



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL DIVISION

CIVIL APPEAL NO. 65 OF 2017

BETWEEN

MILDRED AMOLLO BWIBO.....APPELLANT

AND

LUCY SHIALAKHA ACHITSA.....RESPONDENT

**(Being an appeal from the judgment of M/S T.A. Odera, SPM in Mumias SPMCC NO. 87 of 2017
delivered on 16th June, 2017)**

RULING

Introduction

1. The application for determination is the one dated 20th June, 2017 and is brought pursuant to order 42 Rule 6 and Order 22 Rule 22 of the Civil Procedure Rules. The applicant prays for orders of stay of proceedings and execution of the judgment made on 16th June, 2017 pending the hearing and determination of her appeal.

2. The application is supported by the affidavit of the applicant sworn on the same date wherein she fortifies the grounds upon which her application is based. Her grounds for making this application are that she was aggrieved by the judgment of the lower court delivered on the 10th June, 2017 as a result of which she filed this appeal. She believes the appeal has high chances of success. She maintains that she stands to suffer substantial loss if the orders sought are not granted because the motor vehicle Registration Number KBL 916 E which is the subject matter herein can/will be released to the respondent. She adds that she is willing to comply with any conditions which the court may give.

Response

3. After being served with the application for stay of execution the respondent filed her replying affidavit sworn on the 11th October, 2017. In her response, she depones that prior to the filing of the suit in the lower court at Mumias, she had been in possession of the suit motor vehicle KBL 916 E for almost 2 years and that she had maintained it well. She further avers that the appellant has not demonstrated what substantial loss she will incur if the vehicle is returned to the Respondent.

4. Currently the motor vehicle is lying at Bungoma Police Station yard where it is wasting away. She avers that if the vehicle is released to her and this court eventually finds in favour of the applicant, she

will have no difficulty in surrendering the vehicle to the applicant. She adds that she is a well-known business woman and resides at Lunza within Butere sub-county and she cannot leave or take the vehicle out of this court's jurisdiction.

5. She maintains that the applicants appeal has no chances of success and that she is not an accused person in any criminal case or subject to any criminal investigation in respect of the said motor vehicle. She prays that the application be dismissed with costs.

Submissions

6. The application herein was canvassed by way of written submissions duly filed and exchanged between the parties.

7. In her submissions the applicant maintains that she is properly before this court because she has filed this appeal and with it the application for stay which should be made to this court. She further submits that she has met the conditions for stay of execution pending appeal as provided for under order 42 Rule 6 thereof.

8. The respondent on her part submits that the appellant has not demonstrated satisfactorily the loss that may accrue to her (Appellant), if the vehicle is released to her (respondent).

Determination

9. It is not in doubt that the application herein has been brought without undue delay. It is also worth noting that the circumstances under which the court will grant stay of execution pending appeal are set out under order 42 Rule 6(1) and (2) of the Civil Procedure Rules. Order 42 Rule 6(2) sets out the conditions an applicant must satisfy for the court to grant stay pending appeal. The said sub-section states as follows;

“(2) No order of stay of execution shall be made under sub - rule (1) unless

a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that

b) the application has been made without unreasonable delay and

c) 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.

10. Although the application was filed without undue delay, the applicant needed to demonstrate that substantial loss will be occasioned to her if the subject motor vehicle is released to the respondent. The respondent has stated in her affidavit that she has had the said vehicle for over 2 years that is from 2015 to 2017. All that the applicant stated is that substantial loss will be occasioned to her with no further explanation or details.

11. This leaves the court to speculate as what loss she will suffer if this court does not grant the orders sought. It is evident that the applicant has not laid before this court sufficient material and information to satisfy that she stands to suffer substantial loss unless stay of execution is granted. The authorities cited by respondent's counsel firmly speak to this point.

12. Having stated the above, this court will not belabor the point or go into the issue of security, although the applicant undertakes to abide by whatever conditions this court may impose.

13. In conclusion, I find and hold that the application has no merit and the same is accordingly dismissed with costs to the respondent.

It is so ordered.

Ruling delivered, dated and signed in open court at Kakamega this 30th day of November, 2017

RUTH N. SITATI

JUDGE

In the presence of;-

Mr. Imbenzi for Nandwa.....for Appellant

Miss Omar (absent).....for Respondent

Polycap.....Court Assistant