



**REPUBLIC OF KENYA**

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

**MISC. APPLICATION NO. 668 OF 2018**

**FAZAL TRADING COMPANY LIMITED.....1<sup>ST</sup> APPLICANT**

**PADDY MICRO INVESTMENT LIMITED.....2<sup>ND</sup> APPLICANT**

**BENSON NJENGA CHEGE.....3<sup>RD</sup> APPLICANT**

**-VERSUS-**

**MARY WANJERI.....RESPONDENT**

**RULING**

1. Before me for consideration are two (2) applications: the Notice of Motion dated 18<sup>th</sup> December, 2018 supported by the grounds set out on the body thereof and the affidavit of *Julia Wanjiru Wachira*, and the Notice of Motion dated 28<sup>th</sup> December, 2018 similarly supported by the grounds set out on the body thereof and the affidavit of *Patrick Nthiga*.
2. On the one part, the Motion dated 18<sup>th</sup> December, 2018 seeks orders for a stay of execution of the judgment in CMCC NO. 3 OF 2017 and leave to file an appeal out of time plus costs thereof. In her affidavit, *Julia Wanjiru Wachira* deponed that judgment was entered in the suit on 9<sup>th</sup> August, 2018 against the applicants for the sum of Kshs.250,000/= and that the respondent has unlawfully proclaimed the applicants' goods and hence if a stay is not granted, the applicants will stand to suffer irreparable harm. The deponent asserted that the delay in lodging the appeal resulted from a transfer of the matter from one firm of advocates to another and that the appeal has overwhelming chances of success, adding that the applicants are still awaiting certified copies of the typed proceedings and judgment.
3. On the other part, the Motion dated 28<sup>th</sup> December, 2018 is seeking the release of the motor vehicle registration number KBR 743T from the respondent's custody together with incidental costs already incurred and which continue to be incurred while the said motor vehicle continues to be retained, and that the auctioneer be ordered to file a bill of costs, together with costs of the application. *Patrick Nthiga*, the deponent in this instance, stated that despite the issuance of temporary orders for a stay of execution, the respondent instructed auctioneers to seize the aforementioned motor vehicle and that the same is still being held. That in the meantime, the applicants continue to incur losses since the motor vehicle has been a source of income and they are apprehensive that they will be forced to cater for the storage costs that are accruing on a daily basis.
4. In opposition to the Motion of 18<sup>th</sup> December, 2018, *Mary Wanjeri* swore a replying affidavit on 28<sup>th</sup> January, 2019 to the effect that upon issuance of temporary stay orders by the court, the applicant sought to have the subject motor vehicle released by the auctioneers, to which the respondent's advocate responded by stating that the stay orders only halted the process of disposing of the motor vehicle but in no way meant that the same ought to have been released to the applicants. The deponent in turn stated that the purported agreement involves parties who are strangers to the proceedings and hence, the applicants cannot argue that they have incurred losses. *Mary Wanjeri* added that since the suit was heard and determined at Githunguri Law Courts, the application ought to have been filed at Kiambu High Court and hence it would be prudent to have the file transferred to the proper court.
5. *Mary Wanjeri* also thereafter swore a 2<sup>nd</sup> replying affidavit on 28<sup>th</sup> January, 2019 reiterating the contents of her earlier reply save to add that the applicants had previously sought a stay of execution before the lower court and which stay was not granted. That the applicants thereafter abandoned that particular application mid-way and hence the current application is premature. The deponent further stated that the award of Kshs.250,000/= excluded costs and interest; that the applicants transferred ownership of the subject motor vehicle to one *Joyce Wangui Wachira* on 14<sup>th</sup> January, 2019 despite the same being in the possession of the respondent's auctioneers.
6. In reply thereto, *Patrick Nthiga* swore two (2) separate supplementary affidavits essentially reiterating the averments made in the respective Motions and their supporting affidavits.
7. The applications were canvassed through written submissions. The applicants contended that their appeal is arguable and likely to succeed; that they stand to suffer loss if the order for a stay is denied and that the execution so far effected by the respondent is irregular.

8. In her submissions, the respondent took the position that the applicants have failed to give sufficient reason for the delay in filing the appeal and are therefore not entitled to an extension of time; that the applicants have circumvented the due process and are therefore not entitled to the orders sought; that the decree was served upon the applicants and upon non-action from them, the respondent proceeded with execution. The respondent in addition submitted that the applicants have not met the required threshold for this court to grant a stay of execution.
9. I have duly considered the respective applications, the replying and supplementary affidavits, together with the rival submissions.
10. That said, I deem it prudent to first address the jurisdictional issue raised by the respondent and to which the applicants did not offer a retort. It is not disputed that the suit was heard and determined at the Senior Principal Magistrate's Court at Githunguri, located in Kiambu County. It would therefore have been practical to have the application filed at the High Court in Kiambu. However, the parties will acknowledge that the merits of the respective applications were argued before this court; it would therefore be in compliance with the overriding objective to have the same determined by this court.
11. Having put the above issue to rest, I shall now address the question of *leave to appeal out of time*. To begin with, *Section 79G* of the Civil Procedure Act gives strict timelines for the filing of an appeal from the subordinate courts to the High Court. The said provision also stipulates that leave to appeal out of time can only be granted where sufficient cause has been shown.
12. The above condition has been restated in addition to three (3) other conditions in *APA Insurance Limited v Michael Kinyanjui Muturi [2016] eKLR* with close reference to the Court of Appeal case of *Thuita Mwangi v Kenya Airways Limited [2010] eKLR*.
13. I shall begin with the first condition on the length of the delay and whether or not a reasonable explanation has been given for the same. The relevant Motion (dated 18<sup>th</sup> December, 2018) was filed about four (4) months after the delivery of the judgment which forms the subject of the intended appeal, it is certain that there has been a delay. Nonetheless, I do not find such delay to be inordinate in the relative sense of the term. That being the case, I recall the applicants' explanation that the delay was occasioned by an inadvertent mistake in the transfer of the client file from one firm of advocates to another. In my considered view, it is upon the client to instigate the process of obtaining his or her file from one advocate and passing it on to another where a change of advocates has arisen. Needless to say, I am aware that there are times where a client may experience difficulties in retrieving his or her file from an advocate. I therefore find the explanation given by the applicant to be reasonable.
14. There also exists the condition that an applicant ought to establish an arguable appeal. However, I have known the same to mandatorily apply in appeals from the High Court to the Court of Appeal. This being an appeal from a subordinate court, Order 42 Rule 6 does not make it a requirement for the applicants to show that their appeal raises arguable issues. Either way, I do not have a copy of the impugned judgment to go by. I therefore see no need to dwell on this particular condition.
15. The third condition touches on prejudice that will befall the respondent. It is apparent that as it stands, the judgment is in favour of the respondent and by virtue of this fact, she is entitled to enjoy the fruits of her said judgment. On the flip side, the applicants as well stand to be prejudiced since they are aggrieved by the said judgment and are desirous of filing an appeal. In the premises, it would be in the interest of justice to grant them the opportunity of appealing against the same and in due consideration of the fact that they have shown sufficient cause as required by law.
16. This brings me to the second limb of stay of execution pending appeal as encapsulated under *Order 42, Rule 6 (2)* of the Civil Procedure Rules. I believe the first condition on whether or not there has been unreasonable delay in filing the application has already been covered and I see no need to belabor the same.
17. I will therefore swiftly move to the second condition on substantial loss. It cannot be emphasized enough that this forms the crux of an application for stay. Without it, the application is untenable. The applicants' submission is that they stand the risk of losing their property and as a result, suffering irreparable harm. The respondent on her part maintained that substantial loss has not been shown. In offering my rendition, I draw persuasion from the analysis in *Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) 1 KAR 1018* as referenced in the High Court case of *Praxades Okutoyi v Medical Practitioners and Dentists Board [2008] eKLR* and which I agree with in totality. Therein is held as follows:
- “Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.”***
18. It has been stated time and time again that imminent execution, being a lawful process in itself, is not sufficient basis on which to argue that substantial loss will result. The applicants herein have in no way established that the respondent will not be in a position to refund the decretal sum once the same is paid. I therefore find no reason to conclude that substantial loss will result in such a manner that cannot be adequately compensated by way of costs.
19. On the provision of security, the applicants indicated a willingness to abide accordingly. From the foregoing, while I appreciate that the application has been brought without unreasonable delay and there is no squabble regarding the provision of security, I am hesitant to grant a stay of execution in the absence of proof of substantial loss. This prayer therefore cannot stand.
20. Having determined so, I now turn to the Motion dated 28<sup>th</sup> December, 2018. In line with the applicants' argument, the release sought after is pegged on the temporary order for a stay of execution and the claim that the respondent is in violation of the interim order. The respondent in opposition thereto submitted that the subject motor vehicle is lawfully held since the execution process had begun and the stay order was purely aimed at maintaining the status quo.
21. I have perused the record and noted that warrants of sale and attachment were taken out by the respondent. I have also noted that whereas

the applicants claimed non-service of the decree, they did not contend that they were not served with either the aforesaid warrants of attachments or the notice of proclamation, though they did claim that the proclamation is illegal and in fact filed an application before the subordinate court to that effect. It is not clear whether the said application was heard and determined.

22. Be that as it may, the respondent did annex as “MW 1” a copy of a letter dated 1<sup>st</sup> August, 2018 addressed to the applicants’ erstwhile advocates, informing them of the judgment and decretal amount plus costs. The applicants’ advocate was therefore made aware, one way or another, of the position and imminent execution in the event of non-compliance.

23. Further to this, it is well appreciated that the proclamation process preceded the interim orders for a stay which, to my mind, were intended to maintain the status quo from that point until determination of the application and not to obligate the respondent to release the subject motor vehicle.

24. Tied to the above is the applicants’ submission that the subject motor vehicle was being utilized as a source of income. However, no evidence has been adduced to back this claim save for the purported motor vehicle lease agreement dated 20<sup>th</sup> January, 2018.

25. Furthermore, the applicants also sought in their 2<sup>nd</sup> Motion a prayer that the auctioneer be ordered to file a bill of costs. My view thereto is that a court of law cannot order a party to file a bill of costs; this lies purely at the liberty of the party.

26. From the foregoing, the court makes the following orders:

*i) Prayer 4) of the Notice of Motion dated 18<sup>th</sup> December, 2018 is allowed. Costs shall abide the outcome of the appeal.*

*ii) The Motion dated 28<sup>th</sup> December, 2018 lacks merit and the same is hereby dismissed with costs to the respondent.*

*iii) The applicants to file the intended appeal at the High Court in Kiambu within 30 days from today.*

**Dated, Signed and Delivered at Nairobi this 14<sup>th</sup> day of March, 2019.**

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**L. NJUGUNA**

**JUDGE**

**In the presence of:**

..... for the Applicants

..... for the Respondent