



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. E374 OF 2020

NOMAN TRACTORS & FARM EQUIPMENT LIMITED.....1ST APPELLANT

NUMAAN TRAKTOR AND FARM MACHINERY LIMITED.....2ND APPELLANT

- VERSUS -

CHICKEGG ENTERPRISES LIMITED.....1ST RESPONDENT

BALLOW W. NANGALAMA T/A HEBROS AUCTIONEERS.....2ND RESPONDENT

RULING

The Applicants/Appellants filed a Notice of Motion dated 15th January, 2021 under the provisions of Order 42 Rule 6, Order 43 Rule 1, Order 40 Rules 1(a) & (b) and 4, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Section 1A, 1B & 3A of the Civil Procedure Act, Cap 21 of the Laws of Kenya and all other Enabling Provisions of the Law seeking the following orders;

i. Spent

ii. Spent

iii. THAT pending the hearing and determination of the appeal the court be pleased to issue orders of stay of execution of the ruling/order made on 04.12.2020

iv. THAT the costs of this application to abide the outcome of the appeal.

The application is premised on the grounds on the face of the application and the supporting affidavit of **IRAF EBRAHIM HAROON**, a director of the Applicants sworn on 15th January, 2021. The Respondent opposed the application through a Replying Affidavit sworn on 24th January, 2021 by **GEORGE MWITI NYAGA**, a director of the 1st Respondent. The application was heard orally on 8th March, 2021 as directed by the court and both parties filed their List of Authorities.

The Appellant, being aggrieved by the decision of the Honourable A.N. Makau (Ms), Principal Magistrate delivered on 4th November, 2020 dismissing his objection proceedings made via an application dated 15th September, 2020 which sought to stop an intended sale of his agricultural farm equipments which the Appellant claim were illegally and irregularly attached, has preferred this appeal. The Memorandum of Appeal is dated 11th December, 2020. The Appellants case is that the irregular and illegal attachment of his property by the 2nd Respondent as an agent of the 1st Respondent was in execution of rent distress against Mrs. Noorbanu Mohamed Iqbal(a former tenant of the 1st Respondent) in Rent Restriction Tribunal Nairobi Case No. 12 of 2019.

The Appellant avers that his appeal has high chances of success and is therefore apprehensive that following the impugned ruling, the Respondents will move to sale the movable property through a public auction thus rendering the Appellants' appeal nugatory. The Applicants state that if the said execution is not stayed, they stand to suffer irreparable harm and loss that may not aptly be compensated by way of damages. The Appellants further avers that the present application was filed without undue delay and that the Respondents will not suffer any harm that cannot be compensated by way of damages.

In response to the application, the 1st Respondent in its replying affidavit confirmed that the current application arose from the execution of an Order of the Rent Restriction Tribunal issued on 29th July, 2020 in favour of the 1st Respondent to levy distress in order to recover rent arrears owed. It is the 1st Respondent's contention that the tenants were Noorbanu Mohamed Iqbal and Iraf Ebrahim Haroon who lived as a couple and are directors of the 1st and 2nd Applicants as per the company search. That it was on these basis that the 1st Respondent instructed the 2nd Respondent to carry out execution and distress rent on the property of the tenants stored at the premises.

The 1st Respondent urges the court to be persuaded by the ruling of the lower court and not vacate the orders of 4th November, 2020. The 1st Respondent states that the application is an abuse of the law and an attempt to defeat justice and deny the landlord the fruits of his judgment by invoking the corporate veil. It is the 1st Respondent contention that the property attached were obtained from the property of the tenants stored within their premises and therefore it was not possible for the 1st Respondent or his agents to know that the property belonged to the Appellants/Applicants.

Mr. Maina, counsel for the Appellants/Applicants argue that despite not being parties to the proceedings at the Business Premises Tribunal, the 1st Respondent executed the Tribunal's Order against the registered properties of the 2nd Appellant/Applicant. Mr. Maina relied on the case of *Peris Wakiuru Gaita V Grace Wanjiru Mbugua [2010] eKLR* where Justice Nyamu while addressing the position of an objector stated that an objector although suffers hardship is not the debtor and it is unfair to ask an objector to deposit security for performance. Mr. Maina further submitted that he rely on the principles of granting stay of execution as alluded in the case of *Amal Haulier Limited V Abdulnasir Abukar Hassan [2017] eKLR* and on the ground that the court should not refuse a stay of execution just because another remedy is available. Mr. Maina further submitted on behalf of the Appellants/Applicants that the case before the lower court was not dismissed and that the present appeal is against a ruling dismissing its application for injunction. Although, Mr. Macharia is agreeable to having the attached property be considered as security for performance, he insists that they do not belong to the tenant and that the same were found outside the premises.

It was submitted for the 1st Respondent by Mr. Macharia that the Appellants/Applicants are not properly before the court. It is the 1st Respondent's argument that if indeed the Applicants were objectors, they would have objected to the case before the Tribunal. Mr. Macharia for the 1st Respondent further states that *IRAF EBRAHIM HAROON*, the deponent in the Applicants' supporting affidavit is the husband of the tenant before the Tribunal and although the issue of the properties were raised, the Tribunal held that the execution should proceed. Mr. Macharia rely on the case of *John Nthumbi Kamwithi v Asha Akumu Juma [2018] eKLR* where the court observed the right of a landlord to levy distress and held that items found in the premises are subject to distress for rent. It is further submitted for the 1st Respondent, that in attaching the goods that were in the premises, the 1st Respondent exercised his right correctly and if stay is granted, the goods attached should be held as security for the rent.

Analysis/Determination:

The provisions of *Order 42 (6) of the Civil Procedure Rules, 2010* provides guidelines in application for stay of execution and states that:

“No order for stay of execution shall be made under sub rule (1) unless

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

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.”

The Appellants/Applicants filed their Memorandum of Appeal on 21st December, 2020. This was two (2) weeks after their application dated 15th September, 2020 was dismissed in a ruling delivered on 4th December, 2020. The present application dated 15th January, 2021 was filed on 26th January, 2021. I therefore find that the Appellant/Applicant moved with speed to file the appeal and the present application. I find that there has been no inordinate delay on the part of the applicant in bringing the current application.

The fundamental question on stay of execution emerges in the case of *Butt v Rent Restriction Tribunal {1982} KLR 417* where *Madan JA* held:

“It is the discretion of the Court to grant or refuse a stay, but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the Court as a general rule ought to exercise its best discretion in a way so as to prevent the appeal if successful being nugatory.

It is not in dispute that the 2nd Respondent acting on the instruction of the 1st Respondent proclaimed and attached some agricultural farm equipments; *Tractor Registration Number KTCB 407H, Assorted Disc Ploughs and Disc Harrows, the 2 (5 Tonnes) Farm Trailers* in execution of rent distress against the 1st Respondent's tenant. It is also not in dispute that an application before the lower court was seeking to stop an intended sale of the attached agricultural farm equipments on the ground that the Appellants/Applicants had proprietary and/ or beneficial interests in them. It is therefore evident that the appeal will be rendered nugatory and the Appellants alienated completely with the said farm equipments if the stay of execution is not granted. As to whether the appeal has high chances of success, the Appellants/Applicants claim that the property attached does not belong to the tenant and the 1st Respondent argues that the tenant and the Director of the Applicants company lived in the premises as a couple. These issues would best be determined in the appeal and I am of the view that in the event the appeal succeeds, without an order of stay of execution, there is high likelihood that the Applicants will suffer substantial loss.

On the issue of security, Order 42 Rule 6(2) makes it mandatory for the applicant to provide **“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”**. In the present Appeal, although the Applicants are of the view that it is unfair to ask the objector to deposit security as they are not party to the dispute, they have proposed that the goods attached can be held as security for performance. The 1st Respondent is equally agreeable to having the goods attached act as security for the rent owed. Order 42 Rule (6) serves the purpose of ensuring that the respondent in an appeal can have recourse to the appellant for enforcement of the decree should the appeal be lost.

For the reasons I have set out above, I find the applicant has satisfied the requirements of Order 42 Rule 6 of the Civil Procedure Rules and the Notice of Motion dated 15th January, 2021 is allowed on the following terms:

a. There shall be a stay of execution of the Ruling made on 4th December, 2020 by Honourable A.N Makau (PM) dismissing the Applicants' Notice of Motion dated 15th September, 2020 in Milimani Commercial Court Case No. 5102 of 2020 ;Noman Tractors and Farm Equipment's Limited & Numaan Traktor and Farm Machinery Limited vs Chickegg Enterprises Limited & Ballow W. Nangalama T/A Hebros Auctioneers pending the hearing and determination of the Appellants'/Applicants' appeal on condition that the Tractor Registration Number KTCB 407H, Assorted Disc Ploughs and Disc Harrows, the 2 (5 Tonnes) Farm Trailers proclaimed and attached by the 2nd Respondent shall remain as security for the rent owed.

b. The Appellants/Applicants shall meet the Auctioneers Costs.

c. The costs of the application shall abide the outcome of the appeal and shall follow the cause.

For the avoidance of doubt, the attached properties shall be released to the applicants who are hereby restrained from transferring them to any third party pending the hearing and determination of the appeal. The applicants shall always ensure that the properties are available at any time the court seek to confirm that the security has not been sold.

DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF MAY, 2021

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S. CHITEMBWE

JUDGE