



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. E030 OF 2021

GRACE MARY NJAMBI KARIUKI.....APPELLANT

-VERSUS-

1. MUTUA MUNYITHYA.....1ST RESPONDENT

2. DANIEL NGIGI NGITONGO.....2ND RESPONDENT

3. DANIEL NGIGI GITONGA.....3RD RESPONDENT

4. PATRICK MWALOLO.....4TH RESPONDENT

RULING

1. The application for determining is a **Notice of Motion**, dated **25th March, 2021**. It seeks stay of execution of the decree by the Plaintiff and/or his agents and more specifically, **M/s Makini Auctioneers** from disposing the Appellant/ Applicant's **Motor Vehicle Registration Number KAZ 182 U** make Nissan Caravan pending determination of the instant appeal.

2. In addition to the grounds on the face of the application, the Appellant/ Applicant swore an affidavit on **25th March, 2021** where she has stated that she had filed objection proceedings before the trial court by an application dated **30th October, 2020** seeking to stop the proclamation and attachment of **Motor Vehicle Registration Number KAZ 182 U** on grounds that at the moment the said motor vehicle was attached, she had already acquired it from the Judgment debtor and had already begun to pay the insurance premiums save for that ownership of the vehicle had not changed largely because the Applicant had gone for maternity leave. Secondly, that the NTSA

offices had been closed to mitigate against the spread of Covid-19 virus. Nonetheless, the trial court dismissed the application vide a ruling dated **5th March, 2021** of which the Appellant being aggrieved, has filed the instant appeal. She is however seeking to be granted the orders for stay pending appeal on the ground that the 1st Respondent has through his auctioneers **M/S Makini Auctioneers** proceeded to advertise the subject motor vehicle for sale by public auction. She avers that if the court does intervene in the circumstances, the sale of the said motor vehicle will cause the Appellant/Applicant substantial loss and even render the appeal nugatory.

3. The 1st Respondent opposed the application through the replying affidavit sworn by his advocate, **Kioko Maundu** on **21st April, 2021**. The learned counsel has deposed that the 1st Respondent had on **30th August, 2017** sustained injuries following a road accident involving the 3rd Respondent's **Motor Vehicle Registration Number KBC 434F** in which he was travelling on. That the 1st Respondent instituted proceedings for recovery of damages and Judgment was entered against the 3rd Respondent on **21st November, 2019**. Thereafter, the 1st Respondent began the execution process and on **8th October, 2020** attached **Motor Vehicle Registration Number KBC 434F**, which was at that time registered in the name of the 3rd Respondent.

4. The learned counsel now laments that the Appellant/Applicant has taken up the objection proceedings without any colour of right and in any event, the

insurance policies she purports to have been paying are not title of ownership. The counsel also faults the agreement of sale of Motor Vehicle Registration No. KAZ 182U for not being registered and describes it as a fabrication aimed to defeat the execution. Above all, the counsel asserts the view that in an application like the one at hand, stay cannot be granted.

5. The averments in the **Replying Affidavit** elicited a further affidavit by the Appellant/Applicant in which she avers that the issue on change of ownership of the subject motor vehicle is to be determined on substantive hearing of the main suit and the centre of attention should only

be on whether stay of execution orders should issue pending appeal. She however reiterates that she has an equitable interest in the suit motor vehicle and it is in the interest of justice that the subject matter be preserved to avoid rendering the appeal nugatory.

6. The application was canvassed by way of written submissions with the Appellant/Applicant filing hers on **25th May, 2021** while those for the 1st Respondent were filed on **28th June, 2021**.

7. The submissions by the Appellant reiterate the grounds on face of the application and in the affidavits sworn in support of the application in line with the provision of **Order 42 Rule 6(2)** of the **Civil Procedure Rules, 2010**.

8. For the 1st Respondent, on and above reiterating the grounds in the **Replying**

Affidavit, it is submitted that an appeal on a ruling in objection proceedings does not lie as of right. That leave to appeal has to first be sought before the trial court but the Applicant herein has ignored to seek the requisite leave. Without such leave, it has been submitted that the appeal as well as the present applications are illegally before the court and sanctioning the orders sought, would be tantamount to sanctioning the illegality.

9. On the substance of the application, it is submitted that the appeal is not channeled to challenging the process of execution being undertaken by the 1st Respondent but instead it challenges the dismissal order in objection proceedings. Therefore, were stay orders to be granted as sought, then they would clog the ongoing process of execution when that was not the intended purpose of the appeal. That notwithstanding, it is argued that the applicant is seeking stay of execution against a dismissal order which is a negative order incapable of execution.

10. As regards the conditions set under **Order 42 Rule 6** of the **Civil Procedure Rules**, it has been submitted that the Applicant has not shown sufficient cause for the stay orders to be granted or that she is likely to suffer substantial loss if the orders are not granted. Lastly, it has been submitted that should the court be minded to grant the stay orders, then the Applicant should be directed to deposit the sum of Kshs.472,710/= being the decretal sum in the lower court suit.

Analysis and Determination

11. This court has carefully considered the application dated **25th March, 2021**, the affidavits sworn in support and in rebuttal of the same, the rival submissions filed, the law and the authorities relied on by the parties. The core issue for determination is whether the Appellant/Applicant has demonstrated a case to warrant the stay of execution of the decree issued in favour of the 1st Respondent in **Mombasa SRMCC 452 of 2018**.

12. It is evidently clear from the record that the decree was not issued against the Appellant/Applicant but was issued against the 2nd to the 4th Respondents, thus the Applicant has no obligation whatsoever to settle the subject decree.

13. I have also read through the Memorandum of Appeal and find that the Applicant has not indicated therein that she intends to challenge the subject decree. The order which she intends to challenge through the appeal is the ruling delivered on **5th March, 2021** dismissing her application objecting the attachment of **Motor Vehicle registration number KAZ 182U**.

14. In my view, and while in agreement with the 1st Respondent's counsel submissions, this court cannot order stay of a decree that is not the subject of the instant appeal. Stay of execution can only be granted if the intended appeal is against the order being appealed against.

15. Therefore, in circumstances of the instant case, the orders of stay of execution of the decree as sought by the Applicant cannot issue since it is not the subject decree of which the intended appeal is directed.

16. In any event, the subject of the appeal is the ruling delivered on the **5th March, 2021** dismissing the Appellant/Applicant's application dated **30th October, 2020** which was objecting the attachment of **Motor Vehicle Number KAZ 182U**. The order dismissing the application is in the nature of a negative order and is incapable of execution, hence the same is not capable of being stayed. A similar view was applied in the case of **Raymond M. Omboga –vs- Austine Pyan Maranga Kisii HCCA No.15 of 2010**, where the court observed thus:-

“The court cannot see how it can order stay of the decree that is not the subject of an appeal. Had the aforesaid order been the subject of this appeal then different considerations would have applied. The court would have looked at it alongside the settled principles aforesaid for granting stay of decree. The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise... It is trite law that stay of execution pending appeal can only be granted against the order being appealed against. Put differently, an order for stay of execution pending appeal cannot be granted if the intended appeal is not against the order sought to be stayed; yet this is what obtains in this application where the applicant's appeal is against the order of dismissal of his application, yet the stay sought is against the subordinate court's Judgment or decree.”

17. Similarly in the case of **Co-operative Bank of Kenya Limited –vs- Banking Insurance & Finance Union (Kenya) [2015]eKLR**, it was

held as follows:-

“An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a “positive order” – either an order that has not been complied with or has partly been complied with. See, for this general proposition, the holding of the Court of Appeal of Uganda in Mugenyi & Co. Advocates –vs- National Insurance Corporation (Civil Appeal No. 13 of 1984) where it was stated:

‘..... an order for stay of execution must be intended to serve a purpose ...’ (emphasis supplied).

18. Further, the court of appeal in the case of Kanwal Sarjit Singh Dhiman –vs- Keshavji Juvraj Shah [2008] eKLR, the expounded on stay of execution stating that: -

‘The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the Judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see Western College of Arts & Applied Sciences vs. Oranga & Others [1976] KLR 63 at page 66 paragraph C).’

19. It is clear from the foregoing cases that as the orders sought to be stayed were negative orders, by merely dismissing an application dated **30th October, 2020** there is nothing for this court to stay. Consequently, the application dated **25th March, 2021** is for dismissal.

20. The application dated **25th March, 2021** is therefore dismissed with orders that costs abide the outcome of the intended appeal.

It is hereby so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF OCTOBER , 2021.

D. O. CHEPKWONY

JUDGE

In the presence of:

No appearance for and by either party

Court Assistant - Gitonga