



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 511 OF 2018

HOUSING FINANCE COMPANY OF KENYA LIMITED.....APPELLANT

VERSUS

BRICK & MORTAR HOLDINGS LIMITED.....RESPONDENT

(Being an appeal arising from the ex-parte of the Learned Resident Magistrate Hon I. Oreng)

delivered on 19th October 2018 in Civil Case No 9282 of 2018)

RULING

INTRODUCTION

1. The Appellant's Notice of Motion application dated and filed on 25th October 2018 was brought pursuant to the provisions of Order 42 Rule 6 of the Civil Procedure Rules 2010, Section 1A,1B and 3A of the Civil procedure Act, Cap 21 Laws of Kenya and all other enabling provisions of the law. Prayers Nos (1), (2) and (3) were spent. It sought the following remaining prayers:-

1. Spent.

2. Spent.

3. Spent.

4. THAT pending the hearing and final determination of the appeal herein, an order of stay of proceedings and all orders issued in Civil Suit No 9282 of 2018 in the Chief Magistrate's Court at Nairobi do issue.

5. THAT the costs of the Application be in the cause.

2. Its Written Submissions were dated 18th February 2019 and filed on 21st February 2019. It filed other Written Submissions dated 29th April 2019 on the same date. They were substantially the same with minor amendments. The Respondent's Written Submissions were dated 23rd April 2019 and filed on 24th April 2019.

3. Parties requested that the court deliver its decision based on their respective Written Submissions which they 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 that was sworn by its advocate, Paul Ogunde, on 25th October 2018.

5. It stated that the matter before the subordinate court, **CMCC No 9282 of 2018** involved several motor vehicles and trailers whose combined value of the subject matter was Kshs 46,130,000/= and consequently, the said subordinate court lacked the pecuniary jurisdiction to hear and determine the dispute. It further pointed out that the dispute was predicated on facilities it advanced the Respondent in the sum of USD 1,408,109.00 which was approximately Kshs 140,810,900/=.

6. It averred that the injunction orders that were issued by the Learned Magistrate, Hon K.I. Oreng, were thus irregular, unlawful and

procured and/or granted without jurisdiction. It was emphatic that it lawfully repossessed the subject motor vehicles and trailers and was apprehensive that the Respondent might reclaim the said vehicles and trailers and dispose them to third parties.

7. It added that the *ex parte* orders that were issued by the Learned Magistrate were final in nature and conclusively determined the *substratum* of the suit. It was its contention that if the orders were allowed to subsist and/or proceed, its Appeal would be rendered nugatory.

8. It therefore urged this court to allow its application as it was in the interest of justice to do so.

THE RESPONDENT'S CASE

9. In response to the said application, the Respondent's Advocate, Alex Inyangu, swore a Replying Affidavit on 8th February 2019. The same was filed on the same date.

10. The Respondent averred that the present application was premature because the Learned Magistrate was yet to hear its Notice of Motion application seeking injunctive orders, *inter partes*. It pointed out that the Learned Magistrate only issued *ex parte* orders pending the hearing and determination of its application.

11. It was categorical that the orders restraining the Appellant from disposing of the motor vehicle was a negative order, incapable of execution and same could not thus be stayed.

12. It contended that by the time the Appellant filed the present application, it was in contempt of the court order and it was not up to it to decide when to obey a valid court order. It was its averment that the motor vehicles were registered in both the Appellant's and its name and it could not therefore dispose of the same as was feared by the Appellant.

13. It stated that the Appellant was litigating in two(2) courts whereas one level of court must be allowed to deal with a matter to finality whereafter if aggrieved by the decision thereon, it could appeal.

14. It was its prayer that the subordinate court be allowed to deal with the Preliminary Objection before it and thereafter the Appellant's appeal against the decision if aggrieved by the same.

LEGAL ANALYSIS

15. The Appellant submitted that the guiding principles on the granting of a stay of proceedings was set out in the case of **Winding Cause No 43 of 2000 (UR) Global Tours & Travels Limited** that was cited in the case of **Masisi Mwita vs Damaris Wanjiku Njeri [2016] eKLR** where it was held that an applicant must demonstrate that it is in the interest of justice that the stay orders are granted.

16. It was categorical that the Respondent owed it colossal sums of money and an order mandating them to restore possession of the motor vehicles to it would expose it to substantial risk. It stated that it was arguable whether the orders issued at an interlocutory stage were properly issued.

17. It further argued that Section 75 of the Civil Procedure Act was instructive in that appeals lay as a matter of right from an order for the granting of an injunction as contemplated in Order 43 of the Civil Procedure Rules.

18. In addition, it submitted that no contempt proceedings had been instituted in the lower court and that in any event, claims of contempt could not be maintained in respect of orders that had been made without jurisdiction.

19. On its part, the Respondent placed reliance on the case of **Kenya Power & Lighting Company Limited vs Esther Wanjiru Wokabi [2014] eKLR** which also set out the criteria to be adopted by a court before granting an order for stay of proceedings.

20. It also referred this court to the case of **Heritage Insurance Company Limited vs Patrick Kasina Kisilu [2015] eKLR** where it was held that the filing of an application when another case was pending was an abuse of court process.

21. It argued that the orders it was issued with was an interim measure of protection which are issued to prevent a litigant from prejudicing the outcome of a law suit. It referred to the definition given in the Black's Law Dictionary 9th Edition as follows:-

"An international tribunal's order to prevent a litigant from prejudicing the final outcome of a law suit by arbitrary action before a judgment has been reached. This measure is comparable to a temporary injunction in national law."

22. Order 42 Rule 6(1) of the Civil Procedure Rules provides as follows:-

"No appeal or second appeal shall operate as a stay of execution or proceedings (emphasis court) under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside."

23. Under the said order, the conditions for stay of proceedings are different from those for a stay of execution under Order 42 Rule 6(2) of the Civil Procedure Rules that stipulates that:-

“No order for stay of execution shall be made under subrule (1) unless—

- 1. 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**
- 2. 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 in agreement with the holding in the case of Kenya Power & Lighting Company Limited vs Esther Wanjiru Wokabi (Supra) that was relied upon by the Respondent in which it was held as follows:-

“...the courts discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by any of the following three main principles;

- a) Whether the applicant has established that he/she has a prima facie arguable case.**
- b) Whether the application was filed expeditiously and**
- c) Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.”**

25. It was also in agreement with the decision of Global Tours & Travels Limited (Supra) that was cited in Masisi Mwita vs Damaris Wanjiku Njeri (Supra) that was relied upon by the Appellant where it was held that:-

“Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests of justice to order a stay of proceedings, and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously.”

26. The court therefore has to exercise its discretion judiciously as far as an order for stay of proceedings is concerned whereas in a case for stay of execution pending appeal, it must establish that the criteria that has been set out has been met.

27. It had to be satisfied that the application for a stay of proceedings has not been filed to cause delay to an opposing party and/or to obstruct justice. It must also consider if prejudice will be suffered by the applicant in the event the same is not granted. It is an interim measure of protection much the same way that an interlocutory and/or *ex parte* injunction is an interim measure of protection. It is an order that can be sought at any time during the proceedings. It is irrespective that the order sought to be appealed from is a negative order which is distinct from the case of an application for stay of execution pending appeal where a stay of execution can only be granted if the order sought to be appealed from is not negative in nature.

28. This court was not persuaded by the Respondent’s submissions that the Appellant had to await the determination of a Preliminary Objection before it could approach this court in view of the nature of orders that the Respondent had sought. In its Notice of Motion application dated and filed on 19th October 2018, the Respondent had sought the following prayers:-

- 1. THAT the application be certified as urgent, service be dispensed would in the first instance as the object of this application and of the suit would be defeated if the Defendant/Respondent proceeded to take any of the threatened action against the Plaintiff/Applicant and, interim orders in terms of prayers (2) and (3) be granted *ex parte* pending the hearing of this Application *inter partes*.**
- 2. THAT pending the hearing and determination of this suit, the Defendant/Respondent by itself, its officers, servants, agents or otherwise howsoever be restrained from selling motor vehicle registration numbers KCF 815J, KCF 816J, KCF 817J, KCF 818J, KCF 819J and trailer registration numbers ZF 2005, ZF 2006, ZF 2007, ZF 2008 and ZF 2009 by public auction or otherwise howsoever on October 23, 2018 as advertised or at any other time thereafter and from disposing of, alienating, transferring and/or otherwise howsoever interfering with the Plaintiffs/Applicants’ interest in vehicles.**
- 3. THAT pending the hearing and determination of this suit, the Honourable Court be pleased to order the Respondent to forthwith restore to the Applicant possession of motor vehicle registration numbers KCF 815J, KCF 816J, KCF 817J, KCF 818J, KCF 819J and trailer registration numbers ZF 2005, ZF 2006, ZF 2007, ZF 2008 and ZF 2009.**
- 4. THAT pending the hearing and determination of this suit, the Defendant/Respondent be ordered to release to the Applicant the original log books to motor vehicle registration numbers KBV 714D, KBV 713D, KBT 713J, KBT 714J, KBX 713B.**

5. THAT pending the hearing and determination of this suit, the Defendant/Respondent be ordered to retransfer and release to the Applicant original logbooks to trailer registration numbers ZF 2003 and ZF 2004.

6. THAT the costs of the Application be awarded to the Plaintiff/Applicant.

29. The Learned Magistrate granted the following orders:-

1. THAT the matter be and is hereby considered and certified as urgent.

2. THAT pending the hearing and determination of the Application, the Defendant/Respondent by itself, its officers, servants, agents or otherwise howsoever be and is restrained from selling motor vehicle registration numbers KCF 815J, KCF 816J, KCF 817J, KCF 818J, KCF 819J and trailer registration numbers ZF 2005, ZF 2006, ZF 2007, ZF 2008 and ZF 2009 by public auction or otherwise howsoever on October 23rd 2018 as advertised or at any other time thereafter and from disposing of, alienating, transferring and/or otherwise howsoever interfering with the Plaintiffs/Applicants' interest in vehicles.

3. THAT pending the hearing and determination of the Application, the Respondent is hereby ordered to restore to the Applicant possession of motor vehicle registration numbers KCF 815J, KCF 816J, KCF 817J, KCF 818J, KCF 819J and trailer registration numbers ZF 2005, ZF 2006, ZF 2007, ZF 2008 and ZF 2009 and trailer registration numbers ZF 2005, ZF 2006, ZF 2007, ZF 2008 and ZF 2009.

4. THAT Applicant to serve for *inter partes* on 2nd November 2018 before Hon. D.A. Ocharo (SRM).

30. Upon being aggrieved by the said order, the Appellant had a right to approach this court on appeal because an appeal lay as a matter of right from an order emanating from Order 40 Rules 1,2,3,7 and 11 as stipulated in Order 43 Rule (1) (u) of the Civil Procedure Rules that states that:-

“An appeal shall lie as of right from the following Orders and rules under the provisions of section 75(1) (h) of the Act—

3.

4.
rules 1, 2, 3,7 and 11 (temporary injunctions)

(u) Order 40,

31. The Appellant therefore acted correctly when it approached this court and need not have waited for the determination of its Preliminary Objection or the Respondent's aforesaid Notice of Motion application dated and filed on 19th October 2018.

32. There was potential of the second order in the order issued on 19th October 2018 greatly prejudicing the Appellant in the event the court determined that the Respondent's application was not merited. The subject matter was motor vehicles which were prone to wear and tear. As the Kenyan judicial system experiences delays in hearing and determining cases, there was no knowing how much wear and tear that the motor vehicles would have gone through before the dispute between the Appellant and Respondent could be heard and determined.

33. It was also the considered view of this court that Prayer No (2) of the Respondent's said application was very final in nature and had the potential of terminating the case before it had been fully heard and determined. Indeed, courts must exercise caution and great restraint in granting mandatory injunctions *ex-parte* and at an interlocutory stage due to the finality of orders. It should only be granted in the clearest of cases.

34. In the case of Locabail International Finance Limited vs Agro-Export & Another [1986] I ALL ER, it was held that:-

‘A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction’”

35. There was therefore need for the appellate court to determine whether or not the Learned Magistrate exercised his discretion judiciously in granting Prayer No (2) of the Respondent's said Notice of Motion application.

36. This court was satisfied that the Appellant had demonstrated that it was in the best interest of justice that an order for stay of proceedings in the subordinate court be granted pending the hearing and determination of the Appeal herein so as not to render the Appeal a mere academic exercise. It was satisfied that the Appellant would suffer great prejudice if the order it had sought herein was not granted as prayed.

37. It filed the present application without undue delay. Indeed, the order it intended to appeal against was given on 19th October 2018. This court was therefore satisfied that the present application was not an abuse of process of court. It was an application filed in the course of litigation by a party who truly felt aggrieved by an order of the subordinate court.

38. Since contempt of court proceedings had not been commenced, it was in the best interests of justice that the Appeal herein be heard and

determined to establish whether or not the Learned Magistrate exercised his discretion judiciously in granting the orders sought to be appealed from by the Appellant herein.

DISPOSITION

39. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated and filed on 17th May 2017 was merited and the same is hereby allowed as prayed therein.

40. To avoid any delays in the prosecution of the matter in the lower court, the Appellant is hereby directed to file and serve its Record of Appeal within forty five (45) days from the date of this Ruling i.e by 29th January 2020.

41. The Deputy Registrar High Court of Kenya Milimani Law Courts Civil Division is hereby directed to facilitate the expeditious typing of the proceedings in the lower court and to undertake the requisite preliminaries of ensuring that the Appeal is ready for hearing and determination on a priority basis as the lower court cannot wait indefinitely for the hearing and determination of the Appeal herein.

42. It is so ordered.

DATED and DELIVERED at NAIROBI this 26th day of November 2019.

J. KAMAU

JUDGE