



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL APPEAL NO. E116 OF 2021**

**PLATINUM CREDIT LIMITED.....APPLICANT/ APPELLANT**

**VERSUS**

**FRANCIS ALUVUSI.....1<sup>ST</sup> RESPONDENT**

**SAMUEL WANJOHI.....2<sup>ND</sup> RESPONDENT**

**FRED OMBATI ONUNDU.....3<sup>RD</sup> RESPONDENT**

**Coram - R. Nyakundi**

**Ms. Mogire Advocate for the Applicant**

**Ms. Alwanga Advocate for the Respondent**

**RULING**

1. What is before this court is an application dated 23<sup>rd</sup> September, 2021 for stay of execution expressed to be brought under Order 40 of the Civil Procedure Rules. The Applicant seeks orders for a temporary stay on the sale of the motor vehicle registration number KAY 612X Isuzu NQR, through public auction pending the hearing and determination of appeal. The applicant has interest in the vehicle as a secured creditor for which the vehicle is a security.

2. The orders being sought are grounded on the following: -

- a. The Plaintiff has obtained ex-parte judgment against the Defendants/Applicants.**
- b. That there was no service of summons to enter appearance and pleadings on the Defendants/Applicants**
- c. That Plaintiff has proceed to execute the same to the detriment of the Defendants/Applicants.**
- d. That the execution of the ex-parte judgment infringes on the Defendant's/Applicant's constitutional right to a fair hearing.**
- e. That it is fair, just, expedient and in the interest of justice that this application be allowed and the ex-parte interlocutory judgment be set aside by this Honourable Court.**
- f. That this application has been brought promptly and in utmost good faith**

In addition, the application averred in the affidavit in support why the injunctive and prohibitive orders among other collateral directions should ensue for the benefits of the right orders to property being subject of execution.

The Respondent in opposition relied on the content of his replying affidavit dated 7<sup>th</sup> October, 2021 is to the effect that the applicant has failed to demonstrate existence of substantial loss if the orders of injunction are not granted. That the impugned judgment was entered on 10<sup>th</sup> September, 2020 and the decree is yet to be issued or certified by the court. Further the respondent depones that the application was not privy to the trial court proceedings hence which culminated in the said judgment and decree.

**RESOLUTIONS: -**

3. The principles guiding the grant of stay of execution pending appeal are well settled. These principles are as expressly set out under order 42 Rule 6 of the Civil Procedure Rules. They include the following.

- a) **That the court must be satisfied that substantial loss may result to the applicant unless the order is made.**
- b) **The application has been made without unreasonable delay.**
- c) **That security as the court orders for due performance of such decree or order as may ultimately be binding on him has been given by the applicant**

4. For these see the case of **Vishran Ravji Halae v Thorntone & Turpin C. A. NO. 15 of 1990 (1990) KLR 365.**

Whether an application is for stay of execution or injunction one fundamental principle is for the court to take whatever route that appears to carry the lower risk of injustice and prejudice to the parties, in the event it turns out that grant or denial of the equitable remedy was not justified. The other consideration being that a successful litigant should not be deprived of the fruits of his or her judgment without sufficient good cause. This is what can be deduced from the comparative jurisprudence (**Hammuel Sundarel Solicitors Vs. Agrichem International Holdings Limited (EWCA Civil 2065 Clerke L.J)**) opined that:

*“Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether, there is a risk of injustice to one or other or both parties if it grants or refuses stay. In particular, if a stay is refused to what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand if a stay is refused and the appeal succeeds, and the judgment is entered in the meantime what are the risks of the appellant being able to recover any monies paid from the respondent”*

In the instant case from the trial court record, under order 42 Rule 6 of the Civil Procedure Rules the judgment creditor - Francis Aluvusi moved the court for execution and enforcement of the decree against one **Samuel Wanjohi and Fred Ombati Onundu; in CMCC No. 1186 of 2016** for a decretal sum of 534,575.00. That execution culminated in the instructions vide issuance of proclamation and attachment of Motor Vehicle Registration KAY 612X to satisfy the decree by desire Recovery Auctioneers that mode of execution and attachment was objected to by Platinum Credit Limited. As a consequence objection proceedings were initiated to lay a claim of beneficial interest over the subject motor vehicle. As a party who was aggrieved with the dismissal of the objection proceedings he has intimated to prefer an appeal to challenge the decision of the trial court. A casual appraisal of the memorandum of appeal on the contemplated appeal and the filed affidavit in support of the motion, there may be a basis for the grant of a stay of execution. After assessing the averments in the affidavits, it seems that the applicant had a secured interest on the subject motor vehicle registration KAY 612X against Samuel Wanjohi for Kshs. 450,000/-. Whereas, the judgment creditor, Francis Aluvusi, was not part of that loan agreement. The making of the execution order has a bearing to the construction and interpretation of the instrument annexed in support of the credit facilities advanced to judgment debtor Samuel Wanjohi. In the arguments being canvassed by the applicant there is a reasonable prospect that if stay is not granted the possibility of being ruined financially is real; and the appeal may be rendered nugatory. I tend to agree with that measure of fear in the instant case. Furthermore, Samuel Wanjohi has not provided any evidence or an alternative asset or source of income to settle the outstanding debt owed to the Applicant Platinum Credit Limited.

The consideration is that if the auctioneer proceeds to sell, transfer or otherwise dispose off the disputed motor vehicle to a third person it may as well pose a risk of the applicant suffering substantial loss. The risks of the applicant being able to recover the debt or any other compensation from the creditor Samuel Wanjohi remains in the realm of remoteness. Such a result was the reasoning of the court in **James Wangalwa & Another Vs. Agnes Naliaka Cheseto (2012) EKLR.**

**Global Tours and Travel Limited Vs Fave Continents Travel Limited (2015) eKLR. Silvester Vs Chesoni (2002) KLR (867).**

What is to be stayed here is the sale of the motor vehicle KAY 612X as an immovable property to satisfy the decree in **CMCC 1186 of 2016** if such sale goes through, and stay is not granted it will remain irreversible and necessarily the applicant may not necessarily be compensated by way of damages. It simply means that this court must put a stop to the further proceedings on execution of the decree before the lower court involving this subject motor vehicle to avoid the appeal being rendered nugatory. It is also an exercise of discretion to prevent the act of substantial loss against the applicant pending the determination of the appeal or as the court otherwise orders. This to me makes perfectly good sense in the context of the proceedings and litigation history. The subject matter by virtue of order 42 Rule 6 while exercising these powers to ensure that the ends of justice are met I take the approach of ordering the suspension of warrants of attachment and sale of the stated motor vehicle to await the determination of the intended appeal. For purposes of this Rule it is accepted that in respect of security for due performance of the decree, the phrase stay order, the sale, transfer, disposal, intermeddling with the aforesaid motor vehicle would apply as an armory not to expose any of the parties to a risk of loss temporarily to survive the pending appeal. It is not therefore prudent to order for deposit of any decretal sum for due performance of the decree as an interim measure for grant of stay of execution. As a consequence the balance of convenience and justice of the case tilts in favour of the applicant.

It is for those reasons the notice of motion dated 23<sup>rd</sup> September, 2021 is granted with costs to abide the appeal.

**DATED, SIGNED AND DESPACHED VIA THE EMAILS AT ELDORET THIS 25<sup>TH</sup> DAY OF NOVEMBER, 2021.**

**R. NYAKUNDI**

JUDGE