

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL 235 OF 2018

NGAO CREDIT LIMITED APPELLANT

VERSUS

SARAH ANGIMA OMACHE1ST RESPONDENT

STEVE ONDITI OMACHE2ND RESPONDENT

(Being an Appeal from the Ruling and Orders of Senior Principal Magistrate Hon. G. Mmsai delivered on 18th April, 2018 in Chief Magistrate Court at Nairobi In Civil Suit No. 461 of 2017)

RULING

By a Notice of Motion dated 18th and filed on 21st May, 2018 the appellant seeks orders for stay of execution of the ruling delivered by the lower court on 18th April, 2018 and an injunction to restrain the respondents from taking possession and or interfering with the appellants possession of motor vehicle registration Nos. KAU 404 E (Mercedes Benz Kompressor) and KBG 817 R (Subaru Outback) pending the hearing and determination of the appeal herein.

The application is premised on Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act and Orders 40 Rules 1 and 4 Order 42 Rule 5, Order 51 Rule 1 of the Civil Procedure Rules. The grounds relied upon appear on the face of the application alongside an affidavit sworn by Faith Owino a legal officer with the appellant. The application is opposed and a replying affidavit has been sworn by Sarah Angima Omache. Both parties have filed submissions which I have considered together with several authorities cited therein.

In applications for stay of execution and orders of injunction the principles are not settled. The appellant is supposed to show that the application for stay was filed timeously and that substantial loss may occur if the order is not granted. Further an offer of security should be presented for any decree that may follow against the applicant.

For injunction orders the appellant is supposed to show a prima facie case with a probability of success and that an award of damages may not be sufficient to restore its position. In the event the court is in doubt the matter shall be decided on a balance of convenience – see **Giella vs. Cassman Brown Company Limited (1973) EA 358.**

Having considered the material presented the appellant has not persuaded this court that it is entitled to any of the orders sought. The reasons are clear from the record. The subject matter comprises of two motor vehicles which the appellant had financed in favour of the respondents.

The lower court has already issued an order in favour of the respondents that the motor vehicles be released to the them because it would appear the sum secured has already been paid to the appellant.

Other than the costs said to accrue to the auctioneer and other costs complained of by the respondents, which are a triable issue, there is no other liability attributable to the respondents. The probability of success is therefore in doubt. The respondents have demonstrated by paying the loan due and payable to the appellant that they are people of means and their credibility has not been challenged. This is an indicator that damages would be adequate compensation in the event the appellant succeeds.

I have no doubt whatsoever in my finding above. Even if I were, the balance of convenience would tilt of the respondent they have paid the money owing, they hold a valid court order and the costs are in dispute. The proceedings in the lower court are ongoing and parties will have their days in court. In the end, the application dated 18th May, 2018 is hereby dismissed. The proceedings in the lower court shall continue.

Dated, signed and delivered at Nairobi this 28th day of November, 2018.

A. MBOGHOLI MSAGHA

JUDGE