



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL CASE NO. 576 OF 2019

CHARLES WATATUA KABURU.....1ST APPELLANT/APPLICANT

WALWA PATRICK MACHARIA.....2ND APPELLANT

VERSUS

ERIC OTIENO OCHIENGRESPONDENT

RULING

1. The Application dated 13th August, 2020 seeks orders that:

1. Spent

2. Spent

3. Spent

4. Spent

5. Spent

6. That the Applicant's Motor Vehicle Registration No. KCT 510L be released to the Applicant on a running attachment pending the hearing and determination of this application.

7. Spent

8. That the Warrants of Attachment of Moveable Property in execution of the Decree be set aside or lifted unconditionally.

9. That the Auctioneers do tax their bill in the event that the same is not agreed upon.

10. That there be a stay of execution and/or further execution of the Judgment and Decree delivered on 13th September, 2019 in CMCC No. 1833 of 2019 and all consequential orders and/or proceedings arising therefrom pending the hearing and final determination of the appeal as prayed in the applications dated 4th August, 2020 and 5th August, 2020.

11. That the Appellants be granted leave to amend the Memorandum of Appeal to include issues that were inadvertently left out to enable this honourable court to determine all issues with a finality.

12. That the costs of this application be in the cause.

2. The application is supported by the supporting and supplementary affidavits sworn by the Applicant, Charles Watatua Kaburu. It is deponed that previously the firm of Mogaka Omwenga and Mabeya were on record for the Applicant. That on 3rd August, 2020 the Applicant's Motor vehicle was attached by the auctioneers. That the said motor vehicle is a business motor vehicle as it is used to transport goods for sale. That the Applicant stands to suffer substantial loss as the attachment will cripple the Applicant's business and render the Appeal nugatory. It is further averred that the Appeal is arguable with high chances of success. The Applicant is willing to abide with the

terms that the court may set in granting the order sought.

3. The application is opposed. It is stated in the Replying Affidavit that the application has been brought after inordinate delay on the on the pretext of negotiations. That the Applicant only moved the court following the commencement of the execution. That the Applicant admits 50% of the claim yet no efforts to pay have been made.

4. I have considered the application, the response thereof and the rival submissions.

5. The well settled principles guiding the grant of a stay of execution pending appeal are provided under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides as follows:

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.

6. The Appeal herein was filed on 9th October, 2019. The judgment of the lower court was delivered on 13th September, 2019. The first application for stay of execution before this court was filed on 4th August, 2020 by the firm of Mogaka Omwenga & Mabeya Advocates. Subsequently the firm of Meritad Law Africa LLP filed the instant application and a consent was subsequently filed by the two firms of Advocates for the firm of Meritad Law Africa LLP to come on record on behalf of the Applicant.

7. The Applicant has explained in the supplementary affidavit that the application for stay of execution was first filed in the lower court on 8th October, 2019 but that the same was not certified urgent on the basis that there was no impending execution. That on 3rd August, 2020 the Respondent started the process of execution, hence the application herein made on 4th August, 2020 for stay of execution. That 4th August 2020 it was during the High Court vacation and the application could not be served as the Respondent's advocate's offices were closed. In the premises, I find that in the circumstances of this case, the delay was not inordinate and has been explained to the satisfactory of the court.

8. It is not in dispute that the execution process has been put in motion. Indeed, the Applicant's motor vehicle has been attached by the auctioneers. The Applicant is apprehensive that in the event that the Appeal is successful, the Respondent may not be able to refund the decretal sum. The Respondent has not said anything about his means. As stated by the Court of Appeal in the case of **Nrb Civil Application 238 of 2005 (UR 144/2005) National Industrial Credit Bank Ltd -Vs- Aquinas Francis Wasike & Another**:

“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 an 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.”

9. The Appellant is willing to abide by the conditions that the court may impose for the due performance of the decree. The Appeal herein is on both liability and quantum. To balance the competing interests of both parties herein, the application is allowed on condition that the Applicant do deposit 50% of the decretal sum in a joint interest earning bank account of the Advocates for the parties or in court within 30 days from the date hereof.

Dated, signed and delivered at Nairobi this 21st day of October, 2021

B. THURANIRA JADEN

JUDGE