



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CIVIL APPEAL NO. E116 OF 2021

MOSES ATUORO OCHIENG.....APPELLANT/APPLICANT

VERSUS

TRUPHENA ATIENO APOL.....RESPONDENT

AND

OSCAR OTIENO ODONGO T/A ODONGO INVESTMENT AUCTIONEERS....INTERESTED PARTY

RULING

1. The applicant came to court by way of Notice of Motion dated 3rd March, 2022. It was brought under sections 1A, 1B, 3A, 3B & 100 of the Civil Procedure Act, CAP. 21 Laws of Kenya and under Order 42 Rules 6, Order 22 Rule 22 & Order 51 Rule 1 of the Civil Procedure Rules, 2010. The applicant is seeking the following orders:

- a) That this matter be certified urgent and heard ex parte in the first instance and service thereof be dispensed with.[Spent]
- b) That this honourable court be pleased to order a stay of further proceedings, hearings and/or delivery of ruling in respect of the application dated 25/1/2021 vide Mbita Misc. Application E001 of 2021 pending hearing and determination of this application inter partes.
- c) That this honourable court be pleased to order a stay of further proceedings, hearing and/or delivery of ruling in respect of the application dated 25/1/2021 Vide Mbita Misc. App. E001 of 2021 pending hearing and determination of this appeal.
- d) That the costs of this application be provided for.

2. The application was premised on the following grounds:

- a) Ruling was delivered on the 24/11/2021 vide Mbita PMCC No.92 of 2016 dismissing the appellant/applicants application dated 1/2/2020.
- b) The applicant dissatisfied with the ruling of the trial court on lodged an appeal vide Homa Bay HCCA No.116 of 2021.
- c) The interested party applicant has filed an ex-parte notice of motion dated the 25/1/2021 vide Mbita Misc. Application No. E001 of 2021 seeking to transfer motor vehicle registration KCG 241 to one Naftali Anyumba Onyango based on the ruling dated 24/11/2021.
- d) It is trite law that an appeal does not operate as stay and the applicant's motor vehicle is thus exposed to a risk of being un-procedurally and prematurely transferred.
- e) That it is therefore prudent to have the hearing and/or delivery of ruling in respect of the application dated 25/1/2021 be stayed pending hearing and determination of this appeal.
- f) That therefore, if the orders sought herein are not granted, the appellants motor vehicle risks being transferred rendering this appeal nugatory.

- g) That applicant implore this honorable court to adhere to natural justice, doctrines of equity and the constitution in this matter as the applicants will be condemned unheard if the applicants are not granted an opportunity to defend the appeal on merit.
- h) The applicant has an arguable appeal with numerous chances of succeeding.
- i) The applicant has come to court within a reasonable period of time and without undue delay.
- j) The application will not occasion any prejudice to the respondent.
- k) That this application is made in good faith, timeously and it will be in the interest of justice that the same be allowed.

3. The respondent did not oppose the application. The counsel for the respondent informed the court that the decretal amount has been paid in full.

4. On the other hand the interested party opposed the application and filed notice to cross examine the applicant. The following were grounds of opposition:

- a) That the applicant raises no triable issues.
- b) That the execution against the applicant was lawful for the court issued the warrants.
- c) That the said warrants and a proclamation were served upon the applicant.
- d) That that the applicant indicated that respondent's advocate Mr. G.S. Okoth and the third party were informed on the 11/12/2020 of the payment was false.

5. The notice to cross examine the applicant was opposed. The grounds of opposition were as follows:

- a) That the notice to cross-examine is fatally effective, unnecessary, vexatious and misconceived and an abuse of the court process.
- b) That the delay is inordinate, intentional and contumelious and therefore inexcusable.
- c) That the delay is an abuse of the court process.
- d) That the applicant's supporting affidavit does not contravene the provisions of Order 19 of the Civil Procedure Rules.
- e) The application dated 3rd March, 2022 is an application for stay pending appeal and therefore not contentious as to the issue of facts.
- f) The interested party has not explained reasons for requiring cross-examination of the deponent of the affidavit supporting the application dated 3rd March, 2022.
- g) That the application by the applicant does not give particulars of scandalous and vexatious statements made by the deponent of the affidavit.
- h) That the application by the applicant does not give particulars of the falsehoods and defamatory innuendo made by the deponent of the affidavit.
- i) That the application is without merit and parties should be allowed to proceed on the affidavits filed in this matter.
- j) That there is a substantial risk to fair trial and causes serious prejudice to the respondent.
- k) The notice to cross-examine will cause grave injustice to the applicant if allowed.
- l) The notice to cross-examine will further delay the matter yet the applicant was brought under certificate.
- m) It will be in the interest of justice to dismiss the suit.

6. Oscar Otieno Odongo T/A Odongo Investment Auctioneers was instructed by the respondent herein to attach and sell the appellant/applicant moveable property on the strength of warrant of sale property dated 11th December, 2020 for a decretal sum of Kshs. 864, 863.30.

7. At the time of the hearing of this application, G.S Okoth, the respondent's advocate informed the court that the decretal amount was settled in full on 11th December, 2020. The purported sale of the motor vehicle registration number KCG 241R was on 19th December, 2020.

8. Once the decretal amount was settled in full before the sale, then the auctioneer ceased to have the authority to proceed with the sale. The purpose for which the warrants were issued had been satisfied by full payment. Any subsequent sale was not only irregular but reeked of fraudulent dealing with the respondent's property.

9. The cross examination of the appellant could not add any value to this application and I find that it was not necessary.

10. It would not be in the interest of justice for the auctioneer to be allowed to proceed with the transfer of the motor vehicle.

11. From the foregoing, I find that the application has merits. I allow the same and order the interested party to bear the costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 31ST DAY OF MARCH, 2022.

KIARIE WAWERU KIARIE

JUDGE.