is jointly registered in the names of the appellant and the borrower.
4. That vide a ruling delivered on 23/3/2021, the trial court issued a mandatory order at the interlocutory stage compelling the applicant to release the suit vehicle to the 1st respondent. The basis of the order was that the said vehicle ought to be in a motorable state pending the hearing of the main suit.

5. It was contended that the applicant had appealed against that ruling and that it was not a party to the agreement for sale between the respondents and third parties. That it was only made aware of the existence of such sale transaction in the proceedings in the said suit.

6. The applicant further contended that there was no privity of contract between itself and the 1st respondent. That it will suffer substantial loss and irreparable damage if the order is executed as it will be dispossessed of its registered security. That the borrower had defaulted in its loan payments and had fraudulently transferred other securities to third parties without the consent of the applicant. That if the orders sought were not granted, the suit before the trial court would have been determined at the interlocutory to its detriment.

7. The 1st respondent opposed the application vide a replying affidavit sworn on 16/4/2021. He averred that the applicant was guilty of forum shopping as it was arguing its case afresh having done so before the trial court. That the 1st respondent was an innocent purchaser for value without notice and was not a party to the sale transaction between the respondents and third parties.

8. That the applicant had failed to reveal important information in its application including that a search at NTSA showed that the 2st respondent was a third purchaser. He contended that prima facie evidence before the trial court indicated that the 1st respondent was the owner of the said vehicle and that court appreciated the presence of special circumstances as found in case law before issuing a mandatory injunction at the preliminary stage.

9. That the issues for determination raised in the intended appeal were the same issues pending before the trial court and that the applicant did not satisfy the principles for a grant of interlocutory orders sought.

10. The 2nd respondent also opposed the application vide a replying affidavit sworn on 20/4/2021. That affidavit mirrored the averments in the 1st respondent's replying affidavit. He further averred that the 2nd respondent financed the 1st respondent a sum of Kshs 1,800,000.00 for the purchase of the said vehicle. That the said vehicle was jointly registered in the 1st and 2nd respondent's names.

11. That due diligence processes were conducted by both the respondents whereby the records by NTSA indicated that the respondents are the joint owners of the said vehicle

12. The applicant filed a supplementary affidavit sworn on 3/5/2021in rebuttal. It applicant reiterated that it is the legally registered owner of the said vehicle having financed its purchase to a tune of KES. 6,216,243.00 to Alfred Kipkorir Mutai t/a Kipsigis Stores Limited. This was borne by the hire purchase agreement dated 29/6/2012 and the logbook issued on 31/5/2012.

13. That it was a mystery how the said vehicle was transferred without the applicant's authority which to-date holds the original log book.

14. Having considered the entire record herein, this is an application for stay of execution pending appeal. The applicable principles are set out in Order 42 Rule 6(2) of the Civil Procedure Rules. These are that the application should be made timeously, the applicant must show that it will suffer substantial loss if the stay sought is not granted and there must be security given for the due performance of the order which might ultimately be found to be binding on such applicant.

15. The ruling of the lower court was delivered on 23/3/2021. The present application was lodged on 25/3/2021. As such there was no inordinate delay in lodging the application.

16. On the second limb, the applicant has the obligation to illustrate that it will suffer substantial loss if the stay of execution is not granted. The applicant contended that it is a joint owner of the said vehicle

pursuant to a hire purchase agreement dated 29/6/2012. The log book in its possession evidenced this fact. That the borrower was still indebted to it and it therefore holds the car as security for payment. That if the vehicle is released as ordered, it would render the pending appeal and main suit nugatory as the subject vehicle may be beyond it.

17. In *Mukoma v Abuoga (1998) KLR 645*, it was held that: -

> "Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory".

18. In order to prevent substantial loss and render an appeal nugatory, the court ought to preserve the status quo. The ownership of the subject vehicle is a weighty matter that will be considered during the main trial.

19. In *Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another [2015] Eklr*, the Court of Appeal stated: -

> "In seeking to balance the interests of the respective parties, the approach we have always taken in determining whether or not to grant a stay of execution is to ensure that applicants are not denied their opportunity to ventilate their legal cases as afforded under the laws through the appeal process, with the possibility of success, while at the same time, respondents are not denied the fruit of judgment in their favour and their rights are safeguarded".

20. The Court considers that, the said vehicle has already been a subject of ''irregular transfers". The applicant holds the same as security for its outlay. The debt has not yet been repaid. Releasing the said vehicle would be tantamount to rob the applicant of its security. If the appeal succeeds and the said vehicle would have been either dismantled or involved in an accident at the hands of the 1st respondent, the applicant would suffer substantial loss.

21. The third requirement for a grant of stay of execution is the provision of security by the applicant for the due performance of the order that may be binding on it.

22. The applicant submitted that it is willing to provide such a security. The said vehicle itself is adequate security. In any event, the applicant being a bank will be capable of atoning any losses that might arise.

23. The upshot is that the application succeeds. I allow the same in terms of prayer no.3 save that the trial of the suit before the trial court may proceed in the normal manner pending appeal. The costs in the appeal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JANUARY, 2022.

A. MABEYA, FCI Arb

JUDGE