



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. E 265 OF 2020

PLATINUM CREDIT LIMITED.....1ST APPELLANT/APPLICANT

ANTIQUA AUCTIONS AGENCIES.....2ND APPELLANT/APPLICANT

-VERSUS-

ANN ELSIE NJURA NJERU.....RESPONDENT

RULING

1. The subject matter of this ruling is the Notice of Motion dated 23rd October, 2020 brought by the 1st and 2nd appellants/applicants herein and supported by the grounds set out on its face and the facts stated in the affidavit of **Richard Simbala**, an agent of the 1st applicant. The applicants sought the orders hereunder:

(i) Spent.

(ii) Spent.

(iii) THAT this Honourable Court be pleased to grant a stay of execution in Civil Suit No. 2330 of 2020 pending the hearing and determination of the appeal against the ruling delivered by Honourable S.G. Gitonga (Mrs.) (Resident Magistrate) on 14th October, 2020.

(iv) THAT the costs of the application be provided for.

(v) Any other orders that this Honourable Court deems fit.

2. To oppose the Motion, the respondent put in a replying affidavit.

3. When the Motion came up for *inter partes* hearing before this court, the parties opted to rely on the averments made in their respective affidavits.

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

5. A brief background of the matter is that the respondent filed the application dated 15th June, 2020 before the trial court and sought interlocutory injunctive orders against the applicants in respect to the motor vehicle registration number KCR 371Q (“the subject motor vehicle”).

6. It was the case of the respondent that on 3rd April, 2020 she entered into an agreement with the 1st applicant for the advancement of a loan facility to her, wherein the subject motor vehicle was to act as a security for the loan. Owing to the lockdown resulting from the global Covid-19 pandemic, the respondent’s business suffered a blow, causing her to renegotiate her loan.

7. According to the record, notwithstanding the above, the applicants caused the subject motor vehicle to be attached for sale on 11th June, 2020 and hence the suit.

8. Upon hearing the parties on the application, the trial court in its ruling delivered on 14th October, 2020 granted a temporary injunction restraining the applicants from disposing of the subject motor vehicle until the suit is heard and determined. The aforementioned ruling is now the subject of the appeal and the instant Motion relates to a stay of execution of the said ruling.

9. The question as to whether the applicants' appeal is arguable, which issue was addressed by both parties, cannot be determined by this court since it is the preserve of the Court of Appeal.

10. Before I touch on the merits, I note that the respondent in her replying affidavit states that the applicants never sought leave of the court to appeal against the aforesaid ruling.

11. The provisions of **Order 43, Rule 1** of the **Civil Procedure Rules, 2010** set out the instances where an appeal lies as of right. Among them is Order 40, rules 1, 2, 3, 7 and 11 on temporary injunctions, which is relevant to the impugned ruling and the consequent appeal. It therefore follows that the applicants did not require leave of the court to lodge an appeal against the ruling granting the respondent a temporary injunction.

12. On the merits of the Motion, the guiding provision in considering an application seeking an order for stay of execution is **Order 42, Rule 6(2)** of the **Civil Procedure Rules** which sets out the three (3) conditions in determining an application for stay.

13. The first condition is that the application must have been made without unreasonable delay. While the applicants are of the view that the Motion has been timeously filed, the respondent states that there has been a delay in bringing it.

14. As earlier noted, the impugned ruling was delivered on 14th October, 2020 whereas the instant Motion was filed 10 days later on 24th October, 2020. In my view, this does not constitute inordinate delay.

15. Under the second condition, the applicants must show to this court's satisfaction the substantial loss they would suffer if the order for stay is denied. It is the position of the applicants through Richard Simbala that, unless an order for a stay of execution is granted, the respondent will proceed to execute the order being appealed against and that the 1st applicant in particular stands to lose the monies advanced to the respondent. The applicants add that in this way, the appeal will be rendered nugatory.

16. In opposition, the respondent is of the view that the applicants will not suffer any substantial loss since they still hold the subject motor vehicle under chattels mortgage, though I note from the contents of the impugned ruling that this position was brought to question.

17. In the present instance, it is clear that a temporary injunction was granted in favour of the respondent thereby restraining the applicants from selling or otherwise disposing of the subject motor vehicle. In my understanding of the nature of the orders made by the trial court, the said orders constitute 'negative' orders which are therefore incapable of execution.

18. For all the foregoing reasons, I find that an order for a stay of execution would serve no useful purpose in the present instance.

19. Having determined so, I see no need to discuss the third condition which is the provision of security for the due performance of such decree or order.

20. In the end, the Motion dated 23rd October, 2020 is hereby dismissed for lack of merit. There shall be no order on costs of the Motion.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MARCH, 2021.

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A. MBOGHOLI MSAGHA

JUDGE

In the presence of:

Ms. Mungai for the 1st and 2nd Appellants/Applicants

Mr. Muhatia Pala for the Respondent