



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.126 OF 2016

BOTTO SOLAR.....APPELLANT

-VERSUS-

DIAMOND TRUST BANK.....RESPONDENT

RULING

1. The application dated 26th September, 2017 seeks stay of execution of the judgment and decree in Nakuru CMCC No.1130 of 2011 and the release of motor vehicle registration No. KAP 919N Peugeot already attached. The application is supported by the affidavit of one **Edith W. Mukiri** director of the appellant company.
2. **Edith Mukiri** deposes that the judgment was delivered on 21st September, 2016 and that the applicant made an application for stay of execution on 21st October, 2016; and, a ruling dismissing the application was given on 20th September, 2017. Subsequently on 23rd September, 2017 M/s Direct Auctioneers attached the vehicle No. KAP 919N Peugeot belonging to Edith W. Mukiri and Kenya Women Finance. They also attached motor vehicle No. KBN 864A Nissan Pick-up registered in the name of CFC Stanbic Bank and Botto Solar. Edith Mukiri further deposed that the sale of the vehicles would violate the rights of persons who were not direct parties to the suit.
3. The application is opposed by the respondent. There is however no replying affidavit on record. The proceedings of 23rd November, 2017 however seem to suggest that the respondent had filed a replying affidavit. On that date **Mr. Maina** for the applicant stated that the respondent had filed a replying affidavit and sought leave to file a further affidavit. It is observed that the respondent was not present on that date.
4. The applicant states in its written submissions that they have complied with **Order 42 Rule 6 of the Civil Procedure Rules** and that the respondent would not suffer prejudice if the application was granted. They also submit that their appeal was meritorious. They cite **Housing Finance Company of Kenya Vs. Sharok Kher Mohamed Ali Hirji & Another (2015) eKLR** and **Kenya Hotel Properties Limited Vs. Willesden Properties Ltd, (2009) eKLR** to buttress their submissions.
5. The respondent on the other hand filed written submissions on 18th December, 2017. The gist of the respondent's submissions is that the applicant would not suffer substantial loss as the respondent was a tier 1 bank with the ability to refund the entire decretal sum plus interest should the appellant succeed on appeal. They cite **Shalimar Flowers Self Help Group Vs. Kenya Commercial Bank Ltd (2016) eKLR**. It is the respondent's further submission that the application was not brought without undue

delay and that the applicant was not willing to offer sufficient security.

6. Order 42 Rule 6 (2) of the Civil Procedure Rules (2010) sets out three conditions to be met by the applicant. The applicant must show that substantial loss may result unless the order is made and that the application has been made without unreasonable delay; and, that the applicant has furnished security for the performance of such decree or order as may be ultimately binding on him. **See Baiba Dhidha Mjidho Vs. Van Leer East Africa Ltd. (Greif) (K) Ltd. 2006 eKLR.**

7. I have carefully considered the application and the submissions of the parties. As earlier stated the replying affidavit of the respondent was not on record. This ruling therefore does not have the benefit of affidavit evidence on the part of the respondent. Suffice to state however that the opposition to the application is clearly on record. The proceedings show that the parties had earlier requested the court to settle the matter out of court and was adjourned twice for that purpose. On 23rd November, 2017 however, the applicant's counsel informed the court that the negotiations had collapsed and that they wished to be heard on the application. Further the respondent's submissions in opposition as stated earlier are on record. The issue for me to determine at this stage is whether the applicant has met the conditions set out under **Order 42 Rule 6 (2).**

8. The applicant has averred that they will suffer substantial loss if the stay was not granted. That already two motor vehicles have been attached pursuant to the decree. The respondent on the other hand has averred that it would readily refund the decretal amount if the appellant were to succeed on appeal. I consider that the applicant would suffer substantial loss particularly because the attached properties are co-owned with other parties not party to the suit. While there is apparent ability of the respondent to repay the decretal sum, the inconvenience to third parties and of recovery of the said sums is a factor to consider. I am satisfied that the applicant is likely to suffer substantial loss owing to the likely litigation that may arise from the attachment and sale of the motor vehicles co-owned with financial institutions.

9. On the timeliness of the application, I observe that the present application was filed on 26th September, 2017. Judgment had been delivered on 21st September, 2017. The respondent submits that the application was thus not made without delay. The applicant however has explained that the ruling of the trial court which denied stay was rendered on 20th September, 2017. That being the case I would consider that the present application having been made only 5 days after the said ruling was made without unreasonable delay. There might have been some delay in the application before the trial court as alleged by the respondent but that would be outside the period of delay being considered in the present application.

10. The parties in this application had initially indicated to the court that they wished to compromise the application. They came back to court only after failing to agree on suitable security. As the appeal was in respect of a money decree, I would consider that securing the decretal sum would provide adequate security. In the premises, therefore, I allow the application on condition that the applicant deposits the decretal sum in an interest earning account in the names of the advocates for both parties within 30 days of the date of this ruling. The attached motor vehicles shall (if not already released) be released to the applicant upon the applicant paying the auctioneer's charges.

11. Costs of this application shall abide the outcome of the appeal.

Orders accordingly.

Ruling delivered, dated and signed at Nakuru

This 29th day of March, 2018

R. LAGAT KORIR

JUDGE

In the presence of:-

Emojong Court Clerk

Mr. Maina for appellant

Mr. Mwangi holding brief for Kisila for respondent