



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISCELLANEOUS APPLICATION NO. E 756 OF 2020

TITUS BWEYA OMUKA.....APPLICANT

VERSUS

MOMENTUM CREDIT LTD.....RESPONDENT

ANTIQUA AUCTIONS.....INTERESTED PARTY

RULING

1. Titus Bweya Omuka, the applicant, has filed a chamber summons dated 4th June 2020. He seeks prayers:

- *That a stay of execution in CMCC No. 1207 of 2020 be granted pending the hearing and determination of this application.*
- *The court be pleased to grant leave to the Applicant to appeal out of time against the Ruling made by the Hon A. M. Obura (Mrs.) SPM on the 30th April, 2020 in Nairobi Milimani CMCC No. 1207 of 2020.*
- *The said leave do operate as a stay of all proceedings and the vehicle be released to the applicant immediately.*

2. To support the above prayers the applicant stated the Ruling in the trial court, in case CMCC No. 1207 of 2020, was delivered on 30th April 2020 at a time when the courts had scaled down their services due to COVID-19 pandemic and no one was allowed by then into the court precinct. The applicant came to know that the Ruling was delivered on 27th May 2020 when he was served with a copy of it by the auctioneer. In support of his prayer that stay of execution be ordered the applicant deposed:

“That the plaintiff (sic) [the applicant] has shown commitment to repaying the loan and of the one million loan advanced had paid to a tune of Ksh 887,000 all through mpesa a fact that was not denied by the respondent during the hearing of the application in the lower court.”

3. The applicant further stated that the vehicle, which was the security for the loan, is valued at Ksh 3.5 million and that it would be sold by the respondent at Ksh 1 million.

4. The application is opposed by Momentum Credit Ltd, the respondent, through the replying affidavit of Sheila Imali, the respondent’s legal officer. She deposed that the applicant obtained from the respondent a loan of Ksh 1 million and the security for that loan was motor vehicle KCA 055T. The loan facility was for a period of 12 months in which period the applicant was to pay, from 23rd May 2019, monthly instalments of Ksh 136,923. The motor vehicle was thereafter registered in the joint names of the applicant and the respondent. The respondent also caused the security, the motor vehicle to be registered at the Collateral Registry as provided under the **Moveable Property Security Rights Act 2017**. That the applicant fell into arrears in his repayments and at his request his loan was restructured. The respondent provided to the court the applicant’s loan account statement which reflects a debit balance of Ksh 1,180,844.

ANALYSIS

5. An appeal from the subordinate court to the high court should be filed within 30 days of the date of the judgment/decree or order being appealed. This is what is provided under section 79G of the Civil Procedure Act, thus:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having requisite for the preparation and delivery to the appellant of a copy of the decree or order:

provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time”

6. A close look at that section will reveal that if a party is seeking leave to file an appeal out of time, leave can only be granted when an appeal has been filed. This is why the provision of section 79G states “provided an appeal may be admitted out of time”. An appeal can only be admitted if it is filed.

7. In this case there is no appeal filed. The applicant filed the present application under a miscellaneous file. The applicant’s application therefore fails to meet the standards set in Section 79G. See the case **Asma Ali Mohamed v Fatime Mwinyi Juma (2014) eKLR** where it was stated:

*“Justice M. J. Anyara Emukule in the case **GERALD M’LIMBINE -Vs- JOSEPH KANGANGI [2009]eKLR** was confronted with an application for leave to file an appeal out of time. His holding which I wholly adopt was as follows-*

“My understanding of the proviso to Section 79G is that an Applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal and at the same time seek the Court's leave to have such an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the Court's permission to admit a non-existent appeal out of the statutory period. To do so would actually be an abuse of the Court's process which under Section 79B says”

That holding which I wholly adopt was to the effect that when a party wishes to obtain leave to file an appeal out of time such a party must file the appeal and as provided in the proviso of Section 79G, then must seek leave to admit that appeal out of time.”

8. I am otherwise satisfied that the applicant, timeously filed the present application seeking the appeal to be admitted out of time, the period and the length of the delay, two months, was not inordinate.

9. However, since there is no pending appeal on record the applicant’s prayer for stay of the subordinate order has no foundation. To seek stay when there is no appeal pending would seem to be oxymoron. If stay was granted it would be pending what?

10. Moreover having also looked at the subordinate court’s Ruling, the subject of this application, it is not clear what stay is sought by the applicant. This is because by that Ruling the trial court dismissed the applicant’s application for injunction which sought to restrain the respondent from repossessing the motor vehicle. The injunction application having been dismissed there is nothing positive to stay before this court. In other words, the order of the subordinate court was a negative order and it cannot be stayed. See the case **Catherine Njeri Maranga Serah Chege & Another (2017) eKLR** where **Justice Mwangi** stated:

*“15. Further, in the more recent case of **Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Ors [2016] eKLR**, the Court of Appeal expounded on stay of execution stating:*

“16. In Kanwal Sarjit Singh Dhiman v. Keshavji Juvraj Shah [2008] eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:

“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see Western College of Arts & Applied Sciences vs. Oranga & Others [1976] KLR 63 at page 66 paragraph C.”

11. On the whole the applicant’s application is misconceived and it is without merit.

CONCLUSION

12. The Chamber Summons dated 4th June 2020 is dismissed with costs to the respondent. The order directed at the Respondent to retain attached motor vehicle is hereby vacated. This file shall henceforth be closed.

DATED, SIGNED and DELIVERED at NAIROBI this 24th day of JUNE 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the Applicant:

For the Respondent:

For the Interested Party:

ORDER

This decision is hereby virtually delivered this 24th day of **June**, 2020.

MARY KASANGO

JUDGE