



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. E404 OF 2021

CITIZENS CREDIT LIMITED.....APPELLANT/APPLICANT

VERSUS

JANET ANYANGO ODHIAMBO.....RESPONDENT

RULING

1. The appellant/applicant in this instance has brought the Notice of Motion dated 14th July 2021 supported by the grounds set out in its body and the facts deponed in the supporting affidavit. The applicant sought for the substantive orders for stay of execution of the judgment and decree delivered by Hon P Muholi on 11th June 2021 pending the hearing and determination of this appeal.
2. The respondent opposed the Motion by filing the replying affidavit sworn by Janet Anyango Odhiambo on 21st July 2021.
3. The parties were directed to file written submissions but at the time of writing this ruling the respondent had not filed her submissions. I have considered the grounds set out on the face of the motion dated 14th July 2021 and facts deponed in the rival affidavits.
4. A brief background of the matter is that the on or about November 2017 the respondent was advanced by the applicant a loan of Kshs.740,000/= which was secured by the respondent's motor vehicle registration number KBN 216J. The respondent made some payments with the last being on 26th August 2018 leaving a balance of Kshs.383,769/= and from that time to date the respondent has never made any further payments.
5. The respondent's failure to pay the loan lead to the applicant instructing auctioneers in October 2019 to reposses the motor vehicle for purposes of selling it to recover the outstanding amount.
6. The respondent insisted a suit at the same time filed an application under certificate of urgency dated 24th October 2019 seeking temporary injunctive orders stopping the applicant from selling or dealing with the respondent's motor vehicle.
7. Upon hearing the parties, the trial court rendered a ruling on 11th June 2021 allowing the respondents application. Being aggrieved by the aforementioned decision the applicant has appealed to this court against the lower court's ruling.
8. In his affidavit filed in support of the motion dated 14th July 2021, Mr. Kenneth Muriuki the collection officer to the appellant/applicant stated that by releasing the vehicle the applicant's loan will effectively have been converted to an unsecured loan whereas the parties mutual intention at the time when the loan was advanced.
9. He avers that the respondent's advocate would initiate contempt proceedings against the applicant if the motor vehicle is not released to the respondent in compliance with the court order.
10. He further stated that the said motor vehicle has not been sold as the same is at the Startruck Car Yard and Storage along Kiambu Road.
11. It is his submissions that the respondent has not shown how she would settle the amount owed to the appellant despite being in arrears since 2019 and admitted that her fish business had collapsed, she therefore does not have the financial capabilities to settle the debt owed to the respondent.
12. He further contends that without the security issued by the respondent the appellant is at risk of losing the security and the amount loaned to the respondent. On this counsel relied on ***National Industrial Credit Bank Limited v Aquinas Francis Wasike & Another (2006) eKLR***
13. He submitted that the trial court in releasing the motor vehicle without requiring the respondent to pay part of the amount owed to the appellant/applicant or provide an alternative security amounted to varying or re-writing a legally binding contract and as well as undermining

the appellant’s right under the contract. On this counsel relied on *Absalom Dova v Tarbo Transporters (2013) eKLR*

14. In response, Ms. Janet Anyango Odhiambo stated that she has not had her motor vehicle for past two years and that when she visited the yard where he last saw the motor vehicle being Kenya Valuers Yard, she did not find it. She further stated that it could not be traced in their records and that she overheard the staff saying that the motor vehicle must have been sold.

15. She stated that the current application is intentioned to cover up the fact that this motor vehicle is not there and that she has suffered as the motor vehicle was deployed in her fish business which has since collapsed.

16. The principles guiding the grant of an application for stay of execution pending appeal are well settled. These principles 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.

17. On the issue of substantial loss, which is the cornerstone in an application for stay. The appellant/applicant in this matter avers that the respondent has not discharged the evidential burden by proving to this court that once the motor vehicle held by the applicant has been released that the respondent will pay back the outstanding amount owed to the applicant.

18. It is not in dispute that the respondent has not made any payments towards the loan and the last payment of Kshs.25,000/= on 26th August 2018 leaving a balance of Kshs.383,769/= and that it would be unfair to the applicant if the respondent would be allowed to have his vehicle released to her leaving the applicant without any form of security that can be used to recover the defaulted loan.

19. In *Harit Sheth Advocate -vs- Shamas Charania – Civil Appeal No. 68 of 2008*, this Court held:-

“The principal aims of the overriding objective include the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing.”

20. The motion therefore is competently before this court. Having considered the material placed before me I am satisfied that the applicant has satisfied the conditions necessary for grant of an order for stay pending appeal.

21. In the end the motion dated 14th July 2021 is found to be With merit. It is allowed as prayed save as costs shall abide the outcome of this suit.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent