



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 490 OF 2016

RUNDA WATER LIMITED.....1ST APPELLANT

RUNDA ASOCIATION.....2ND APPELLANT

-VERSUS-

TIMOTHY JOHN NICKLIN.....1ST RESPONDENT

ANNE CHRISTINE NICKLIN.....2ND RESPONDENT

RULING

1) The subject matter of this ruling is the motion dated 16th May 2019 taken out by the appellants/applicants whereof they seek for following orders:

i. That this application be certified urgent and be heard ex parte in the first instance.

ii. THAT pending the hearing and determination of the application, this honourable court be pleased to grant an interim order for stay of execution of the ruling and order delivered on 23rd August 2017 by the honourable Mr. Orege SRM in CMCC No. 3062 of 2014, Nairobi.

iii. THAT pending the hearing and determination of the application this honourable court be pleased to grant an order of restitution of motor vehicle registration no. KBB 299A back to the first applicant.

iv. THAT pending the hearing of this appeal, this honourable court be pleased to grant an order of stay of execution of the ruling and order delivered on 23rd August 2017 by the honourable Mr. Orege SRM in CMCC No. 3062 of 2014, Nairobi.

v. THAT costs of and incidental to this application be costs in the appeal.

2) The motion is supported by the affidavit of Cleopas Agingu. When served with the motion the respondents filed the replying affidavit of Mugui Mungai to oppose the motion.

3) When the motion came up for interpartes hearing, learned counsels made oral submissions in support of their respective positions. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the application.

4) It is the submission of Mr. Kahora, learned advocate for the appellants/applicants that prayer (iii) of the motion which is seeking for restitution of motor vehicle registration no. KBB 299A is already spent having been granted ex parte, hence, what is pending for hearing and determination is the prayer for stay of execution pending appeal.

5) Mr. Mungai, learned advocate for the respondents is of the contrary view that the prayer sought to release the attached motor vehicle is not spent since it was issued ex parte. I have perused the replying affidavit of Timothy John Nicklin and it is clear that in paragraph 18 of the replying affidavit that the deponent avers as follows:

“That the order seeking for the restitution of the motor vehicle is spent given that upon payment of the costs, the attached motor vehicle was released.”

6) It is not in dispute that when the instant motion was placed before Justice Mbogholi on 17.5.2019 the honourable Judge certified the application urgent and further proceeded to grant prayer (iii). In prayer (iii) the applicants had basically sought for an order of restitution of

motor vehicle registration no. KBB 299A back to the 1st applicant pending the hearing and determination of the motion exparte.

7) With respect, I am persuaded by the argument of Mr. Kahora that prayer (iii) of the aforesaid motion spent. Therefore, the only prayer which commends itself for determination is that for stay of execution of the ruling and order delivered on 23rd August 2017 by Hon. Orege, learned Senior Resident Magistrate vide C.M.C.C. no 3062 of 2014, Nairobi, Milimani Commercial Courts.

8) It is the submission of Mr. Kahora that on 23rd August 2017, Hon. Orege, delivered a ruling in which he inter alia issued an order for the attachment of the applicants' properties for contempt of court orders. It is stated that the order for attachment was executed on 25th April 2019 whereof the 1st applicant's motor vehicle registration KBB 299A was seized to recover a sum of kshs.114,100 being the costs of the suit.

9) The applicants aver that they paid the aforesaid sum but the respondents have declined to release the attached motor vehicle unless the appellants complied with the court order to remove the barrier thus prompting the appellants/applicants to seek for the intervention of this court.

10) The appellant aver that they have already filed an appeal against the decision directing them to remove the barrier and the same is pending hearing. Mr. Kahora argued that should the barrier be removed before the appeal is heard, the security of over 9 thousand (1000) residents of Runda Estate will be compromised, since the barrier forms a critical part of the security of the residents.

11) The appellants further submitted that they will suffer substantial loss in that the removal of the barrier for any period of time will be a direct infringement to the constitutional protection of the life and property of the residents of Runda Estate.

12) The appellants stated that they are ready and will to provide any form of security this court directs.

13) Mr. Mungai strenuously opposed the application arguing that the same is resjudicata. He is of the argument that the appellants were found in contempt of court on 23.8.2017 and since they have not purged the contempt they should not be given audience. The respondents filed a similar application dated 25.8.2019 before this court which application was heard and dismissed by Lady Justice Njuguna on 29th November 2018.

14) It is also pointed out that the appellants being dissatisfied with the dismissal order preferred an appeal before the Court of Appeal. The respondents further averred that the appellants filed the appeal contemporaneously with an application for stay of execution pending appeal which application was too dismissed by the Court of Appeal vide its ruling delivered on 11th May 2018. This court was therefore urged to dismiss the application for being resjudicata. It was also pointed out that the appellants have failed to show sufficient cause and further failed to demonstrate the substantial loss they stand to suffer if the order for stay is refused.

15) The history behind this motion appears to be short and straightforward. The trial court delivered its judgment on 30th June 2016 whereof the court issued inter alia a mandatory order of injunction compelling the appellants to remove the barriers already erected on Ruaka Road within Runda Estate in Nairobi. The appellants preferred this appeal. They then filed an application for stay before the trial court which application was heard and dismissed. The respondents thereafter filed an application dated 27.4.2017 in which they inter alia sought for the attachment of the appellants' properties for disobeying the court order directing them to remove the barrier placed on Ruaka Road. The aforesaid application was heard and allowed on 23rd August 2017. The appellants being aggrieved preferred this appeal against the aforesaid decision.

16) Having set out in brief the background of the motion I now consider the substance of the motion dated 16th May 2019. I have already taken into account the arguments put forward by both sides. The respondents have raised a preliminary point of law which is to the effect that the motion is resjudicata.

17) Mr. Mungai, learned advocate for the respondents urged this court to dismiss the motion on the basis that the same is resjudicata. Mr. Kahora, learned advocate for the appellants did not address this court over the preliminary point of law.

18) The record shows that the appellants filed the application dated 25th August 2017 seeking for similar orders as obtaining in the instant motion. The motion dated 25.8.2017 was heard on its merits and dismissed by Lady Justice Njuguna vide her ruling delivered on 29th November 2017.

19) The appellants being dissatisfied preferred an appeal to challenge the decision of Lady Justice Njuguna before the Court of Appeal. Pending the hearing and determination of the aforesaid appeal, the appellants filed the Notice of Motion dated 6th December 2017 in which they sought for inter alia an order for stay of execution of the orders of the trial court issued on 23rd August 2017.

20) The Court of Appeal heard the application and dismissed it on 11th May 2018 thus affirming the dismissal order issued on 29.11.2019 by Lady Justice Njuguna. I am convinced that the instant motion dated 16.5.2019 is therefore resjudicata. On this singular ground, the same is dismissed with costs to the respondents.

Dated, signed and delivered at Nairobi this 5th day of August, 2019.

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Defendant/Applicant