

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 39 OF 2018

CAPTAIN MOTORCYCLES MANUFACTURING CO. LTDAPPELLANT

VERSUS

JOSEPH MWITI NAIBORO.....1ST RESPONDENT

JAMES GATIBA.....2ND RESPONDENT

RULING

This is an application by way of Notice of Motion under Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules and Sections 3, 3A and 80 of the Civil Procedure Act dated and filed on 30th January, 2018 for orders that there be a stay of execution pending the hearing of the appeal herein. There is also a prayer that the auctioneers known as Clear Real Traders be restrained from proceeding with attachment in execution of the decree following proclamation of the appellants' goods.

The grounds are set out on the face of the application and there is a supporting affidavit sworn by a director of the appellant. The application is opposed and there is a replying affidavit sworn by the 1st respondent. Both parties have filed submissions to argue the application.

The record shows that there was an application seeking the same orders before the lower court which was dismissed on 11th January, 2018. The present application was filed on 30th January, 2018 and therefore there was no delay that can be attributed to the applicant.

The thrust of the application is that the appellant was never aware of any suit against it as summons to enter appearance was never served upon it. There was an admission however to the fact that a firm of advocates known as Mose Mose and Milimo Advocates had actually filed a defence on behalf of the applicant herein but it is the applicant's position that the insurers who the said advocates were acting for had no authority or instructions to do so.

There is also evidence that the demand letter, summons to enter appearance and the plaint were alleged to have been posted to the appellant using a wrong postal address which contention has not been seriously challenged by the respondent. It is also the applicants case that they have a strong defence and there is no way they could have entered into a consent on liability because the motor cycle had been involved in accident long before it was sold to the applicant.

It is also common practice that before counsel accepts service on behalf of a defendant, communication is dispatched confirming that they have instructions to act. No evidence has been displayed to show that the advocates who alleged to have filed a defence had such instructions.

In the absence of such evidence the applicant may be right in denying service of any such summons. I have also looked at the Memorandum of Appeal dated and filed on 30th January, 2018. It raises an arguable appeal and may be rendered nugatory if stay is not allowed.

Accordingly I allow the application for stay of execution pending the hearing of the appeal. The auctioneers are also restrained in terms of prayer 3 of the application. Since the main ground is that summons were never served upon the applicant there shall be no order for posting any security. Costs shall be on appeal.

Dated, signed and delivered at Nairobi this 24th day of May, 2018.

A. MBOGHOLI MSAGHA

JUDGE