



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**MISC. APPLICATION NO. 7B OF 2020**

**FRANCIS KARIUKI GITAU & MAUREEN IMALI**

(Suing as the personal representatives of the estate of)

**PETER GITAU KARIUKI..... APPLICANTS**

**VERSUS**

**DREAMLINE EXPRESS COMPANY LTD.....1<sup>ST</sup> RESPONDENT**

**SCANIA CREDIT SOLUTIONS (PROPRIETARY) LTD.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application for determination is dated 02/06/2019. It was filed under certificate of urgency and is brought under, Order 22 Rule 22, Order 42 Rule 6, Order 51 Rules 1& 3 of the Civil Procedure Rules, 2010, section 3 & 3A, section 79G & 63(e) of the Civil Procedure Act and all enabling provisions of the law. It seeks the following orders;

a) *Spent.*

b) **That**, leave be granted to admit this appeal out of time.

c) **That**, alternatively, the Memorandum of Appeal herein be admitted upon paying the requisite charges.

d) *Spent.*

e) **That**, this honorable court be pleased to order stay of execution of the ruling delivered on 29<sup>th</sup> April 2020 by Honorable Senior Resident Magistrate A. Ndung'u pending the hearing and determination of this application.

f) **That**, this honorable court be pleased to order stay of execution of the ruling delivered on 29<sup>th</sup> April 2020 by Honorable Senior Resident Magistrate A. Ndung'u pending the hearing and determination of this appeal.

g) **That**, alternatively, this court do make such orders as it may deem just and expedient pending the hearing and determination of this application or appeal.

h) **That**, costs of this application do abide the outcome of the Appeal.

2. The application is supported by the grounds on its face, the affidavit sworn by counsel Evans Mochama on 02/06/2020 and his further affidavit sworn on 16/06/2020. Counsel deposes that the ruling sought to be appealed against released the attached motor vehicle unconditionally and the Appellants are apprehensive that they may never recover the decretal sum, auctioneer's fees and storage charges which are substantial. He also deposes that the intended Appellants are ready and willing to furnish the security that this court may deem fit, that the appeal has high chances of success and that this application has been brought without inordinate delay. The Memorandum of Appeal is exhibited as **EMM-1** and the ruling as **EMM-2**.

3. It is also his deposition that the Respondents' means and ability is unknown and compromised as previously demonstrated. To support this deposition, he has exhibited a ruling in Makueni HCC Misc Application No. 12 of 2018 as **EMM-3**.

4. The application is opposed through a replying affidavit sworn on 11/06/2020 by the 2<sup>nd</sup> Respondent's Financing Representative, Elizabeth

Wachira. She deposes that the trial court made the ruling after hearing objection proceedings, filed by the 2<sup>nd</sup> Respondent, in which it was demonstrated that the subject motor vehicle (*KBW 084D*) was among vehicles offered to it as collateral, by the 1<sup>st</sup> Respondent, for a credit facility valid for 36 months with effect from 09/01/2019. A copy of the credit facility is exhibited as **EW-1**.

5. She deposes that in order to succeed in the appeal, the Applicant should, at the minimum, furnish evidence to show that the 2<sup>nd</sup> Respondent lacks a legal or equitable interest in the whole or part of *KBW 084D*-attached and *KBW 085D*, *KBW 086D*, *KBW 087D*-proclaimed for attachment. She deposes that the registration certificates of the registered motor vehicles indicate that the Respondents are joint owners.

6. It is also her deposition that the question of Auctioneer's fees and storage charges was not available for determination in the objection proceedings and as such, it should be settled between the Applicants, auctioneers and the 1<sup>st</sup> Respondent in separate proceedings. She also deposes that the Applicants had an obligation to mitigate the storage charges, by abandoning the attachment, upon being served with the objection proceedings which clearly demonstrated a legal interest in the attached motor vehicle.

7. Further, she deposes that from the schedule of movable property attached to the proclamation, the judgment debtor has various other motor vehicles and property which can be sold to realize the decretal amount, auctioneer's fees and storage charges. Accordingly, she deposes that no prejudice will be suffered if the subject motor vehicle is released. On the other hand, she deposes that the 2<sup>nd</sup> Respondent will be highly prejudiced as it will be left without adequate security. The proclamation notice is exhibited as **EW-2**.

8. The 1<sup>st</sup> Respondent opposed the application through the replying affidavit of counsel Erick T. K'okul sworn on 26/06/2020. He deposes that the application is intended to settle scores between the Applicant and 1<sup>st</sup> Respondent.

9. He deposes that they requested the Applicants' counsel to file a declaratory suit against the insurance company (*AMACO*) and the 1<sup>st</sup> Respondent was willing to fund the counsel's costs for the same. At the same time, they requested for the release of the attached asset as it was co-owned with the 2<sup>nd</sup> Respondent.

10. He deposes that the 1<sup>st</sup> Respondent initiated a suit against its insurers (*AMACO*) in Makindu PMCC 241 of 2019 as it was unable to satisfy the decretal amount of Kshs.2,812,512/= obtained against it in PMCC 508 of 2015. The application is exhibited as **ETK-1(a)**. The 1<sup>st</sup> Respondent got a partial judgment compelling *AMACO* to satisfy the judgment in PMCC 508 OF 2015 together with the auctioneer's charges and storage fees. *AMACO* failed to comply and the 1<sup>st</sup> Respondent instituted garnishee proceedings against it for the decretal sum and costs incurred amounting to Kshs.3,714,662/=. They were awarded Kshs.100,000/= as costs of the garnishee proceedings. The application and order are exhibited as **ETK-2**.

11. He further deposes that during the hearing of the garnishee application, counsel for the garnishee asserted that despite the presence of Kshs.8.9 million in the account, there were previous garnishee holders hence the bank was only willing to give Kshs.1,313,214/= in favor of the Applicants herein. The amount was released to the account of the 1<sup>st</sup> Respondent's counsel but they continued to follow up on the garnishee's allegations. Meanwhile, they offered the Applicants a sum of Kshs.1,213,214/= as down payment plus regular monthly installments in exchange for the attached asset.

12. It's his averment that the Applicants counsel refused to release the asset and insisted on the full amount of Kshs.1,313,214/= plus auctioneer's charges. The unsigned consent is exhibited as **ETK-3**. He deposes that the 1<sup>st</sup> Respondent's license had been suspended hence its inability to cater for the auctioneer charges. The suspension letter is exhibited as **ETK-4**.

13. He deposes that the Applicants would have benefited twice by having both the attached asset and the sum of Kshs.1,213,214/=. It is also his deposition that the garnishee proceedings are still pending in court and the funds are still intact. He further deposes that the Applicants are misinforming this court by saying that they will be unable to recover.

14. Further, he deposes that the intended appeal is not arguable as it does not contest any of the averments made by the trial Magistrate. Accordingly, the 1<sup>st</sup> Respondent fully supports the submissions of the 2<sup>nd</sup> Respondent and will not file its own.

15. He deposes that he is more than willing to give Kshs.1,213,214/= to the Applicants on condition that he is not compelled to give the auctioneer's charges and storage costs as he is currently not in possession of the extra costs. He deposes that Kshs.100,000/= has catered for the garnishee costs as per the orders of the trial court.

16. In a rejoinder, counsel Mochama deposes that despite the 1<sup>st</sup> Respondent being an established commercial entity, it has failed/refused to honor its obligations in PMCC 508 of 2018, which was delivered on 02/08/2018, and has played hide and seek games to frustrate the Applicants. He has exhibited the order in Makindu PMCC 241 of 2019 as **EMM-4** and the garnishee orders as **EMM-5**.

17. It is also his deposition that he signed the consent and returned it to the 1<sup>st</sup> Respondent for endorsement (*The signed copy is exhibited as EMM-6*) but the 1<sup>st</sup> Respondent retracted from the agreement and stated that they had been advised by their client not to release the funds until receipt of the full decretal sum. The email to that effect is exhibited as **EMM-7**.

18. He deposes that it is crystal clear that the 1<sup>st</sup> Respondent is not willing to conclude this matter and is taking the court in circles and making a mockery of the rule of law.

19. The application was canvassed by way of written submissions.

## Submissions

20. Counsel for the Applicants submits that the governing principles for leave to appeal out of time are: length of delay, reason for delay and chances of success of the appeal. On length of delay, he argues that the delay of nearly 4 days was occasioned by the Covid 19 pandemic and inability to access their offices. While for the reason for delay he contends that the lockdown of Nairobi made it impossible for him to access his office as he was upcountry. He also submits that the Government directed that people should work from home yet the file was in the office.

21. On the issue of chances of success, he submits that the appeal has triable and arguable issues as the trial magistrate allowed the objector's application without giving guidelines on who was to meet the auctioneer's costs and storage charges. He further submits that the principles governing stay of execution are; whether substantial loss may result, whether the application has been made without undue delay and whether security has been given by the Applicant.

22. It is his submission that the ruling was delivered on 29/04/2020 and the application filed on 02/06/2020 hence there was no undue delay. He argues that the Covid 19 pandemic hindered their movement and ability to work as the Government directed people to work from home.

23. He further submits that the decretal sum is substantial and if the attached motor vehicle is released, the Respondents will either dispose or hide it yet their financial status is unknown. He relies *inter alia* on the case of **G.N Muema P/A (sic) Mt. View Maternity & Nursing Home –vs- Miriam Maalim Bishar & Anor (2018) eKLR** where the Court held that;

*“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an Applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a Respondent in the event his or her appeal was successful.”*

24. He also submits that the Applicants are ready and willing to offer security for the due performance of such decree as may be ultimately binding on them. He has also undertaken to issue a professional undertaking or personal bond. It is his further submission that the appeal will be rendered nugatory unless stay is granted and relies on the case of **Stanley Kang'ethe Kinyanjui –vs- Tony Ketter & 5 Others (2013) eKLR** where the Court stated that;

*“In considering this application, we shall bear in mind these principles. On whether the appeal is arguable, the Applicant has deposed that; the term ‘nugatory’ has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.”*

25. Mr. Nyakundi for the 2<sup>nd</sup> Respondent has submitted that the application should be dismissed for failing to meet the requirements of stay of execution. He argues that the Applicants have not discharged their burden of proving the 1<sup>st</sup> Respondent's inability to pay the decretal amount. He relies *inter alia* on **Peter Ndung'u Ngae & 2 Others –vs- John Mugane Karomo (2015) eKLR** where the Court held that;

*“To prove substantial loss, the Applicant is under a duty to do more than merely stating that he will suffer loss, details and particulars must be given and the court will there from determine whether such loss will ensue and if it so does, that the Applicant is likely to suffer substantial injury pending the hearing of the appeal. Where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay of execution.”*

26. He submits that the Applicants have proclaimed various other motor vehicles and assets, owned by the 1<sup>st</sup> Respondent, which can be attached and sold to satisfy the judgment debt auctioneer's fees and storage charges if any. He therefore contends that the Applicants will not suffer any prejudice if the subject motor vehicle is released.

27. It is his further submission that the likelihood of success of appeal is irrelevant for purposes of granting stay of execution and relies on **Antoine Ndiaye –vs- African Virtual University (2015) eKLR** where the Court held that;

*“On the basis of the above, the Applicant has not established that substantial loss will occur unless stay of execution is made. The Applicant seems to rely more on the success of the appeal to the extent of almost urging the grounds of appeal on immunity. The inquiry for purposes of stay pending appeal under Order 42 Rule 6 of the CPR is not really about the merits of the appeal but rather the loss which will be occasioned by satisfaction of the appeal in the event the appeal succeeds.”*

28. Be that as it may, he contends that the appeal is not arguable, has no chance of success and the issue of auctioneer's fees and storage charges cannot negate the 2<sup>nd</sup> Respondent's legal and/or equitable interest in the subject motor vehicles which interest statutorily precludes the Applicants from proclaiming and attaching such property in execution of the decree.

29. It is also his submission that the Applicants had 30 days leave to appeal the trial court's decision and their belated attempt to pursue a clearly lost cause is only meant to coerce the 1<sup>st</sup> Respondent to settle the alleged debt. He contends that the Applicants are using the continued detention of the subject motor vehicle as leverage to compel the 1<sup>st</sup> Respondent to pay. It is also his contention that the Applicants' conduct is an abuse of the court process and the unfortunate Covid 19 pandemic is nothing but a convenient scapegoat.

30. Having considered the application, the affidavits in support, the replying affidavit and the rival submissions, it is my considered view that the only issue for determination is whether the application is merited.

31. The subject motor vehicle was at the verge of being sold, in execution of the decree in Makindu PMCC 508 of 2018, when the 2<sup>nd</sup>

Respondent objected to the attachment. In allowing the objection, the learned Magistrate expressed herself as follows;

*“...the objector has established that it is entitled to or has a legal or equitable interest in the whole or part of KBW 084D attached and KBW 085D, KBW 086D, KBW 087D proclaimed for attachment, respectively in execution of a decree. Therefore, the movable properties are not liable to and were not properly proclaimed for attachment in execution of the decree in this case.”*

32. The relevant law with regard to objection to attachment is in Order 22 Rule 51(1) of the Civil Procedure Rules which provides that;

*“Any person claiming to be entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all parties to the decree-holder, of his objection to the attachment of such property.”*

33. The credit facility was accepted on 09/01/2019 and is valid for 36 months. The subject motor vehicle is one of the assets given as collateral. The proclamation notice is dated 22/06/2019 and the subject motor vehicle is included in the schedule. It is therefore evident that by the time the proclamation notice was being issued, the 2<sup>nd</sup> Respondent already had an interest in the subject motor vehicle and as correctly submitted by the 2<sup>nd</sup> Respondent, the Applicants need to show the error in the trial Magistrate’s application of Order 22 Rule 51(1) of the CPR.

34. The Applicants’ grounds in the intended appeal are as follows;

- a) The learned Magistrate erred in fact and law in allowing the application without considering the Respondents’ facts, submission and authorities as required by law.*
- b) The learned Magistrate erred in law and facts by allowing the said application and failing to give directions on who is to meet the Auctioneers fees and storage charges*
- c) The learned Magistrate erred in law in holding that the motor vehicle had been improperly attached and releasing it unconditionally without bearing in mind that the accumulated decretal sum and auctioneer’s fees were unsettled.*

35. I am unable to see anything in those grounds that is challenging the law applied by the trial magistrate in allowing the objection. As for the Auctioneers fees and storage charges, I do agree with the 2<sup>nd</sup> Respondent that the same should be canvassed between the Applicants, 1<sup>st</sup> Respondent and the auctioneers. The 2<sup>nd</sup> Respondent was not a party in Makindu PMCC 508 of 2018 and had no way of knowing that a decree had been passed against the 1<sup>st</sup> Respondent. Its involvement was limited to establishing its legal/equitable interest in the attached property. Accordingly, I do not see how that particular ground gives life to the intended appeal.

36. I have also noted that indeed, there are several other assets in the proclamation notice, including motor vehicles, which have not been offered as collateral. It is therefore evident that no substantial loss will occur as the Applicants can still sell the non-encumbered property to get the money owing to them.

37. I have also noticed the effort by the 1<sup>st</sup> Respondent in trying to get the decretal award and other costs from the insurance company by filing a declaratory suit and the garnishee proceedings.

38. The upshot is that the intended appeal has no chance of success and it is my considered view that admitting it will be a mere academic exercise.

39. The result is that the application lacks merit and is dismissed with costs.

Orders accordingly.

**Delivered, signed & dated this 29<sup>th</sup> day of July 2020, in open court at Makueni.**

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**H. I. Ong’udi**

**Judge**