



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO. 63 OF 2018

ESTHER NGENDO WAMBARI.....APPELLANT

VERSUS

MARY WANGUI KIMANI & GEORGE NGUGI KIMANI

[Suing as the legal representatives of JAMES KIMANI.....RESPONDENTS

RULING

1. The appellant prays for *stay* of the order of the lower court pending the hearing and determination of this appeal. She also seeks for *release* of a “motor vehicle”; and, removal of the “2nd respondent” from the proceedings.
2. The impugned *order* was made on 20th December 2018 in *Murang'a Chief Magistrates Court Civil Case 413 of 2017*.
3. The applicant has *not* annexed the copy of the ruling or order appealed against. But from paragraph 4 of her affidavit, she avers that “*the attached goods belong to some other party and if a stay is not issued, the auctioneer will sell the said the said goods to the detriment of parties not in this suit*”.
4. The affidavit does *not* specify the motor vehicle. The memorandum of appeal filed on 21st December 2018 in grounds (a) to (f) casts some further light. The lower court is blamed for *four* main reasons: First, for dismissing the appellant’s motion for review; secondly, for countenancing the sale on expired warrants; thirdly; for upholding the proclamation and attachment of motor vehicle registration KCN 477T belonging to *Alkhaba Trading Company* on expired warrants; and, fourthly, failing to remove the appellant from the proceedings.
5. The appellant’s notice of motion is dated December 2018. The grounds are two-pronged: that the appeal has a high chance of success; and, that the motor vehicle does not belong to her husband. The latter is *not* deposed to in her affidavit.
6. The motion is contested. There are grounds of opposition filed on 23rd January 2018. The gravamen is that the lower court issued a *negative order*. Consequently, there is nothing to stay.
7. Learned counsel agreed that the matter be determined by written submissions. They filed the submissions and lists of precedents on 20th February 2019; and, 26th February 2019 respectively.
8. The motion is expressed to be brought under sections 3A and 1B of the **Civil Procedure Act**; and, Order 43 of the **Civil Procedure Rules**. That is a poor foundation for the prayers for *stay*.
9. However, the court is enjoined by **Article 159 (2) (d)** of the **Constitution** to do *substantial justice* to the disputants. **Edward Steven Mwitii v Peter Irungu & 2 others (No. 2)** Nairobi High Court ELC 105 of 2011 [2012] eKLR. The court should also maintain “*equality of arms and as far as it is practicable to place the parties on equal footing*”. **Harit Sheth Advocate v Shamas Charania** Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR.
10. In **Butt v Rent Restriction Tribunal** [1982] KLR 417, Madan JA (as he then was) quoted with approval the views of Brett LJ in **Wilson v Church (No 2)** 12 Ch. D [1879] 454 at 459-

“*I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful is not nugatory*”

11. Like I have stated, the applicant has *not* annexed the copy of the ruling or order appealed against. Her affidavit does *not* specify the motor

vehicle or elaborate the *owner*; or, why her husband has *no* connection with it. The applicant did *not* attach the two applications dated 22nd August 2018 and 17th September 2018 which were dismissed by the lower court. The impugned warrants of attachment are *not* annexed either.

12. As I have stated, the details of grievance and the car are in the *memorandum of appeal*. The appeal is pending for hearing. The point to be made is that at *this stage*, I have *no* materials to gauge whether the appeal is *arguable* or its chances of *success*.

13. The application was brought without delay. But the supporting affidavit neither demonstrates that *substantial loss* may occur nor does the applicant make any *offer* to furnish *security* for the due performance of the decree that may ultimately be binding on her. Those twin elements are required by Order 42 Rule 6 of the ***Civil Procedure Rules*** before grant of stay.

14. The upshot is that the appellant's notice of motion dated 21st December 2018 is hereby *dismissed*. The costs shall be in the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 27th day of March 2019

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

No appearance by counsel for the appellant/applicant.

Mr. Gitonga holding brief for Mr. Kibiku for the respondents instructed by K. Kibiku & Company Advocates.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.