



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NANYUKI**  
**CIVIL APPEAL NO. 7 OF 2017**

**MENANY SACCO SOCIETY LT.....APPLICANT**

*versus*

**ROBERT MURIUKI GITONGA**

**JANE KANANU KAUNARUJI (suing as the legal representatives  
of the estate of WEDDY GACHERI (Deceased).....RESPONDENT**

**RULING**

1. Menany Sacco, the appellant, filed an application, before this court dated 1<sup>st</sup> December 2017. By that application the appellant sought orders of stay of execution pending appeal without stating which matter was being stayed. It is the grounds upon which that prayer was sought that I wish to focus on.

2. Those grounds are as follows:-

- a) That judgment was delivered by the Hon. E. Ngigi (SRM) on 11<sup>th</sup> July, 2017 whereby judgment was entered as against the applicant/appellant and the plaintiff was awarded Kshs.468,090 as Special damages and plus costs and interests.*
- b) That judgment was delivered in the absence of the appellants/applicants and no stay of execution was granted.*
- c) That a decree was subsequently issued for the amount of kshs.641,990 in favour of the Respondents against the Applicant.*
- d) That being aggrieved by the said judgment the appellant/applicant filed an appeal to the High Court of Kenya at Nanyuki as Civil Appeal No. 7 of 2017.*
- e) That the plaintiff/respondent commenced the process of execution via warrants of attachment and warrants of sale issued on the 29<sup>th</sup> August, 2017.*
- f) That on 13<sup>th</sup> November 2017 the respondent herein instructed the firm of Nasioki Auctioneers to proceed with execution where upon they attached the applicants motor vehicle registration number KBB 918 Z.*
- g) That the Appellants/Applicants have since paid the auctioneers fees of Kshs.84,000 in full.*

***h) That the applicant is apprehensive that should stay of execution not be granted, the plaintiff/respondent firm of Nasioki Auctioneers will proceed to impound, gazette and auction the said motor vehicle.***

***i) That this application will not occasion any prejudice to the plaintiff/respondent that cannot in any event be compensated with payment of costs.***

***j) That in the event that Nasioki Auctioneers are to proceed with advertisement and sale of the appellant's/applicant's motor vehicle registration no. KBB 918 Z, it would greatly prejudice his transport business thus denying him his source of livelihood.***

***k) That the Appellant/Applicant has come to court within a reasonable period of time and without undue delay.***

***l) That it is in the interest of justice that the application be granted as prayed.***

***m) That the application has been made in good faith.***

3. The application was brought under a certificate of urgency and therefore it was first heard exparte. The court on entertaining it exparte granted temporary stay of execution of Nanyuki CMCC 124 of 2014 up to 20<sup>th</sup> December 2017. On that date it was not heard but it was eventually heard interparties on 1<sup>st</sup> February 2018.

4. Robert Muriuki Gitonga, the respondent in opposition to the application relied on his replying affidavit sworn on 15<sup>th</sup> December 2017. The issues raised therein are in the form of preliminary objection to the application.

5. The respondent by his replying affidavit called the attention of this court, to the previous applications the appellant filed before the trial court, which applications are to date still on record and had not yet been disposed. Respondent deponed that the applications before the trial court were similar to the one being entertained by this court.

6. Those depositions led this court to peruse the trial court's file. It is important to state that the learned counsel for the appellant Mr. Osioma did invite this court to peruse that trial court's file.

7. My perusal of the trial court file revealed that the trial court delivered its judgment on 11<sup>th</sup> July 2017. That Judgment was for the sum of Kshs.468,090 in favour of the respondent. On the date that judgment was delivered the appellant was granted by the trial court 21 days stay of execution.

8. By application filed before the trial court on 4<sup>th</sup> September 2017 the appellant sought stay of execution pending appeal, temporary exparte stay was granted on 4<sup>th</sup> September 2017 and the application was fixed for interpartes hearing on 12<sup>th</sup> September 2017.

9. On 12<sup>th</sup> September 2017 the exparte order was extended to 24<sup>th</sup> October 2017 by the trial court in the presence of both counsels for the appellant and the respondent.

10. On 24<sup>th</sup> October 2017 the trial court ordered parties to file written submissions to the application. Hearing by way of written submission was fixed on 7<sup>th</sup> November 2017.

11. On 7<sup>th</sup> November 2017 the appellants failed to attend the trial court and the matter was adjourned. In essence the stay of execution lapsed.

12. The appellant again approached the trial court with another application dated 14<sup>th</sup> November 2017. By that application the appellant sought stay or extension of stay of execution on the ground the

appellant's motor vehicle had been attached. On the very day that application was filed the court, on ex parte basis, granted temporary stay of execution. The interpartes hearing was fixed on 21<sup>st</sup> November 2017.

13. On 21<sup>st</sup> November 2017 the court was informed by the respondent's learned counsel that the appellant having negotiated with the auctioneer secured the released of the attached motor vehicle. Consequently the trial court adjourned the application.

14. Therefore it follows that the two applications before the trial court were still subsisting, and had not been determined by the time the appellant approached this court with its application dated 1<sup>st</sup> December 2017.

15. In filing the application before this court the appellant did not, and I repeat, did not disclose to this court that it had pending, before the trial court, applications that are similar to the one filed.

16. What was very disturbing to this court is that even though I severally questioned learned counsel for the appellant about the respondent's submission about the existence of those applications before the trial court the said learned counsel was adamant that the respondent's submissions were incorrect.

17. My perusal of the trial court's file revealed that indeed those applications have not to date been disposed.

18. The appellant obtained ex parte stay orders from this court on 4<sup>th</sup> December 2017, which orders subsist up to today, on basis of facts that were untruthful.

19. I will begin to outline the untruthfulness based on the appellant's grounds reproduce above in this Ruling.

20. The appellant stated in ground (b), above, that the trial court delivered its judgment in its absence and did not grant a stay of execution. Contrary to that statement the reality is that the trial court delivered its judgment in the presence of leaned counsel Mr. Mukhama who held brief for the appellant's counsel. On that day of judgment the trial court granted the appellant 21 days of stay of execution.

21. The appellant in its further grounds in support of the application before this court stated that execution had been levied against its motor vehicle registration No. KBB 918 Z by Nasioki Auctioneers and that the said auctioneers would proceed to impound, gazette and auction that vehicle if the stay sought from this court by the application dated 1<sup>st</sup> December 2017 was not granted.

22. My perusal of trial court file revealed that by a letter of consent, signed between learned counsel for the appellant and Nasioki Auctioneers dated 14<sup>th</sup> November 2017 an agreement was reached that on Nasioki Auctioneers being paid their fees of Kshs.84,450 they were to release the motor vehicle KBB 918 Z.

23. That consent was not revealed to this court by the appellant and the appellant learned counsel did not contradict the respondent's learned counsel's submission that the vehicle was indeed released by the auctioneer following that consent.

24. It follows that this court as it granted ex parte stay order on 4<sup>th</sup> December 2017 did so on the understanding that there was no stay of execution from the trial court; there was no similar application for stay which remained undisposed before the trial court; and there was imminent danger of appellant's motor vehicle KBB 918 Z being sold by the auctioneer.

25. The appellant, and perhaps more importantly its learned counsel, were under a duty to state the facts truthfully when the matter appeared before me ex parte. This is what was stated by Justice Emukule when the learned judge adopted the words of Lord Warrington L. J. in the case **King –vs- The General**

***“The court is supposed to know the law. But it knows nothing about facts and the applicant must state fully and fairly the facts and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside and any action it has taken on the faith of imperfect statement.”***

***“ A plaintiff applying for ex-parte orders ..... comes under a contract with the court. If he fails to do that, and the court finds, when the other party applies to dissolve the injunction that any material fact has been suppressed or not properly brought forward, the plaintiff is told that the court will not decide on the merits and that as he has broken faith with court the injunction must go.”***

In the case in exparte **Princess Edmond De Polignac 1917 1KB 48 Washington L. J.** Stated as follows at page 509:-

***“It is perfectly well established that a person who makes an exparte application to the court that is to say, in the absence of the person who will be affected by which the court is asked to do is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge and if he does not make that fullest disclosure then he cannot obtain any advantage form the proceedings and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him.”***

26. The Court of Appeal in discussing the burden borne by a party who seeks exparte orders in an injunction application in the case **UHURU HIGHWAY DEVELOPMENT LIMITED –vs- CENTRAL BANK OF KENYA & OTHERS** Civil Appeal No. 140 of 1995 stated thus:-

***“..... it must clearly be understood that a party who goes to a judge in the absence of the other side assumes a heavy burden and must put before the judge all the relevant materials, including even material which is against his interest. The basis of this is obvious: It is a universal rule of natural justice that court orders ought to be made only after hearing or giving all the parties an opportunity to be heard. Expated orders whether they be injunction or whatever, form an exception to this rule and for a party to benefit from the exception there must be a good compelling reason for it.”***

27. The appellant when it approached this court, exparte, was obligated to make full disclosure of the fact that there were pending before the trial court similar applications for stay of execution and that the motor vehicle had been released by the auctioneer.

28. Failure to make disclosure will lead to this court in penalising the appellant by setting aside the stay order.

29. Moreover, the appellant abused the court process by filing the application dated 1<sup>st</sup> December 2017 before this court while similar applications were pending disposal before the trial court.

30. The supreme court in the case **Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others [2015] eKLR** disapproved of such abuse as follows:-

***“Where the litigant’s prayer is pending for leave in the Court of Appeal, the motion in that court is to run its full course; and the matter does not in a parallel course, transmute into an appeal not conditional on grant of leave.”***

31. Justice Edward M. Muriithi the case **Heritage Insurance Company Limited v Patrick Kasina Kisilu (2015) eKLR** similarly disapproved such abuse when he held:-

*“To prevent abuse of the court of process where parallel proceedings are heard before two different courts with concurrent jurisdiction or before the same court at different times, section 6 of the Civil Procedure Act requires that the latter application be stayed to allow the hearing and determination of the earlier proceedings. The filing of an application before this court while a similar application is pending hearing and determination before a lower court of competent jurisdiction is, clearly, an abuse of court process. In addition the appellate court has no jurisdiction to interfere with the exercise of discretion by a lower court except where the court is clearly wrong or has misdirected itself resulting in a miscarriage of justice. From the material before the court, it is not possible to determine that the trial court has exercised its discretion wrongly, as the grant of an order for stay of execution is not automatic upon the filing of an appeal to a higher court.”*

32. Following the above holdings this court cannot permit the process of the court to be abused by the appellant. Accordingly this court grants the following orders:

- a) The stay of execution issued by this court on 4<sup>th</sup> December 2017 and its extensions is hereby set aside.
- b) The application dated 1<sup>st</sup> December 2017 being premised on untruthfulness is hereby struck out.
- c) The respondent is awarded costs of the application dated 1<sup>st</sup> December 2017.

**DATED and DELIVERED at NANYUKI this 22<sup>nd</sup> day of FEBRUARY 2018.**

**MARY KASANGO**

**JUDGE**

**CORAM**

Before Justice Mary Kasango

Court Assistant: Njue / Mariastella

For appellant .....

For Respondents:.....

**COURT**

Ruling read in open court.

**MARY KASANGO**

**JUDGE**