

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CASE NO. 446 OF 2016

KENNETH SUMBA KHAKINAAPPLICANT

VERSUS

NANCHANG FOREIGN ENGINEERING COMPANY LIMITED....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 3A and 79 A of the Civil Procedure Act for the following orders; that the applicant be granted leave to file appeal out of time and that there be a stay of execution of the orders of the lower court delivered on 6th July, 2016.

The facts disclosed by the material before me are that, the applicant secured a judgment against the respondent in the lower court. There was no payment of the decretal sum and execution proceedings were initiated. A motor vehicle registration No. KBS 126Z was attached by Fantasy Auctioneers. In the meantime, the respondent moved the lower court to set aside the judgment. On 6th July, 2016 the judgment was set aside and all consequential orders. The respondent was ordered to deposit the decretal sum in court and that the motor vehicle should not be transferred to third parties. However, execution had already taken place on 9th February, 2016 and motor vehicle sold to one Peter Ngotho.

Upon service of the order of stay of execution given by the lower court on 6th July 2016, the advocate for the applicant wrote to the advocates for the respondent informing them that they were not in possession of the motor vehicle nor were the auctioneers as the same had been sold to a third party. On 24th August, 2016 the advocates for the respondent filed an application seeking the committal of the applicant, the auctioneers and the applicant's advocate to civil jail for contempt of court. This related to failure to release the motor vehicle No. KBS 126 Z.

It is the applicant's position that such an order cannot be complied with because execution had taken place by the time the lower court issued the same. It is also the applicant's position that his advocate having written to counsel for the respondent, and believing that they had understood the contents, he did not file any appeal. Further that the appeal stands a good chance of success and leave should be granted to do so out of time.

The application is opposed and there are grounds of opposition filed on behalf of the respondent. Both counsel have filed submissions which I have on record. The applicant has a right of appeal. Whether or not the memorandum of appeal dated 6th September, 2016 presents an arguable appeal has to be discerned from the facts available.

As at the time the lower court was making an order to set aside the judgement, and also to stay the transfer of the attached motor vehicle, it would appear execution had already taken place and the motor vehicle transferred to a third party. Indeed there are copies of cheques in the record dated 22nd February, 2016 that would justify such a position. That indeed is a serious arguable point on appeal.

There is also the contentious issue of whether or not counsel for a party can be held liable for actions flowing from a discharge of professional duty while acting on instructions of a client.

If in an affidavit, an advocate is able to set out the facts within his or her own knowledge, based on instructions by a client, without entering into the arena of conflict where he or she may be called upon to testify, then no prejudice can be said to have been visited upon the other party. My assessment of the affidavit sworn by the advocate for the applicant in support of the application, is factual and has not strayed into any contentious issues between the parties. If anything, it re-states all the steps taken in the case before the lower court.

The delay in filing the appeal has been sufficiently explained and if the order is not granted, the applicant, the auctioneer and the advocate are likely to suffer irreparable damage, in the form of loss of personal freedom or attachment of property. There is also a third party who is said to have purchased the motor vehicle and who is not a party to these proceedings.

Any orders made to the detriment of the applicant, the auctioneer and the advocate may impact negatively upon his position. The motor vehicle is still available and an order staying the transfer has been registered with NTSA. At the end of it all, if the said appeal is subsequently dismissed, there would be recourse to damages. I know there is requirement to offer security and note that the money raised following the auction is still available.

I am inclined to allow the application on the following terms. Leave to file appeal out of time is hereby allowed. The memorandum of appeal shall be filed within (7) seven days from the date of this ruling. There shall be a stay of execution in terms of prayer 3 of the Notice of Motion dated 6th September, 2016 until the determination of the appeal.

The money realised from the auction shall be deposited with the court within 14 days from the date of this ruling. Each party shall bear their own costs of this application.

Dated, signed and delivered at Nairobi this 28th Day of February, 2017

A. MBOGHOLI MSAGHA

JUDGE