



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

HIGH COURT CIVIL CAUSE NO 25 OF 2020

CONSENSLUS KIPRUTOAPPLICANT

VERSUS

AFRICA MERCHANT ASSURANCE CO. LTD.....RESPONDENT

MILDRED KHATENJE (suing as the personal representative of the estate of

RAYMOND ODHIAMBO OGADA)1ST INTERESTED PARTY

ESHIKONI AUCTIONEERS2ND INTERESTED PARTY

RULING

1. By an application dated 6th July 2020 supported by an affidavit of even date, **CONSENSLUS KIPRUTO** (the applicant) seeks that:
 - a) There be stay of execution of the decree in **ELDORET CMCC NO 1215 OF 2017** and all the consequential orders pending the hearing and determination of the declaratory suit filed herewith
 - b) Motor-vehicle registration number **KCJ 003K TOYOTA V8** be released to the applicant pending hearing and determination of the declaratory suit, on condition that he deposits the original logbook in court
 - c) The defendant be condemned to bear the costs of this application
 2. The application is premised on grounds that the applicant is the legally registered owner of the said motor-vehicle and had been indemnified by the respondent (**AFRICA MERCHANT ASSURANCE CO. LTD**) following a judgment which had been entered against him. He thus approached the respondent's Eldoret Branch who informed him that they were willing to satisfy the decree and its incidental costs and that they were negotiating with the decree holder's advocate on the mode of payment (as per the letter dated 26th February 2020). He thus moved to the trial court and sought release of the subject motor vehicle by an application dated 28th February 2020, and was granted a conditional stay of execution for 30 days to enable him prevail upon his insurers to pay the decretal sum to the claimant. This payment never took place and eventually the subject motor vehicle was impounded by **ESHIKONI AUCTIONEERS** on 26th February 2020 in satisfaction of the decree issued vide **ELDORET CMCC NO 1215 OF 2017**.
 3. The applicant explains that he was not able to satisfy the condition set by the trial court as the circumstances were not within his control, and he is apprehensive that the said motor-vehicle which is worth over Kshs 5,000,000/- may be sold at a lower price than its actual market value, thus rendering the pending declaratory suit nugatory. He points out that the motor vehicle in question has a much higher value than the decretal amount forming the subject of the execution in force hence he stands to be greatly prejudiced should the same be sold in satisfaction of the said decree.
- Further, the Defendant is already making payments towards the decretal sum, hence the sale of the subject motor vehicle in execution as threatened would amount to double jeopardy on his part as he fully paid the requisite insurance premiums towards the policy covering the said motor vehicle. He has further attached copies of correspondence from his insurer to demonstrate that it has started making part payments of the decretal sum, and laments that if the sale were to continue, then he would suffer double jeopardy, and contends that the Defendant herein is under a legal obligation to indemnify the Plaintiff/Applicant from payment of the decretal sum which forms the subject of the decree in force.
4. The applicant's plea for the release of the Motor vehicle is borne out by his fears that the same may be vandalized at the auctioneer's yard, and that as an act of good faith he is willing to deposit in court, the original log book for the said motor vehicle.

5. The Applicant by a Miscellaneous application sought and was granted leave to enjoin the decree holder and the auctioneer, as they are bound to be affected by the orders sought, much more than the defendant/respondent. None of the respondents filed a reply to the application

Before a court can exercise its discretion on whether to grant stay orders, it must be satisfied that:

- a) Substantial loss may result to the applicant, unless the order is made,
- b) The application has been made without unreasonable delay
- c) The applicant has furnished security for the due performance of such decree or order.

Order 42 Rule 6 of the Civil Procedure Rules provides inter-alia:

No order for stay of execution shall be made under sub-rule (1) unless:

a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay and

b) Such 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.

5. **Substantial loss:** I refer to the case of **Winfred Nyawira Maina –vs- Peterson Onyiego Gichana (2015) eKLR**, where the court considered various factors in exercising its discretion in an application granting stay of execution orders that the phrase ‘**may for sufficient cause order stay of execution of such decree or order**’ is a wide scope which allows the court to follow after the constitutional prescription under Article 159 and the overriding objective in the administration of justice in matters falling under order 42 Rule 6 of the Civil Procedure Rules. That some of the major prerequisites to ordering of a stay of execution are that inter alia:

- a) The court is satisfied that substantial loss may result to the Applicant unless the order is made and
- b) the Application has been made without unreasonable delay and
- c) Such security as the court orders for the due performance of such decree or orders as may ultimately be binding on him has been given by the Applicant.

In the case of **Antoine Ndiaye vs. African Virtual University [2015] eKLR** where Gikonyo J. held among other things that

“...stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules...”

The Court further observed in this paraphrased version that:

“...substantial loss is a qualitative concept [Emphasis added]. It refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal...insistence on a policy or practice that mandates security, for the entire decretal amount is likely to stifle possible progress of other remedies the applicant may wish to pursue” [underlined paraphrased portion]

The onus is on the Applicant to show to this court that in fact his prayers warrant a grant of stay of execution. In the present situation, the applicant has demonstrated that the insurer had acknowledged their duty to make the payments by the letter dated 26/02/2019 and had commenced negotiations on the mode of payment. Infact the copies of correspondence marked CK6 (being a letter and a cheque) demonstrate that payment has commenced. I take note that whereas the decretal sum is Kshs **2,814,868/-**, the value of the vehicle as per the attached valuation report places it at **Kshs 5,250,000** (way above the sum owed) and such sale would cause great loss to the applicant. Meanwhile his vehicle has been attached and will be subjected to a sale by auction to settle the same sum for which he had paid insurance premiums as per Ex CK-3. Not only will he suffer the loss of the vehicle, but he also faces double jeopardy. I find that the applicant has explained the reason for failing to satisfy the condition precedent to the stay, as well as the apprehension regarding substantial loss

Undue Delay? The applicant had been granted a 30 days conditional stay on 17/02/2020 the same was proclaimed and eventually attached. The insurer had proposed to commence payments in March 2020 as per the letter of 26th February 2019. The conditional stay order was issued on 26th June 2020, and upon realizing that he would not be able to meet the condition, he quickly moved to court in less than a month and filed the application on 6th July 2020, so there was no inordinate delay

Security for grant of Orders?

25. I am alive to the fact that under **Order 42** it is often desirable that an applicant seeking stay pending other remedial pursuits, ought to provide security so that in the event the intended appeal is dismissed then the other party will have their rights secured and will be able to enjoy the fruits of the Judgment of the Court in their favour. The applicant is willing to deposit the attached vehicle’s original log book in court to ensure that he does not alienate the same pending hearing and determination of the declaratory suit. His prayer for release of the

vehicle into his custody stems from the fact that the vehicle is exposed to possible vandalism where it is parked at the auctioneer's yard. There has been no assurance given by the auctioneer by way of a reply to allay those fears, and I thus grant the request that the vehicle be released to the applicant on condition that he deposits the original logbook for **Motor Vehicle Reg. No KCJ 003K** in the custody of this court within 7 days hereof, and he also pays the auctioneer's charges within.

Orders

- a) Stay of execution of the decree in **ELDORET CMCC NO 1215 OF 2017** and all the consequential orders is granted pending the hearing and determination of the declaratory suit filed herewith
- b) Motor-vehicle registration number **KCJ 003K TOYOTA V8** be released to the applicant pending hearing and determination of the declaratory suit, on condition that he deposits the original logbook in court within 7 days hereof, and not alienate the vehicle in any manner. It is also on condition that the applicant pays the auctioneer's costs
- c) The declaratory suit be set down for hearing within 60 (sixty) days from today
- d) The respondent shall bear the costs of this application.

Virtually delivered on 7th day of August 2020 at Eldoret at 10.30am

H.A. OMONDI

JUDGE

Mrs Sawe present for applicant

N/A for respondents and interested parties

Mrs Sawe: I pray the court directs the OCS Eldoret Central Police Station to oversee the release of the motor vehicle.

Order: Upon the applicant meeting the conditions set out for the release of the motor vehicle, being:

- a) Deposit of the original logbook for motor-vehicle registration No KCJ 003K Make- Toyota V8 within 7 days hereof
- b) Payment of the auctioneer's charges

The OCS Eldoret Central Police Station is directed either by himself or officers serving under him, to oversee the release of the motor vehicle registration No KCJ 003K Make- Toyota V8 subject to the applicant meeting costs of the police, as this is a civil matter.

H.A. Omondi

Judge