



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO 17 OF 2020

FARHAN AHMED KHAN.....1ST APPELLANT

RIZWAN YOUNIS.....2ND APPELLANT

DAIKYO JAPANMOTORS LTD..... 3RD APPELLANT

VERSUS

KAZURI MWAROME.....1ST RESPONDENT

FAIRUZ FEISAL YASIN.....2ND RESPONDENT

RULING

1. Before the court for determination is a Notice of Motion by the appellant/applicant dated 5.5.2020 and seeking an order that the court be pleased to order the stay of execution of the ruling by the trial court dated and delivered to the parties on the 19.02.2020 by which the court issued a mandatory injunction directing the appellants to release to the respondents some seven identified motor vehicles and jewellery.

2. That decision aggrieved the appellant who then filed the current appeal and set out some five ground of appeal to challenge the impugned decision. The reasons advanced in both the application and the affidavit in support thereof to ground the application is that the appellants /applicants stand to suffer substantially by the hearing of the appeal being rendered futile and nugatory if the order is enforced yet they had demonstrated before the trial court that the motor vehicles and jewellery were given to them as security for the payment of some obligation by the respondents.

3. In the affidavit in support sworn by the advocate, one Mr Sajid Khan, there were exhibited the charge sheet against the 2nd respondent in Mombasa Cr Case No. 168 of 2020, witness statements for the case, a Notice of Motion yielding the orders appealed against, the ruling and another ruling dismissing an application for stay pending appeal.

4. For the respondents, Grounds of opposition together with a Replying Affidavit by the 2nd respondent were filed. The grounds of opposition fault the application for being grounded on falsehood and thus being an abuse of the court process and designed to delay and prejudice the respondent while blessing the appellants' violation of the respondents' rights and that the appeal was filed out of time and without the leave of the court.

5. On the other hand the affidavit opposes the application by reiterating the grounds of opposition the adding that the prerequisites of grant of stay pending appeal had not been met and that a similar application had been urged before the trial court and dismissed and that by this application the appellants are irregularly seeking to remedy the faults before the trial court.

6. The application proceeded by way of oral submissions offered by Mr Magolo and Mr Osoro for the respective parties. Both counsel largely reiterated their positions on the filed papers. It was the position of Mr Magolo that the purpose of the stay was to maintain the status quo ante created by the voluntary handing over of the suit property by the respondent to the appellants in the presence of the father to the 2nd respondent together with motor vehicle log books. He took the position that compliance with the order would literally conclude the litigation without a trial being conducted. He added that the appellants being operators of a showroom had the capacity to keep the motor vehicles unused unlike the respondents who employ the motor vehicles in the business of taxis and would thus subject same to waste by depreciation so that by the time the litigation is over the vehicles would be worthless.

7. In his argument before the court, Mr Osoro, Advocate for the Respondent reiterated the grounds in the grounds of opposition and replying affidavit with a stress that the order granted to the respondent was not unconditional but rather conditional in that the respondents were not to alienate or part with possession of the property pending the suit and to deposit the log books in court. Counsel underscored the fact that while the respondents are the legal owners of the property, the appellant had no proprietary rights over the same and that while the 2nd respondent had been an employee of the appellants, the 1st respondent had never had any relationship with them. He emphasised the fact that it was the father of the 2nd respondent who convinced the respondents to hand over the property, that the vehicles were driven by the 2nd appellant out of the respondents' house and that the pendency or a criminal case is not a basis to label his clients as thieves. It was further submitted that before the trial court, the appellants had filed a defence and counter claim to recover lost money and not retention of the property. He concluded that the ability to pay damages should not be the license to discriminate and take advantage over others.

8. The counsel had attached three decisions; one from the court of appeal and two from the high court. The court of appeal decision as well as those from the high court are on the principles applicable on an application for stay pending appeal the only distinction from the case at hand being that in those matters there were final monetary decrees. Based on those submissions, counsel prayed that the application be dismissed with costs.

9. In his submissions in response to Mr Osoro's submissions, Mr Magolo emphasised the fact that it had emerged as a common ground that the motor vehicles had always been in the possession of the appellants having handed over and that it was only just that the status quo be maintained. He then made an offer that his clients were prepared to give an undertaking as to payment of any damages the respondent may suffer as a consequence of continued detainer if the same is ultimately adjudged wrongful.

10. Being an application for stay, the main consideration is the need to balance the competing interests of the parties in the litigation. The decree holder has a crystallized interest in the property in the decree which ought not to be disregarded as to pass for an arbitrary deprivation of property while the judgment debtor has the very important right to have access to justice unhindered and upon conclusion of the process not to be left with a worthless paper judgment only serving academic purposes. That is the balance the court has to strike and I take the view that the test to be applied is an Adjective one. It is thus a question of coming to a conclusion that secures the two competing interests by preserving the interests of both parties in the most just way possible.

11. I give regard to the appreciation that there is indeed no final judgment against the appellant and that the appellants object in the application is to maintain status quo by retaining the possession of the property in its custody pending the outcome of the appeal. That position is apparently informed by the fact that before litigation started, parties had a dispute over some money allegedly lost in the hands of the 2nd respondent and both agree that the property was taken as security for the recovery of that money. The bone of contention emerges to be whether that pledge of the property was to bar any criminal process and if the handing over was voluntary or coerced. That was and remains a matter to be decided by tender of evidence in the usual way and may not be best suited for determination on affidavits.

12. On the facts disclosed in this matter, I entertain no doubt that the appeal is not the kind to be viewed as frivolous but I consider it arguable. Being arguable, I consider that it is only just that it gets its day in court and that the outcome there be preserved and not rendered worthless or futile. I consider that unless I grant stay, the property I consider to be subject to heavy depreciation when used will be put in the hands and use of the respondents before the dispute is resolved and contrary to the arrangement between the parties prior to litigation. There would be no assurance that in the event the appeal succeeds, the property would have the same value. If the property was to be used and employed by the respondent so that its value is disproportionately reduced on the determination of the appeal so that it falls short of serving the purpose for which it was handed over to the appellant, the pursuit of the appeal shall have been made nugatory and of no meaningful purpose. Such would not be fair nor just. The court shall itself have spent its resources in vain and in most undesirable manner. That should not be the attribute of a court of law.

13. I do find that in order that the substratum of the appeal be preserved and not rendered nugatory, I grant stay pending appeal but on terms that the appellant shall keep the possession of the motor vehicle in their yard, regularly cleaned and the engine cranked, and shall not cause the same to be driven or otherwise used or alienated while the jewelry be kept in a safe box at a bank in the joint names of the counsel for the parties, pending the determination of the appeal within 21 days from today. The costs of such custodial services shall be met by the appellants.

14. In order that the appeal be progressed it is further directed that the appellants shall file and serve the Record of Appeal and submission

within 30 days from today. Upon service by the appellant, the respondents shall within 21 days, file and serve written submission, to enable the appeal be mentioned on the 17.09.2020 for further directions.

15. In addition, the appellants having offered to give an undertaking as to payment of damages should they be ultimately adjudged to have been wrongful in the detainer of the goods, they shall file in court within 7 days from today, an undertaking addressed to the Deputy Registrar, **for the payment of any damage or loss that shall have been suffered by the respondents.**

16. Time shall be of essence and if the appellant shall default in complying with any of the conditions imposed, the stay hereby granted shall stand lapsed and the respondent will then be at liberty to take out enforcement proceedings of the mandatory injunction in accordance with the law.

17. On costs I direct that the same be left to abide the outcome of the appeal.

Dated, signed and delivered at Mombasa this 29th day of June 2020

P J O Otieno

Judge