



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**CIVIL APPEAL NO 389 OF 2018**

**FIONA MOTORS LIMITED.....APPELLANT**

**VERSUS**

**PHILIP WAMBUA THUO.....RESPONDENT**

**(Being an appeal from the Ruling of the Chief Magistrate's Court at Nairobi by the Hon. A. Mburu (Mrs), Senior Principal Magistrate delivered on 23<sup>rd</sup> July 2018 in CMCC 6460 of 2008)**

**RULING**

**INTRODUCTION**

1. The Appellant's Notice of Motion application dated 22<sup>nd</sup> August 2018 and filed on 23<sup>rd</sup> August 2018 was filed pursuant to the provisions of Article 22, 24 and 51 of the constitution (**sic**), Order 22 Rule 19 & 22, Order 9 Rule 9, Order 42 Rule 6, Order 51 of the Civil Procedure Rules 2010 and Section 3A of the Civil Procedure Act and all other enabling provisions of the law. Prayer Nos (1) and (2) were spent. It sought the following remaining orders:-

**1. Spent.**

**2. Spent.**

**3. THAT this honourable court be pleased to issue an interim order suspending, lifting and or staying execution of warrants of arrest issued against the individual directors of the Appellant/applicant pending hearing and determination of the Appeal.**

**4. THAT this honourable court be pleased to stay the orders made on the 23<sup>rd</sup> July, 2018 in CMCC No 6460/2018.**

**5. THAT costs of this application be provided for.**

2. On 19<sup>th</sup> September 2018, this court directed parties to file and serve their respective Written Submission. The Appellant was to file its Written Submissions by 4<sup>th</sup> October 2018. It did not comply. As a result, the Respondent did not file his Written Submissions by 12<sup>th</sup> October 2018. This court extended the time for the parties to file and serve their Written Submission when the matter was mentioned on 17<sup>th</sup> October 2018 but as at 29<sup>th</sup> October 2018 when the matter was mentioned again, the Appellant had not filed its Written Submissions. Its advocates did not also attend court on that day. The Respondent filed his Written Submissions dated 25<sup>th</sup> October 2018 on even date.

3. When the matter came before the court on 29<sup>th</sup> October 2018, the Respondent requested it to render its decision based on its Written Submissions which he relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

**THE APPELLANT'S CASE**

4. The Appellant's present application was supported by the Affidavit of Silvyia Wanjiru Merie that was sworn on 22<sup>nd</sup> August 2018.

5. It stated that the lower court issued warrants of arrest against its individual directors in execution of a decree dated 21<sup>st</sup> October 2014 but that the Notice to Show Cause were irregular and improper because fraud had not been established for the Learned Trial Magistrate, Hon A Mburu, to have lifted the corporate veil.

6. It averred that its directors were ready and willing to abide by any conditions set by the court and that it had in fact deposited security for costs in the intended appeal.

7. It was its contention that it had an arguable appeal with high chances of success and that it was only fair that the warrants issued against its directors be lifted.

8. It therefore urged this court to allow its application as prayed.

### **THE RESPONDENT'S CASE**

9. In response to the said application, the Respondent swore his Replying Affidavit on 17<sup>th</sup> September 2018. The same was filed on even date.

10. The Respondent stated that the Appellant's present application was misconceived, vexatious, bad in law and an abuse of the court process and ought to be dismissed with costs.

11. He averred that after judgment was delivered in 2013, he attached the Appellant's goods but an application that was filed by an Objector was allowed, the court having found that the goods belonged to the said Objector. He then applied to execute directly against the Appellant's directors, which application was allowed.

12. He stated that since the orders of the lower court had not been set aside, he applied for Notices to Show Cause which were served upon the Appellant's directors. However, they never showed cause why they should not be sent to jail.

13. He pointed out that the Appellant filed two (2) applications on 26<sup>th</sup> January 2018 and 24<sup>th</sup> April 2018 seeking to set aside the warrants of arrest but both applications were heard and dismissed. He also stated that the Appellant should deposit the entire decretal sum of Kshs 2,146,307/= into court or in a joint interest earning account in the names of the advocates.

### **LEGAL ANALYSIS**

14. As had been pointed hereinabove, the Appellant did not file any Written Submissions despite this court having given him ample time to do so.

15. The Respondent submitted that the power to grant an order for stay of execution under Order 42 Rule 6 of Civil Procedure Rules was discretionary and that such an order would only be granted if an applicant demonstrated that:-

**1. he will suffer substantial loss if the order for stay of execution is not granted;**

**2. He had made the application for stay of execution without unreasonable delay;**

**3. He has given security for the due performance of such decree or order.**

16. He placed reliance on the cases of **Butt vs Rent Restriction Tribunal [1982] KLR**, **Kenya Shell Ltd vs Kibiru & Another [1986] eKLR**, **Commercial Bank of Kenya Ltd vs David Njau Nduati [2015] eKLR** and **Nelson Mutai vs Benson Kathunge [2018] eKLR** to buttress his case.

17. He asked this court not to assist a litigant who disregarded its orders and urged it to dismiss the present application as it had been five (5) years since judgment was delivered in his favour.

18. This court noted from the Order marked as Exhibit PW 1 that was attached to the Respondent's Replying Affidavit, that despite having been served with the Respondent's Notice of Motion application filed on 31<sup>st</sup> July 2013 in the lower court, the Appellant did not attend the *inter partes* hearing as a result of which the lower court allowed him to execute against its directors. This was on 10<sup>th</sup> April 2014. This Order had not been appealed against and/or set aside as at the time it filed the present application.

19. In his Ruling delivered on 23<sup>rd</sup> July 2018, the Learned Trial Magistrates declined to set aside the warrants of arrest on the ground that the aforesaid order of 10<sup>th</sup> April 2014 had not been set aside and/or appealed from. It was this Ruling delivered that was on 23<sup>rd</sup> July 2018 that the Appellant intends to appeal against.

20. At this juncture, all that the court is required to ascertain is whether or not the Appellant, as an applicant, has demonstrated all the three (3) ingredients of Order 42 Rule 6 of the Civil Procedure Rules as has been set out by the Respondent hereinabove. They must all be demonstrated to exist before an order for stay of execution pending appeal can be granted.

21. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is "**and**". It connotes that all three (3) conditions must be met simultaneously.

22. The present application was filed without undue delay as the Ruling the Appellant wishes to appeal from was delivered on 23<sup>rd</sup> July 2018. The Appellant was also ready to abide by any conditions of depositing security. However, it had not demonstrated what substantial loss it would suffer if an order for stay of execution pending appeal was not granted.

23. Appreciably, the Appellant had only demonstrated existence of two (2) ingredients in Order 42 Rule 6(2) of the Civil Procedure Rules that stipulates as follows:-

**“No order for stay of execution shall be made under subrule (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.**

24. This court was not therefore persuaded that it should grant the orders that the Appellant had sought. The demonstration of whether or not an applicant has an arguable appeal with a very high chance of success or that the appeal will be rendered nugatory if the order for stay of execution pending appeal is reserved for stay of execution applications to the Court of Appeal under Rule 5 (2) (b) of the Court of Appeal Rules 2010 and are not applicable herein.

25. Rule 5 (2) (b) of the Court of Appeal Rules stipulates as follows:-

**“Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may-**

**(b) In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75 order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.**

26. The above notwithstanding, it was also apparent to this court that the Appellant may have lost interest in this matter. It neither filed its Written Submissions as directed by the court nor attended court on 29<sup>th</sup> October 2018 when the Ruling herein was reserved despite the date having been taken by consent. Its conduct disentitled it from being granted the orders it had sought in its present application as it did not act equitably.

#### **DISPOSITION**

27. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Notice of Motion application dated 22<sup>nd</sup> August 2018 and filed on 23<sup>rd</sup> August 2018 was not merited and the same is hereby dismissed with costs to the Respondent.

28. It is so ordered.

**DATED and DELIVERED at NAIROBI this 29<sup>th</sup> day of January 2019**

**J. KAMAU**

**JUDGE**