



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 563 OF 2019

J. MWANGI KARIUKI.....1ST APPELLANT/APPLICANT

ANAS MOTOR LIMITED.....2ND APPELLANT/APPLICANT

VERSUS

ROSEMARY WANJIKU MUNGAI (Suing as the

personal representative of the estate of

ANDREW MACHARIA-Deceased).....RESPONDENT

RULING

1. The subject matter of this ruling is the motion dated 6th May 2021 taken out by the appellants in which they seek for the following orders:-
 - i. THAT this application be certified urgent and service thereof be dispensed with and the same be heard ex-parte and in the first instance.*
 - ii. THAT this honourable court be pleased to grant leave to the firm of Kimondo Gachoka and Company Advocates to come on record for the appellants/applicants in the place of M/S Kairu & Mc Court advocates who are on record.*
 - iii. THAT this honourable court be pleased to reinstate the applicants/appellants notice of motion application dated 09th March, 2020 and the orders for stay of execution pending appeal granted on the 24th day of September, 2020 and thereafter enlarge or extend time within which to comply with the said court order pending hearing and determination of this application.*
 - iv. THAT upon reinstatement, this honourable court be pleased to extend and/or grant orders of stay of execution of the judgment/decree delivered by the trial court on the 06th September, 2019 in the CMCC 1484 of 2013 pending the hearing and determination of the appeal.*
 - v. THAT this honourable court be pleased to grant orders of stay of execution of the judgment/decree delivered by the trial court on the 06th September 2019 in CMCC 1484 of 2013 pending hearing and determination of this application.*
 - vi. THAT this honourable court be pleased to give any other and or further orders that it may deem fit, just and expedient in the circumstances and in the interest of justice.*
 - vii. THAT the costs of this application be provided for.*
2. The motion is supported by the affidavit and a supplementary affidavit of the 1st appellant. When served, the respondent filed grounds of opposition and a replying affidavit she swore to oppose the motion.
3. When the motion came up for interpartes hearing learned counsels were invited to make oral submissions.
4. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavit filed in support and against the application. I have further considered the grounds of opposition plus the rival oral submissions.
5. It is the submission of the appellants/applicants that this court delivered its ruling online via Microsoft Teams without notice and in the absence of the parties. The appellants further aver that since the timelines given to them to comply with the conditions had lapsed they now

seek for the order for stay to be reissued and for time to comply with the conditions extended.

6. It is pointed out that the appellants became aware of this court’s ruling when the respondent’s advocate served them with a letter demanding that they pay the entire decretal sum failure to which execution would follow. The appellants stated that they are ready and willing to deposit and or provide reasonable security for the due performance of the decree.

7. The respondent argued against the application stating that the same was brought after unreasonable delay of 7 months from the date of ruling.

8. The respondent further stated that the appellants/ applicants failed to demonstrate sufficient cause to warrant the grant of the orders sought.

9. The respondent pointed out that this court issued a fresh ruling notice using the court portal therefore it cannot be claimed that the ruling was delivered without notice.

10. Having considered the material placed before this court and the rival oral submissions, it is clear that this court heard the motion dated 9th March 2020 and fixed its ruling for 25th September 2020. The record shows that the ruling was brought forward and delivered on 24th September 2020 instead of 25th September 2020. The court issued a notice bringing forward by a day all the rulings scheduled for 25th September 2020 to 24th September 2020 since the court was closed to allow fumigation of the court on 25/9/2020.

11. The appellants/applicants have stated that they were not issued with a notice of the change of the ruling date. The respondent has clearly stated that the ruling notice was posted in the court’s online portal.

12. It is possible that the appellants did not check on the court online portal on 24th September 2020 and that may explain the reason why the parties in this matter did not appear online before the court to take their ruling.

13. The appellants/applicants have stated that they became aware of the delivery of this court’s ruling of 24.9.2020 when they received a letter dated 20th April 2021 from the respondent’s advocate demanding from them to settle the decretal sum or risk execution.

14. I am convinced that the appellants/applicants have demonstrated that they deserve to benefit from this court’s discretion. In the ruling delivered on 24th September 2020, this court granted an order for stay of execution of the decree to the applicants on condition that they deposit the decretal sum in an interest earning account in the joint names of the advocates appearing in this matter. The deposit was to be made within 30 days from the date of the ruling and in default the application would be treated as having been dismissed.

15. It is obvious that the condition for stay was not met hence the application for stay automatically became dismissed. I am satisfied that the appellants/applicants deserve an order to reinstate the motion plus the resultant orders.

16. In the end, the motion dated 6th May 2021 is allowed.

Consequently, an order for stay of execution of the decree of the trial court is reissued on condition that the appellants deposit the decretal sum in an interest earning account in the joint names of advocates and or firms of advocates appearing in this appeal within 30 days from the date hereof. In default the order for stay shall stand dismissed and execution to follow. Costs of the motion to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF JUNE, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

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

..... for the Respondent