



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

MISC. CIVIL CASE NO.6 OF 2021

THE GUARDIAN COACH.....1ST APPLICANT

HENRY MACHARIA.....2ND APPLICANT

VERSUS

PHAUSTINE ONGACHI OJIJO.....RESPONDENT

RULING

1. The Application coming for consideration in this ruling is dated 13/1/2021 filed order Certificate of Urgency seeking the following Orders;

(i) THAT this Application be and is hereby certified urgent and heard ex-parte on priority basis in view of its urgent nature and service of the same be dispensed with in the first instance.

(ii) THAT pending the hearing and determination of this application inter-partes, there be a stay of sale by way of Public Auction of the Applicants' Motor Vehicle Reg. No. KCL 241P Isuzu scheduled to take place on 18/1/2021.

(iii) THAT pending the hearing and determination of this application inter-partes, Motor Vehicle Reg. KCL 241P be released on a running attachment.

(iv) THAT pending the hearing and determination of the application dated 6/1/2021 vide KERICHO CMCC No.345 of 2018; Phaustine Ongachi -vs- The Guardian Coach, the Honourable Court be pleased to issue an order stay of execution of the ex-parte Judgment issued on 30/4/2020 and any other incidental and/or consequential orders arising there from

(v) THAT this Honourable Court do make any such further and/or other orders and issue any other relief it may deem just to grant in the interest of Justice.

(vi) THAT the cost of this Application and the Auctioneers be borne by the Respondent.

2. The Application is based on the grounds on the face of it and supported by the Affidavit of ENOCK OJEKI sworn on 13/1/2021 in which it is deposed that the Respondent herein obtained an Ex-parte Judgment on 30/4/2020 and subsequently dismissed an Application seeking to set aside the Ex-parte Judgment on 9/12/2020.

3. Further, that the Respondent instructed HEGEONS AUCTIONEERS, who have taken out warrants of attachment and proclaimed the following Motor Vehicles belonging to the Applicant

(i) KCG 421 P

(ii) KCL 241 P

(iii) KCP 183 A

(iv) KCU 383A

(v) KCU 075 R

(vi) KCU 792 U

- (vii) KCG 420 P
- (viii) KBN 024 A
- (ix) KCA 765 M and
- (x) KCA 766 N

4. It is also deposed in the Supporting Affidavit that HEGEONS AUCTIONEERS had issued a notification of Sale and advertised the Applicant's Motor Vehicle KCL 241 P Isuzu Bus for Sale by Public Auction on 18/1/2021.
5. The Applicant further stated in the Supporting Affidavit that when he became aware of the Ex-parte Judgment dated 30/4/2020, he filed an Application dated 27/5/2020 seeking to set aside the Ex-parte Judgment and he was granted Interim Orders and the matter was fixed for hearing on 15/6/2020.
6. On 15/6/2020, the matter was adjourned to 05/07/2020 when it was again adjourned to 12/8/2020 by Consent.
7. On 12/8/2020 the Court was not sitting due to the Covid 19 Pandemic and the Applicant could not extend the Interim Orders.
8. It is deposed that subsequently, on 12/9/2020, the Application was fixed for hearing inter-partes on 9/12/2020 in the Registry but the hearing notice was not served upon the Applicant and the Application was dismissed for non-attendance by the Applicant.
9. The Applicant is now seeking Stay of Execution pending hearing of an Application dated 6/1/2021 which is seeking to set aside the dismissal orders issued on 9/12/2020.
10. The Respondent opposed the Application dated 13/1/2021 and filed a Replying Affidavit sworn on 20/1/2021 by ROBERT MOCHACHE in which it is deposed that the said Application is frivolous, Vexatious, Incompetent and Otherwise an abuse of the Court Process as it is made with the sole intention and aim of misleading the Court.
11. It is further stated in the Replying Affidavit that the Judgment dated 30/4/2020 was not Ex-parte as the Applicant was aware of the trial but did not turn up in Court to defend the case on 29/1/2020 when the matter was scheduled for interpartes hearing and the Court had no option but to enter Judgment.
12. Further, that the Applicant failed to prosecute his Application seeking to set aside the Judgment and his Application dated 27/5/2020 was dismissed for non-attendance on 9/12/2020.
13. It is also deposed that the Applicant abandoned another Application dated 16/12/2020 which was a replica of the Application which was dismissed dated 27/5/2020.
14. It was also deposed that this Miscellaneous Application is bad in law since no appeal has been preferred from the Judgment dated 30/4/2020 hence the same is just an academic exercise aimed at clogging the busy court calendar with frivolous and incompetent litigations.
15. The parties filed written submissions in the Application dated 13/1/2021 which I have duly considered. I find that it is not in dispute that the Judgment delivered on 30/4/2020 was an Ex-parte Judgment in the sense that the Applicant who was the Defendant was not in Court during the Inter-partes hearing.
16. The issue for determination in this Application is whether the Applicant is entitled to stay of Execution pending the hearing and determination of his Application dated 6/1/2021 which is seeking to set aside the dismissal of the Application dated 27/5/2020 which was seeking to set aside the Ex-parte Judgment entered on 30/4/2020.
17. I find that the Application dated 27/5/2020 was not heard and determined on merit as the same was dismissed for non- appearance by the Applicant.
18. I find that the Applicant deserves to be heard and his Application determined on merit and I accordingly allow the Application dated 13/1/2021 on condition that the Applicant pays the costs of the Application to be agreed upon by the parties or assessed by the Deputy Registrar of the Court.
19. The attachment is also lifted and the orders for stay of execution are extended pending the hearing and determination of the Application dated 6/1/2021 on condition that the Applicant pays the Auctioneer's costs before release of the Motor Vehicle Reg. No. KCL 241 P and the same to be agreed on by the parties or taxed by the Deputy Registrar of the Court.

Delivered, dated and signed at Kericho this 22nd day of March, 2021.

A. N. ONGERI

JUDGE