



REPUBLIC OF KENYA



KENYA LAW
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**Gachare v Platinum Credit Limited & 2 others (Civil Appeal E040 of 2021)
[2021] KEHC 418 (KLR) (Commercial and Tax) (16 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 418 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E040 OF 2021
WA OKWANY, J
DECEMBER 16, 2021**

BETWEEN

DEREK KIMANTI GACHARE APPELLANT

AND

PLATINUM CREDIT LIMITED 1ST RESPONDENT

AUCKLAND AUCTIONEERS 2ND RESPONDENT

SWALEH A. BAJABER 3RD RESPONDENT

RULING

Background

1. The Appellant and the 1st respondent herein entered into a loan agreement in which the appellant used motor vehicle registration number KBJ 571W (hereinafter referred to as the ‘motor vehicle’) as security to obtain a loan facility from the 1st Respondent. It was agreed that the 1st respondent would repossess and sell the said motor vehicle in the event that the appellant defaulted in the loan repayments. The Appellant defaulted in the loan repayments and the 1st Respondent, through the 2nd Respondent, repossessed the motor vehicle and sold it to the 3rd Respondent thus precipitating the filing of the suit and application for the release of the motor vehicle before the Lower Court. The Lower Court allowed the application and directed the 1st and 2nd Respondents to release the motor vehicle to the applicant but the said court later set aside the release orders and ordered the Appellant to unconditionally restore the motor vehicle to the 3rd Defendant Respondent. This ruling relates to the prayer to stay the Lower Courts release orders issued on 21st May, 2021.

Application

2. The appellant/applicant filed the application dated 24th May 2021 seeking the following orders: -



1. Spent.
2. Spent.
3. That pending the hearing and determination of this appeal, the Honourable Court be pleased to stay execution of the orders issued by the Honourable D. W. Mburu SPM on 21st May, 2021 ordering release of Motor Vehicle Reg. No. KBJ 571W to the 3rd Respondent.
4. That the costs of the application be in the cause.
3. The application is supported by the applicant's affidavit and is premised on the grounds that: -
 - a) That the appellant has filed an appeal against the orders issued by the Honourable D.W. Mburu SPM on 21st May 2021 ordering release of Motor Vehicle Registration No. KBJ 571W to the 3rd respondent and the appeal has high likelihood of success.
 - b) That the appellant is disputing the sale of Motor Vehicle Registration No. KBJ 571W to the 3rd respondent by the defendants on account of illegality and fraud.
 - c) That unless this application is heard and allowed at the first instant, the appellant will suffer loss as the 3rd respondent may transfer the motor vehicle to a third party thereby rendering the appellant's application a mere academic exercise and causing the appellant to lose the motor vehicle.
 - d) That the appellant is ready and willing to provide such security as the court may order.
 - e) That this application has been made without unreasonable delay.
4. The respondents opposed the application through their respective replying affidavits wherein they mainly state that the orders sought have been overtaken by events and that the application does not meet the threshold set for the granting of orders of stay of execution pending appeal.
5. Parties canvassed by way of written submissions which I have considered. The main issue for determination is whether the applicant has made out a case for the granting of the order for stay of execution pending appeal.
6. Order 42 Rule 6 of the *Civil Procedure Rules* sets out the conditions for the granting of an order for stay of execution pending appeal. Under the said provision, the court will issue an order for stay only when satisfied that the following conjunctive requirements are met: -
 1. Substantial loss may result if stay is not granted.
 2. That the application for stay was made without unreasonable delay; and
 3. That 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.
7. The Appellant submitted that it is necessary to preserve the suit motor vehicle as it is the subject matter of the appeal which will be rendered nugatory unless the orders sought are granted. The Appellant maintained that it has an arguable appeal with good chances of success and that he will suffer substantial loss if the orders sought are not granted
8. The respondents, on the other hand, submitted that the Appellant will not suffer any loss if stay is not granted as the 1st Respondent rightly exercised its right of sale following the Appellant's default in the loan repayments. They submitted that the Appellant will not suffer any loss as he does not have any



legitimate or equitable right or interest in the subject motor vehicle. They added that the Appellant will still be able to recover damages for any loss he may have incurred in the event that he succeeds on the appeal. They further argued that the application has been overtaken by events following the release of the motor vehicle to the 3rd respondent.

9. A perusal of the impugned ruling shows that the order that the Appellant appealed against was as follows: -

“That the motor vehicle registration number KBJ 571W shall with immediate effect, and in any case not later than seven (7) days from the date of this Ruling, be unconditionally released to the Interested Party.”

10. It was not disputed that the impugned order was complied with and the motor vehicle released to the 3rd respondent who has its custody as a bona fide purchaser following the Appellant’s default.
11. My finding is that the orders for stay of execution pending appeal cannot issue, in the circumstances of this case, as the action that the applicant seeks to stay has already taken place following the release of the motor vehicle to the 3rd respondent pursuant to the court order. I am also not satisfied that the Appellant has established that he will suffer substantial loss unless the orders sought are granted as the value of the motor vehicle in question is quantifiable, in which case, the Appellant will be able to recover its value should he succeed on the appeal. I am therefore not persuaded that the instant application is not merited and I therefore dismiss it with costs to the respondents.

Dated, signed and delivered via Microsoft Teams at Nairobi this 16th day of December 2021 in view of the declaration of measures restricting court operations due to Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of: -

MS Mwanzile for MS Chege for 1st and 2nd Respondents.

Mr. Chimei for 3rd Respondent.

Court Assistant: Margaret

