Sarwar Motor Limited v NIC Bank Limited (Civil Appeal 230 of 2019) [2022] KEHC 14270 (KLR) (21 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14270 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL 230 OF 2019

JK SERGON, J

OCTOBER 21, 2022

BETWEEN

SARWAR MOTOR LIMITED ..... APPELLANT

AND

NIC BANK LIMITED ..... RESPONDENT

RULING

1. The appellant/applicant in this instance has brought the notice of motion dated June 11, 2019 supported by the grounds set out in its body and the facts deponed in the supporting affidavit. The applicant sought for the substantive order for stay of execution of the judgment delivered on March 28, 2019 pending the hearing and determination of the appellant's Appeal.

2. The respondent opposed the Motion by filing the replying affidavit he swore on July 25, 2019 and a further affidavit sworn on October 4, 2019.

3. When the Motion came up for interparties hearing the parties respective advocates chose to rely on the averments made in their respective affidavits.

4. I have considered the grounds laid out on the body of the Motion, the facts deponed in the affidavits supporting and opposing the Motion and the brief oral arguments.

5. A brief background of the matter as seen in the record is that the appellant instituted a suit before the Chief Magistrate's Court against the applicant vide the plaint dated March 3, 2015 and sought for Injunction orders against the respondent to not sell or auction or interfere with motor vehicle KBK 186R and damages together with costs and Interests.

6. Upon hearing the parties, the court vide the judgment delivered on March 28, 2019 where the suit was dismissed with costs to the respondent. Being aggrieved by the aforementioned decision, the applicant appealed to this court against the lower court's juIn his affidavit filed in support of the motion

dated 11/6/2019, Mr. Mohammed Qayum Deen, the director of the appellant/ applicant stated that the lower court erroneously dismissed the appellant's case after misconceiving the facts thereof and subsequently the law.

7. The applicant avers that the appeal has got merit and thus has high chances of succeeding and that it is willing to offer such reasonable security for the due performance of the decree as may be ultimately binding on it.

8. She contends that the appellant is going to incur substantial loss in the event the stay is not granted the subject matter of this appeal the said motor vehicle which is lying at a storage yard shall be released to the respondent.

9. In response, Mr. Ibrahim Ngatia Mbogo the Legal Officer to the respondent stated that vide a Chattels Mortgage Agreement dated August 14, 2013, the respondent herein entered into an a contract and advance a credit facility of Kshs.3,295,000/= to one Frank Onchagwa Nyabwari, the borrower to enable him purchase the said motor vehicle from Stargent Enterprises.

10. He further avers that the said motor vehicle as at August 2013 was registered in the name of Stargent Enterprises who invoiced the Respondent Bank an amount of Kshs.3,295,000/= which the bank settled on their behalf but as per their agreement the motor vehicle was registered under the name of the Borrower and the respondent bank to secure the interests of the Respondent bank.

11. The respondent avers that the borrower defaulted severally despite notices sent by the bank and as per their terms of their agreement the respondent bank repossessed the motor vehicle in January 2015 and made efforts to resell it and it as that point that the appellant filed the present suit seeking the said order in its plaint but were dismissed.

12. The respondent contends that the appeal and this application herein are not merited and that the orders sought should not be granted since the appellant has not produced any proof of ownership of the said motor vehicle in question since the respondent herein advertised the motor vehicle and the same has already been sold to a third party.

13. The respondent therefore avers that this application has been overtaken by events owing to the fact the motor vehicle in question has already been disposed of and that there is no substantial loss that will be occasioned to the appellant if the following orders are not granted.

14. The principles guiding the grant of an application for stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides as follows:

> No order for stay of execution shall be made under subrule (1) unless—
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> 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
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> 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.

15. Was the application filed without unreasonable delay? The application has been filed two month after the delivery of the judgment. It is noted that the appeal was filed on 11th June, 2019 soon after the delivery of judgment thus signaling the applicant's interest in pursuing the appeal. There is thus no inordinate delay on the part of the applicant.

16. On the issue of substantial loss, which is the cornerstone in an application for stay. The applicant in this matter avers that it shall suffer substantial loss unless the stay order for is granted.

17. The respondent on the other hand, states that this application has been overtaken by events owing to the fact the motor vehicle in question has already been disposed of and that there is no substantial loss that will be occasioned to the appellant if the following orders are not granted.

18. The decision of Platt Ag JA, in the case of *Kenya Shell Ltd v Kibiru & Another* [1986] KLR 410. , in my humble view set out two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. The Platt Ag JA (as he then was) stated inter alia that:

> "The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages...It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded which would cause difficulty to the Applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts... (emphasis added)"
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> 10. The learned Judge continued to observe that:
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> "It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. 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 cornerstone of both jurisdictions for granting 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."

19. It is clear that the subject matter of this suit has already been sold by the respondent who has even produced enough evidence to demonstrate to the court that the said motor vehicle was registered in the name of the respondent bank and its customer to secure the interests of the bank as the financier.

20. Further, the respondent further confirms that the motor vehicle in question, together with the relevant title and transfer documents was released to the buyer upon sale on May 31, 2019 and that upon conducting a search of the Motor vehicle Registration No.KBK 186 R on the NTSA TIMS System generated results indicated that there is an existing caveat placed against the said motor vehicle.

21. As held in the Shell case, substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to justify keeping the respondent out of the fruits of his judgment. It is trite that without a demonstration of substantial loss, it would be rare that any other event would render the appeal nugatory and to justify keeping the decree holder out of his money. In this case the Applicant swore that if stay is denied, its appeal would be rendered "hopeless", whatever that means.

22. The upshot therefore is that the motion dated June 11, 2019 is devoid of merit and is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 21ST DAY OF OCTOBER, 2022.

……**……**

J. K. SERGON

JUDGE

In the presence of:

……for the Appellant/Applicant

…… for the Respondent