



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. 116 OF 2018

BETWEEN

ODHIAMBO AMBALA T/A AMBALA COMPLEX.....APPELLANT

AND

VICTOR OMONDI MIDIGO & ANNE ATIENO ODUNGA.....RESPONDENTS

RULING

1. By a ruling dated 22.10.18, the trial court in **Winam SPMCC 95 of 2018** directed the Appellant, his agents and/or employees to unconditionally release to the Respondents the cosmetic products and assorted beauty products proclaimed on 10.07.17.
2. The Appellant being dissatisfied with the lower court's decision preferred an appeal setting out 8 grounds of appeal mainly that the Respondents' case was not proved on a balance of probabilities.
3. By a judgment dated 28th November, I found that the appeal was unmerited and dismissed it.
4. By an application dated 02nd December, 2019, the Appellant seeks to stay this court's orders pending hearing and determination of an intended appeal to the Court of Appeal.
5. The application is supported by the Appellant's affidavit sworn on 02nd December, 2019 in which he avers that he stands to be prejudiced if the orders sought are not granted.
6. The application is opposed by way of a replying affidavit sworn by the 1st Respondent on 10th December, 2019 in which he avers that the Applicant has for the last 2 years been unlawfully holding Respondents' goods despite court orders that the same be released. The deponent avers that the Appellant is using antics to delay justice which has led to more loss and suffering on the part of the Respondents.

Analysis and Determination

7. I have carefully considered the notice of motion *vis a vis* the supporting affidavit and the Replying affidavit.
8. Order 42 (6) of the Civil Procedure Rules provides:

(2) No order for stay of execution shall be made under sub rule (1)

Unless—

- a. The court is satisfied that substantial loss may result to the applicant unless the order is made**
- b. That the application has been made without unreasonable delay; and**
- c. 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.**

9. There is a myriad of cases on what constitutes substantial loss. In **Civil Appeal No. 186 Of 2007 Standard Assurance Co. Ltd –Vs-**

Alfred Mumea Komu the Court stated-

“Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. That is what has to be presented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”

10. Similarly in Civil Case No. 41 Of 1995 United Builders & Contractors (Africa) Limited –Vs- Standard Chartered Bank Ltd the Court stated-

“If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other suits.”

11. Additionally, the court in ABN Amro Bank N.V. v Le Monde Foods Ltd Civil Application No. Nairobi 15 of 2002 held that:

“Each party bears a specific burden regarding proof of substantial loss in a case such as before us.So all an Applicant in the position of the bank (Appellant) can reasonably be expected to do is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it were paid over to him and the pending appeal was to succeed. In those circumstances, the legal burden still remains on the Applicant but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. This evidential burden would be very easy for a Respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on.”

12. From the affidavit evidence, I am not persuaded that the Applicant has demonstrated that he is likely to suffer substantial loss if he complies with the court order issued 22.10.18 directing him to release goods lawfully belonging to the Respondents to them.

The upshot of the foregoing is that the notice of motion dated 02nd December, 2019 is considered and found to have no merit and the same is disallowed with costs to the Respondents.

SIGNED AND DELIVERED AT KISUMU THIS 18th day of December 2019.

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant

-Amondi/Okodoi

Appellant/Applicant

- Present in person

1st Respondent

- Present in person

2nd Respondent

- N/A