REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO 9 OF 2020

RANA AUTO SELECTION LTD.....APPELLANT

VERSUS

LILIAN OSEBE MOSES.....RESPONDENT

RULING

1. The application before me is seeks a stay of execution pending the hearing and determination of this appeal. The appellant alleges that trial magistrate delivered a judgment in favour of the Respondent herein to the tune of Kshs 950,000/-. The applicant preferred an appeal against the decision and also filed an application for stay of execution pending appeal. The trial court determined and dismissed its application for stay of execution that was before it on 9th October 2020.

2. The applicant explained that its advocate on record took ill for the better part of the year 2020 and somehow the matter fell off the firm's internal cause list. The respondent has thus proceeded to instruct auctioneers to execute for the decretal sum. The applicant contends that if the execution process is stopped, its appeal will be rendered nugatory.

3. The applicant also claims that the respondent's means are not within the knowledge of the applicant and the court, hence, if the decretal sum is paid at this stage the likelihood of refund is not guaranteed should the appeal succeed. According to the applicant it has already deposited Kshs 400,000/- in a joint earning interest account which amount the applicant is willing to be retained as security subject to further orders and conditions which the appellant is willing and ready to abide by.

4. The application was the supported by affidavit sworn by Sultan Ali Khan dated 28th April 2021 and a supplementary affidavit dated 2nd July 2021.

5. The respondent's opposed the application by filing a replying affidavit dated 21st May 2020. The respondent averred that judgment was entered against the applicant in **CMCC No 437B of 2015** whereupon the applicant filed an application in the lower court under the provisions of **Order 42 Rule 5 of the Civil Procedure Rules** seeking stay of execution of the decree of the lower court pending hearing and determination of the intended appeal. The trial court heard and dismissed the application. The respondent contends that it has now taken the applicant over 5 months before presenting the present application and the said application was prompted by the action of the decree holder to take out execution proceedings.

ANALYSIS AND DETERMINATION

6. I have carefully considered the Affidavits on record, the submissions of Counsel and the authorities relied on. There is one issue to be determined with regard to this application, namely: whether or not the Court should grant the Applicant stay of execution pending hearing of the Appeal.

7. ***Order 42 Rule 6(2)*** **of the Civil Procedure Act** sets out the principles that the court should consider while deciding whether to grant *Stay of Execution Pending Appeal*. These are:-

> ***"No order for stay of execution shall be made under subrule (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."***

8. In ***James Wangalwa & Another vs. Agnes Naliaka Cheseto*** **[2012] eKLR**, the court observed that:

> ***"No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."***

9. In the case of **Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007** the court stated:

> ***"The word "substantial" cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words "substantial loss" must mean something in addition to all different from that…Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the*** **status quo** ***pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment."***

10. The applicant is required to show that substantial loss would be occasioned if the orders sought are not granted. The applicant was apprehensive that if stay was denied, the Respondent would not be in a position to refund the decretal sum paid out, in the event of the appeal resolves in his favour. In **National Industrial Credit Bank Ltd vs Aquinas Francis Wasike and Another [2006] eKLR** the Court of Appeal stated that:

> **"This court has said before and it would bear repeating that while the legal duty is on an Applicant to prove the allegation that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such Applicant to know in detail the resources owned by a Respondent or the lack of them. Once an Applicant expresses a reasonable fear that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example Section 112 of the Evidence Act, Chapter 80 Laws of Kenya."**

11. The award of Kshs 950,000/- is a substantial amount and there was need for the respondent to show the resources she had in order to disprove the case established against her by the applicant.

12. The applicant is required to make his application timeously without unreasonable delay. I am not satisfied regarding the same in this instant application. The applicant filed a notice of motion dated 13th February 2020 before the trial court seeking stay of execution pending hearing and determination of the appeal filed before this court and its application was dismissed on 9th October 2020. The applicant took no further step following the dismissal of its application and has only filed this instant application after the lapse of 6 months.

13. Although there has been delay, I cannot find that the delay was unreasonable as the applicant attributed the delay to his advocate being ill for the most part of 2020.

14. Having carefully considered the instant Application and the written submissions, the Court finds and holds that the Applicant has met the threshold to warrant the Court exercise of its discretion in its favour. I hereby allow the Notice of Motion Application dated 28th April 2021. The applicant to deposit a sum of Kshs 400,000/- in court within 30days and in default execution to issue. Costs shall follow the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT KISII THIS 27TH DAY OF OCTOBER, 2021.

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A.K. NDUNG'U

JUDGE