



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 39 OF 2016

MANRICO MAMMUCARI.....APPELLANT

VERSUS

FOREZESSA EBRAHIM

TRAILINK FABRICATORS LIMITED

JITENDRA HARIA.....RESPONDENTS

RULING

The application dated 22nd December, 2016 seeks an order of stay of execution of the ruling in CMCC number 12 of 2014 delivered on 21.12.2016 pending the hearing and determination of the intended appeal. It also seeks stay of any further proceedings in the suit before the Chief Magistrate's Court. The application is supported by the applicant's affidavit. The 2nd respondent filed grounds of opposition dated 28th February 2017.

Mr. Ole Kina, Counsel for the applicant informed the Court that he was out of the Country where an application was made before the trial Court and an order was made to the effect that the motor vehicle in dispute be impounded and retained at the Police station until the suit is heard and determined. In the alternative, the applicant is supposed to deposit into the Court or into a joint account of both advocates a sum equal to the value of the vehicle. It is further submitted that the ruling was delivered on 21.12.2016 and the current application was filed promptly on 28.12.2016. The applicant shall suffer irreparable loss as there is no proper security at the Police station for vehicles. The vehicle might go to waste. A sum of Ksh. Two(2) million is to be deposited in the joint account which amount is quite substantial. The applicant is ready to provide alternative security.

Miss Kaguri appeared for the 2nd respondent Counsel submit that the application does not meet the conditions for granting stay of execution. The vehicle is being held by the applicant and it is subject to wear and tear. The nature of the security is not indicated. The 2nd respondent is claiming 5000 U.S dollars from the applicant. The appeal does not raise any triable issue. All the issues being raised were articulated by the trial Court.

The record shows that the application was filed on 28.12.2016. The ruling which is the subject of appeal was delivered on 21.12.2016. The application was filed within one week after the delivery of the ruling. The ruling itself was not annexed neither were the pleadings before the trial court. It is good practice to annex the ruling or decree which is the subject of an appeal. This normally enables the Court to determine the application for stay of execution in an informed position. The registration number of the vehicle in dispute is not indicated in the application or supporting affidavit. Apart from my above observations, I do find that the application was filed within time as there was no delay in its filing.

The next issue is whether the applicant will suffer irreparable damage if the orders being sought are denied. The dispute involves a motor vehicle. If it is parked before the Police station, there are good reasons to believe that it will go to waste. The engine will not be running, it might be mistaken to be one of the vehicles involved in an accident and the likelihood of it being vandalized cannot be ruled out. There is also the loss of use of the vehicle by the applicant. I do find that although the vehicle can be quantified in monetary terms, the applicant will suffer irreparable damage or loss if the vehicle is impounded and kept at the Police station.

Mr. Ole Kina informed the Court that the applicant is supposed to deposit Ksh.2 million in the joint account. On the other hand Miss Kaguri stated that the 2nd respondent is claiming 5000 U.S. dollars from the applicant. This is about Ksh.500,000. Its not clear what are the claims of the 1st and 3rd respondents against the applicant. The applicant has indicated that he is ready to provide an alternative security. Its not indicated what that security is.

It is the applicant's legal right to pursue an appeal. The court has to balance between the right of the applicant to pursue the appeal against the right of the 2nd respondent to enjoy the fruits of its favourable ruling. The vehicle is a movable property which can be made to disappear or can be involved in an accident and become a total loss.

Since the 2nd respondent is claiming 5000 U.S dollars from the respondent, I do find that a deposit of 3000 U.S dollars either in Court or in a joint account for both counsels can be reasonable security. The applicant to deposit the sum of 3000 U.S dollars either in court or in joint account of both Counsels within Sixty (60) days hereof.

In the end, the application dated 28.12.2016 is granted as prayed. Costs shall follow the outcome of the appeal.

Dated and Signed at Marsabit this Day of 2017

SAID CHITEMBWE

JUDGE

Dated, Signed and Delivered at Malindi this 22ND day of JUNE,2017

WELDON KORIR

JUDGE