



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NO. 3 OF 2017

RONALD OYAGI.....APPELLANT

VERSUS

ANDREW NDERU KARIUKI.....1ST RESPONDENT

ESTHER MUTHONI.....2ND RESPONDENT

JULIUS MACHARIA.....3RD RESPONDENT

JERRY JUMBA.....4TH RESPONDENT

DISTRICT CRIMINAL INVESTIGATIONS OFFICER,

KITUI CENTRAL.....5TH RESPONDENT

OFFICER COMMANDING POLICE DEPARTMENT,

KITUI CENTRAL.....6TH RESPONDENT

CCI KITUI.....7TH RESPONDENT

R U L I N G

1. The Applicant approached this Court by way of Notice of Motion seeking orders thus:

(i) That pending the determination of this instant application, the Honourable Court be pleased to grant an interim order of stay of execution of the Ruling and orders dated **30th January, 2018** and **12th February, 2018**, together with all consequential orders and more particularly any execution orders pending the determination of the instant application.

(ii) That this Honourable Court be pleased to order that the vehicle **KBY 067D** remains in police custody at the Kitui Police Station pending the full and conclusive determination of the matter.

(iii) That the 5th and 6th Respondents to ensure the vehicle **KBY 067D** is detained at the Kitui Police Station till the conclusion of **Civil Suit No. 586 of 2016** filed here in Kitui.

(iv) Costs of the Appeal do abide in the cause.

(v) Such other and/or further orders as this Honourable Court may deem just and expedient be granted.

2. The application is premised on grounds that: the Applicant has an arguable Appeal against the Ruling of the Lower Court with a high probability of success; that the Applicant bought the said motor-vehicle on the **8th November, 2016** and paid a consideration of **Kshs. 455,000/=** having seen a sale agreement and transfer documents signed or purportedly signed by **Jerry Jumba**, (the 4th Respondent) his Identity Card, copy of KRA Pin Certificate and original Logbook therefore if the motor-vehicle is not retained at the station the suit will be rendered nugatory and superfluous which will make the Applicant suffer irreparable damage and the Respondents will gain out of their fraud and continue perpetrating fraud against other Kenyans.

3. That the Ruling for the 4th Respondent/Applicant's Application was to be delivered on notice but was done without notice. He (Applicant) learnt from a friend of the unconditional release of the motor-vehicle to the 4th Respondent along with its Logbook.
4. That after he bought the motor-vehicle as a bonafide purchaser having paid for it and obtained all documents the Respondents started intimidating him with re-possession of the same an act that made him report the matter to the police and hand over the motor-vehicle to them for safe keeping. That the vehicle was released prior to the dispute being resolved an act that made them have the car ownership documents and the consideration. These will make him suffer substantial loss.
5. The 1st, 2nd and 3rd Respondents did not respond to the application.
6. The 4th Respondent filed grounds of opposition where he stated that the prayer sought is outrightly oppressive against him being the rightful owner of the subject motor-vehicle as he has the legitimate right to collect and retain the motor-vehicle.
7. That the Applicant cannot sustain the argument based on forged documents having been a victim of fraud executed by the 1st and 2nd Respondents. That the 4th Respondent is not a party to and/or an accomplice to the scam/fraud and is willing and amenable to any co-operation with the police and the Court to ensure that the subject motor-vehicle is available at any time at a notice.
8. The application was canvassed by way of oral submissions. **Mr. Muema**, learned Counsel for the Applicant submitted that the bone of contention was that the Applicant is an innocent purchaser for value therefore has a good title to the motor-vehicle and if released to the 4th Respondent it will leave him (Applicant) in a precarious situation. It therefore calls for preservation of the subject motor-vehicle as the Applicant paid for it and was given the Logbook.
9. In response, **Mr. Kilonzi**, learned Counsel for the 4th Respondent submitted that the Respondent did not take due diligence to verify the advertisement. That he relied on an agreement presented to him by the two (2) sellers. He did not ask for the telephone number of the 4th Respondent to confirm. That the agreement that is home drawn was not attested by any Advocate. And after the matter was reported to the police 1½ years have lapsed without them investigating the matter. That in the interest of justice it will not be fair for the motor-vehicle to be kept at the police station therefore the Appeal shall not be rendered nugatory.
10. **Mr. Gesire**, learned Counsel for the 5th, 6th and 7th Respondents did not oppose the application.
11. I have considered the application and rival submissions by Counsels.
12. Principles of stay of granting stay of execution pending Appeal are set out in **Order 42 Rule 6** of the **Civil Procedure Rules** that provide thus:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.

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

(a) 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 (b) 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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

In the case of **Butt vs. Rent Restriction Tribunal Civil Appeal No. NAI 6 of 1979** it was stated that:

“(i) The power of the court to grant or refuse an application for a stay of execution is discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

(ii) The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so

that an appeal may not be rendered nugatory should the appeal court reverse the Judge's decision.

(iii) A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.

(iv) The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”

13. The Applicant was therefore duty bound to demonstrate that:

(i) Substantial loss may result unless the order is made;

(ii) The application was made without unreasonable delay;

(iii) Such security as the Court may order for due performance of such a decree or order as may ultimately be binding on him has been given by the Applicant.

14. It has been stated now and again that substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory (See **Silverston vs. Chesoni (2002) eKLR**; **Joseph Simiyu Mukenya vs. Agnes Naliaka Cheseto, Bgm High Court Misc. Application No. 42 of 2011 (2012) eKLR**).

In the case of **James Wangalwa & Another vs. Agnes Naliaka Cheseto (Supra)** it was also held that:

“..... The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential care of the Applicant as the successful party in the appeal. This is what substantial loss would entail.....”

15. The impugned Ruling was delivered on the **19th day of January, 2018** in the absence of parties. The instant application was filed on the **16th February, 2018** and the Memorandum of Appeal was subsequently filed on the same day. In the premises there was no delay in making of the application.

16. The Applicant contends that if the motor-vehicle is released to the **4th Respondent** he shall suffer irreparable loss as he was a bonafide purchaser for value without notice. He argues that he carried out diligent investigations prior to purchasing the motor-vehicle whereafter he was put in possession of the requisite documents which the **4th Respondent** dismisses as forgeries. These are issues to be determined on Appeal. In the circumstances failing to preserve the subject matter may render the Appeal nugatory.

17. In the premises I grant stay of the Ruling and orders of the Lower Court dated the **30th January, 2018** and **12th February, 2018** respectively together with all consequential orders pending hearing and determination of the Appeal on condition that the Appeal is prosecuted within **120 days**. In default, the order shall stand vacated.

18. Costs of the application shall abide the Appeal.

19. It is so ordered.

Dated, Signed and Delivered at Kitui this 29th day of August, 2018.

L. N. MUTENDE

JUDGE