



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. E168 OF 2021

BLUE SKY WORLD LIMITED.....APPELLANT

VERSUS

CASSAMIA INVESTMENTS LIMITED.....1ST RESPONDENT

ARFA ARFA LIMITED.....2ND RESPONDENT

RULING

- 1) Blue Sky World Ltd, the appellant/applicant herein took out the motion dated 24th March 2021 whereof it sought for two main orders. **First** is an order for stay of execution of the dismissal order issued by the trial magistrate on 15th March 2021 pending appeal and **secondly** an order for temporary injunction to restrain the 1st respondent, its agents or servants from selling, disposing of or in any way interfering with the attached property pending appeal.
- 2) The appellant filed the affidavit and a further affidavit sworn by Oleksii Sierkor in support of the application. The 1st respondent filed grounds of opposition and a replying affidavit sworn by Gaetano Ruffo to resist the motion. When the motion came up for interpartes hearing this court gave directions to have the motion disposed of by written submissions.
- 3) I have considered the grounds stated on the face of the motion dated 24th March 2021 and the facts deponed in the rival affidavits. I have also considered the 1st respondent's grounds of opposition plus the rival written submissions and the authorities cited by the parties.
- 4) The history behind this dispute is deducible from the material placed before this court. Casamia Investments Ltd, the 1st respondent herein is the owner of IR 16229/1 where the building known as 20th Century Plaza stands and has rented the premises to Arfa Arfa Ltd, the 2nd respondent. The 2nd respondent has a lease over the theatres and related premises at the said 20th Century Plaza vide a lease agreement dated 6th March 2012.
- 5) It would appear the 2nd respondent fell into arrears of rent hence the 1st respondent levied distress to recover the outstanding rent. The 2nd respondent obtained an interim order of injunction on 10th July 2020 prohibiting the auction that was scheduled to take place on 15th July 2020. In the aforesaid application the 2nd respondent averred that the items attached in the premises were its property and tools of trade.
- 6) On 25th November 2020, the trial magistrate dismissed the 2nd respondent's application thus paving way for the 1st respondent to proceed with the distress by re-advertising the auction of the attached good on 18th December 2020.
- 7) On 16th December 2020, the appellant which was the objector in the trial court obtained an order halting the second sale which had been scheduled for 18th December 2020. The 1st respondent opposed the appellant's objection. On 15th March 2021 Hon. Murage, learned Senior Resident Magistrate dismissed the appellant's objection, prompting the appellant to prefer this appeal and the instant application.
- 8) It is the submission of the appellant that unless the orders sought are granted it would suffer substantial loss in that the amounts involved is colossal. The appellant estimated the value of the attached properties to be 1,040,000/=. It is said that the appellant is in the business of leasing the aforesaid equipments which are highly specialized and being the only source of income to the appellant.
- 9) The 1st respondent aver that there is nothing to stay because the order of dismissal is a negative order which is incapable of execution. The 1st respondent further argued that the appellant has not given an undertaking as to damages therefore the order should be denied.

10) There is no doubt that on 15th March 2020, Hon. Murage, learned Senior Resident Magistrate dismissed the appellant's objection proceedings. There is no dispute that the appellant obtained an order halting the sale of the attached goods via the objection proceedings as a matter of right pending the hearing and determination of the objection proceedings. The effect of the dismissal order meant that the appellant lost the automatic order of stay given upon filing the objection proceedings.

11) In my view if the order for stay is granted, it means that the order dismissing the objection proceedings is halted thus indirectly retaining the orders that came with the filing of the objection proceedings.

12) In my humble view, a stay of the dismissal order of objection has the effect of maintaining the status quo as if the orders which came upon the filing of the objection proceedings were reinstated. Having dispensed with the preliminary issue, I now consider the merits of the application.

13) In an application for stay an applicant must show the substantial loss he would suffer if he is denied the order. The applicant has stated that the property attached are specialized equipments which are very expensive and cannot easily be found in the local market. I am satisfied that the applicant has shown the substantial loss it would suffer if the order for stay is denied. The other consideration which the court must take into account is the provision of security for the due performance of the decree.

14) The 1st respondent has argued that the appellant has not given an undertaking as to damages. In the circumstances of this matter, there is no need to order the appellant/applicant to provide security because the 1st respondent is still holding the attached property whose value runs into millions of shillings.

15) In the end, I find the motion dated 24th March 2021 to be meritorious. It is allowed. Consequently, there be an order for stay of execution of the dismissal order issued on 15th March 2021 and the intended sale of the attached goods pending appeal.

16) Costs of the motion to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 26TH DAY OF AUGUST, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent