



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CIVIL APPEAL NO. E001 OF 2020

AISHA HASSAN HEMED..... 1ST DEFENDANT/APPLICANT

BASHIR ABDALLA 2ND DEFENDANT/APPLICANT

VERSUS

PETER LUGANJE KARISA RESPONDENT

(Being an Appeal against the Ruling and/or decision of Hon. E Kadima (SRM) to dismiss the Application dated

10th of August, 2020 Delivered on 12th November 2020)

Coram: Hon. R. Nyakundi

Mr. Kokul for the Applicant

Wambua Kilonzo & Co. Advocates for the Respondent

RULING

Pursuant to Section 1A, B and 3A, Order 51, Order 42 Rule 6 of the Civil Procedure Act and Rules. The applicant moved to this Court by way of a Notice of Motion dated 2.12.2020 seeking a substantive order of stay of sale, transfer, alienation assignment of the attached secured Asset namely KBH 834X by placing it at the Garsen Police Station pending the hearing and determination of the substantive appeal.

In support of the application are reasons premised on the face of the Motion and a further Affidavit by **Bashir Abdalla**.

The respondent is opposed to the application on grounds that it lacks merit.

Determination

A stay of execution of proceedings is an exercise of Judicial discretion provided for under Order 42 Rule 6 of the Civil Procedure Rules. The mover bears the burden of proof that: -

- (1) He or she has filed the application without undue delay.***
- (2) Whether in seeking stay, a strong case has been made out that he or she will suffer substantial loss.***
- (3) Whether he is ready and willing to deposit security for the performance of the decree.***
- (4) Whether the applicant has demonstrated existence of a prima facie case likely to succeed on the merits in the Intended Appeal.***

The general rule known grounded to lead weight to the application is an substantial loss as stated in **James Wangewa vs Naliaka Chesoto & Another vs Agness Naliaka Cheseto (2012) Eshur** and the guidelines set out in **Butt vs. Rent Restriction Tribunal (1979) KLR**.

The question is whether the applicant has met the criteria under Order 42 Rule 6 of the Civil Procedure Rules for the Court to exercise discretion to allow stay of execution pending hearing and determination of the Intended Appeal.

In the instant case I have reviewed the impugned ruling and Affidavit evidence as deposed by the applicant.

Based on the foregoing, it is the opinion of the Court that the first prerequisite on undue delay was satisfied.

The second prerequisite is on substantial loss. The applicant submitted that the Learned Trial Magistrate erred in Law and fact in determining a ruling admissible to the outcome of the subject motor

Vehicle which decision was made on absence of cogent evidence. Indeed, in the evidence the motor vehicle Registration No KBH 834X is sold or transferred to a Third Party. He is likely to suffer irreparable harm not compensable by way of damages.

From the record, the execution process has taken the following states:

The first stage is the essence of the issuance of the proclamation and attachment order to Mombasa Auctioneers and the second stage is the enforcement of the order by way of sale or transfer of the asset to realize the detrimental sum.

There are issues deductible from the primary proceedings. The **CMCC No. 33 of 2019** on the process of execution of the decree, detachment of the applicant's property. As demonstrated by the applicant this may not be a tribunal matter calling upon the court to order for security as a condition for due performance of the decree.

I am of the considered view that the subject matter of the appeal involves an attachment of the Motor vehicle on which that applicant has a legal and or beneficial interest. In this case there is every likelihood that the applicant will be irreparably injured if it turns out that purchasers and auctioneers of the aforesaid motor vehicle.

Proceeded on wrong principles. That is to say there would be a problem for the respondent to restore the motor vehicle in its original condition or same mode to the applicant. This argument is not without merit.

From what I have accomplished to outcome above, the applicants motion for stay of execution, sale, transfer, assignment of subject motor vehicle registration KBH 834X is hereby allowed pending appeal.

Learned counsel for the respondent placed reliance on the preliminary objection on the issue of jurisdiction of the Court. I would agree with **Law J. A. in Mukisa Biscuit Manufacturing Co. Ltd v West End Distribution Ltd {1969} EA 696**, where the threshold of the phrase preliminary objection is defined as follows:

“So far as I am aware a preliminary objection consists of a point of Law which has been pleaded or which arises by implication out of pleadings, and which if argued as a preliminary, point may dispose of the suit.”

I have considered the respondent's preliminary objection which I take to the answer to the applicants notice of motion. In my view, the objection raised an issue of this Court not seized of jurisdiction. In my view the intended appeal concerns the interlocutory exercise of discretion by the Learned trial Magistrate in determining the impugned Ruling. As I have deduced from the principles in **Mukisa Biscuits case** that is not a jurisdictional issue.

As of now with preliminary objection, answering the application, and with observations of the record, the objection filed by the respondent on lack of competence *ratione temporis* of the Court to hear the facts as set out in the application dated 2.12.2020 fails for being devoid of merit.

As set out in the Motion, the said Motor vehicle be moved from the custody of the Auctioneer or any such Third Party in possession to the central and safety at Garsen Police Station pending any further orders of this Court.

In the result, the Motion succeeds with no order as to costs.

RULING DELIVERED, DATED AND SIGNED AT MALINDI THIS 15TH DAY OF DECEMBER, 2020

.....

R. NYAKUNDI

JUDGE

In the presence of:

- 1. Mr. Okul advocate for the applicant**
- 2. Mr. Wambua advocate for the respondent present**