



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 748 OF 2019

ANTHONY WARUI WANJIRU.....APPELLANT/APPLICANT

-VERSUS-

DAVID NIYIBIZI1ST RESPONDENT

NATIONAL TRANSPORT & SAFETY AUTHORITY.....2ND RESPONDENT

RULING

1. This ruling is precipitated by the Notice of Motion dated 19th December, 2019 filed by the appellant/applicant and supported by the grounds set out on its face and the facts deponed in the self-sworn affidavit of the applicant. The applicant substantively sought for an order for a stay of execution of the judgment and decree issued by the lower court in CMCC No. 6621 of 2014 pending the hearing and determination of the appeal.

2. The 1st respondent opposed the Motion by putting in the replying affidavit of his duly appointed attorney, Isaiah Mwaniki Mwangi.

3. Pursuant to the orders made by this court on 16th June, 2020 the parties filed and exchanged written submissions on the application.

4. The applicant submits that the application has been timeously filed and refers this court to the case of **Mary Mwomaiitha v Joshua Kimamanchia [2009] eKLR** in which the court held that a delay of three (3) months in bringing an application for a stay of execution was not unreasonable.

5. The applicant further submits that he stands to suffer substantial and irreparable loss if the order for stay is not granted since the subject matter of the dispute is motor vehicle registration number KBX 823A Toyota Noah (“the subject motor vehicle”) and the applicant is apprehensive that the 1st respondent may proceed to execute the decree by transferring the subject motor vehicle to himself and thereafter selling it to third parties. To support his submission, the applicant cited the case of **Praxades Okutoyi v Medical Practitioners and Dentists Board [2008] eKLR** where the court held as follows:

“Just as the Court of Appeal clarified this point in the case of Reliance Bank Limited v Norlake Investments Ltd (C. A. 93 of 2002, Nairobi), I do so here that in considering “substantial loss” the Court is bound to consider the conflicting claims of both sides. In the Reliance Bank case, the Court of Appeal, in considering an application under its Rule 5 (2) (b), stated:

“All these are legitimate factors for the Court to take into account when it is considering the question of whether an appeal would be rendered nugatory if a stay of execution or an injunction is not granted. Whether one designates it as “a balance of convenience” or “weighing the claims of both sides” it is clear from the decisions of the Court that they do not constitute a distinct and separate head from the two principles applied by the Court, but rather they are some of the legitimate elements which the Court has to take into account when considering the second principle, namely whether an appeal or an intended appeal would be rendered nugatory if a stay of execution or an injunction, as the case may be, is not granted.”

6. It is also the contention of the applicant that he is ready and willing to abide by any conditions that will be set by this court in respect to the decree, though pointing out that the decree in the present instance is non-monetary in nature.

7. In response, the 1st respondent has argued in his submissions that since the applicant has not attached a copy of the decree to his application, this court cannot consider the same.

8. The respondent has further argued *inter alia*, that the appeal will not be rendered nugatory if the order for a stay of execution is declined since the applicant was paid the full purchase price for the subject motor vehicle through his brother, Charles Maina Wanjiru.
9. Further to the foregoing, it is the submission of the 1st respondent that he is a man of means and there is no indication that he will not be in a position to return the subject motor vehicle if called upon to do so upon determination of the appeal.
10. I have considered the grounds presented on the face of the Motion; the facts deponed in the affidavits supporting and resisting the Motion; and the rival submissions together with the authorities cited.
11. A background of the matter in brief is that the 1st respondent instituted a suit before the lower court against the applicant and the 2nd respondent for breach of contract in respect to the subject motor vehicle and sought for injunctive orders, a declaratory order that he is the lawful owner of the subject motor vehicle and general damages.
12. The suit was defended by the applicant, who filed a statement of defence and counterclaim. In the counterclaim, the applicant sought for declaratory orders, the sum of Kshs.1,150,000/ and punitive and exemplary damages.
13. Upon hearing the parties at the trial, the trial court in its judgment delivered on 9th December, 2019 found in favour of the 1st respondent and against the applicant and 2nd respondent, and awarded the reliefs sought save for the prayer on general damages. The trial court consequently dismissed the applicant's counterclaim.
14. The applicant desires to challenge the aforementioned judgment on appeal, hence the present application.
15. Before I consider the merits of the Motion, I note that the 1st respondent is of the view that the Motion is improper for the reason that the applicant has not annexed a certified copy of the decree. This position has been strongly challenged by the applicant who is of the view that there is no mandatory requirement to that effect.
16. Upon perusing the Motion, it is noted that the decree is not annexed thereto. That notwithstanding, the applicant has availed a copy of the impugned judgment as "AWW 3." In my view, it is not mandatory for an applicant to attach the decree to his or her application for a stay of execution, as long as a copy of the impugned judgment or ruling has been availed for reference.
17. On the merits of the Motion, the relevant provision concerning applications seeking an order for a stay of execution is **Order 42, Rule 6(2)** of the **Civil Procedure Rules** which sets out the conditions to be met for an application for a stay of execution to succeed.
18. I will begin with the first condition on whether the application has been brought without unreasonable delay. As earlier noted, the trial court delivered judgment on 9th December, 2019 while the instant application was brought on 19th December, 2019. In my view, I think the delay cannot be said to be unreasonable.
19. On the second condition of substantial loss the applicant has stated in his affidavit that he stands the risk of suffering substantial loss since the 2nd respondent may at any time transfer the subject motor vehicle to the 1st respondent, the latter of whom is a Rwandese national with no permanent residence in Kenya and it is plausible that the 1st respondent may thereafter leave the country or sell the subject motor vehicle to third parties.
20. The applicant further states in his affidavit that the 1st respondent has no known assets or income to guarantee his ability to pay for the value of the subject motor vehicle and/or damages to the applicant in the event that the appeal is successful.
21. It is the averment of the applicant that the appeal will therefore be rendered nugatory if the 1st respondent is permitted to proceed with execution.
22. In reply, the 1st respondent through the deponent, Isaiah Mwaniki Mwangi, states that he has not occasioned the applicant any loss whatsoever and that the appeal will not be rendered nugatory if the order for a stay of execution is not granted.
23. The deponent goes on to state that registration of the subject motor vehicle in the name of the 1st respondent is a reversible process and if an order for a stay of execution is granted, the 1st respondent will be precluded from enjoying the fruits of his judgment.
24. According to the deponent, the 1st respondent is also a man of means and a resident in Nairobi.
25. From the foregoing, it is clear that the present matter involves a non-monetary decree. It therefore follows that the issue of refund of a decretal sum does not arise. Suffice it to say that the Court of Appeal in the case of **Reliance Bank Limited v Norlake Investments Ltd** cited by the court in the authority of **Praxades Okutoyi v Medical Practitioners and Dentists Board [2008] eKLR** in the applicant's submissions called for a balancing or consideration of the conflicting interest of the parties.
26. In the present instance, it is apparent that rights arising from or relating to the subject motor vehicle form the crux of the dispute. It is also

apparent that the subject motor vehicle is yet to be registered in the name of the 1st respondent though it is presumably in his possession currently.

27. Moreover, it is not in dispute that the 1st respondent is not a Kenyan national and though he stated that he is a man of means and currently residing in Kenya, he did not bring any credible evidence to support those statements.

28. In my view, while it is true that the 1st respondent is entitled to the fruits of his judgment, it is equally true that if the 1st respondent is allowed to proceed with execution of the decree arising out of the trial court’s judgment and before the appeal is heard and determined, the applicant is likely to suffer substantial loss which would render the appeal nugatory.

29. For the foregoing reasons, therefore, I am convinced that the applicant has shown the substantial loss he stands to suffer should this court decline to grant an order for a stay of execution.

30. On the third condition touching on the provision of security for the due performance of the decree, as earlier noted, this being a non-monetary decree, the issue of security does not arise. The applicant cited a few authorities that have restated this position, including the case of **Sarah N. Sakwa v Elizabeth Wamwanyi t/a Namukhosi Ltd & another [2017] eKLR** where the court held the following:

“The case in the Tribunal was not about rent. This being a non-monetary decree, the condition of security for due performance of the order does not arise. Refer to the case of Praxades Okutoyi v Medical Practitioners and Dentists Board (2008) eKLR where Visram, J (now JA) stated that:

“As this is not a monetary decree, no financial obligations are involved on either side, the issue of security does not arise...”

31. In the end, the Motion is found to be meritorious, it is allowed.

Consequently, there shall be a stay of execution of the judgment delivered on 9th December, 2019 and the consequent decree pending the hearing and determination of the appeal. Costs of the application to abide the outcome of the appeal.

It is so ordered.

Dated, signed and delivered online via Microsoft Teams at Nairobi this 30th day of July, 2020

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the 1st Respondent

..... for the 2nd Respondent