



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL MISC. APPLICATION NO. 15 OF 2017

SIMON NJOROGE KIRIKA.....APPLICANT

Versus

MICHAEL LESHAN ISAACK.....1st RESPONDENT

NATIONAL TRANSPORT &

SAFETY AUTHORITY LTD.....2ND RESPONDENT

RULING

The applicant Simon Njoroge Kirika has approached this court vide notice of motion dated 18/10/2017 pursuant to Order 42 Rule 6(1), (2), (3), Order 51 Rule 1 of the Civil Procedure Rules 2010 and section 3A of the Civil Procedure Act and Article 159 of the Constitution of Kenya.

In particular the applicant requests this court to stay the lower court declaratory orders issued on 11/10/2017. In support of the instant motion the applicant relies on the grounds on the face of it and the supporting affidavit copies of which have been served at counsel for the respondents.

By its order dated 11/10/2017 the trial court entered judgement directing:

(1) That the motor vehicle reg. No. KBV 717F currently detained at Kitengela Police Station be immediately released to the plaintiff.

(2) That the 2nd respondent reverts ownership of motor vehicle reg. No. KBV 717F to the plaintiff by surrendering the original log book and duly executed transfer documents in favour of the plaintiff within 50 days from the date of the order.

(3) That the plaintiff/applicant to pay the owed and outstanding amount within 30 days from the date of transfer.

In opposing the application the respondent Michael Leshan Isaack filed a replying affidavit dated 21/11/2017.

Basis which a stay may be granted:

Jurisdiction to grant stay of execution pending appeal is provided for under Order 42 Rule 6(1), (2), (3) of the Civil Procedure Rules. The general principle in law is that a mere lodging of an appeal in the high court shall not operate as an automatic stay.

In exercising this discretion the court has to be guided and determine the application with the following principles in mind:

- (1) That the application has been brought and filed timeously.**
- (2) That the court must be satisfied that the applicant will suffer substantial loss unless the order is granted.**
- (3) That there be such security as the court orders for the due performance of such a decree or order as may ultimately be binding on him has been given by the applicant.**

All these considerations make it clear that it's in the interest of justice for an applicant to be granted interim orders of stay of execution. The applicant however must bring himself/herself within the scope of the above conditions.

What comes out of the memorandum of appeal is that the applicant is interested in prosecuting his appeal against the respondent. The subject motor vehicle ordered to be released by the trial court is at the heart of the dispute. The motor vehicle apparently was given up as security to guarantee Ksh.250,000 loaned to the respondent. It is also clear that by the time CMCC No. 44 of 2017 was filed and prosecuted the loan agreement terms dated 28/6/2016 were yet to be concluded. The ruling and orders issued by the learned trial magistrate pauses a serious threat of execution before the appeal can be canvassed and determined.

I have considered both the applicant case and the respondent rejoinder as deduced from their respective affidavits. The legal counsels have also taken a shot at the matter by filing submissions. When I apply the facts of the motion to the provisions of Order 42 Rule 6(1) (2) and (3) of the Civil Procedure Rules I am of the conceded view that the applicant has filed the application without unreasonable delay. The order appealed against was issued on 11/10/2017. The applicant challenge to the decision was made on 18/10/2017. The applicant has therefore satisfied these criteria.

Secondly, there is the question of substantial loss. It is not in dispute that the subject motor vehicle is registered in the name of Fatma Ebrahim Khatri. The vehicle was later transferred to the applicant Simon Njoroge Kirika under the terms of a loan agreement. What arises therefore is whether by the order of the trial court the applicant is likely to suffer substantial loss?

Case Commentaries on substantial loss:

In the case of ***James Wangalwa & Another v Agnes Naliaka Cheseto HC Misc. No. 42 of 2012*** the court held as follows interalia on substantial loss:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold,.....does not amount to substantial loss under Order 42 rule 6 of the CPR. This is so because execution is a lawful process. 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 core of the applicant as the success party in the appeal. That was aptly discussed in the case of *Silverstain v Chesoni*. The issue of substantial loss is the cornerstone of both jurisdictions. “Substantial loss is what has to be prevailed by presenting the status quo because such a loss would render the appeal nugatory.”

In the case of ***Global Tours & Travels Ltd Civil Application No. 322 of 2006 eKLR*** the court held:

Whether or not to grant a stay of execution of proceedings or further proceedings on a decree or order appealed. From this is a matter of judicial discretion to be exercised in the interest of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion it should be exercised rationally and not capriciously or whimsically.

The sole question is whether, it is in the interest of justice to order a stay of proceedings, and if it is on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros-conditions of granting the order. And in considering those matters it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not be whether it is an arguable one.”

I consider also appropriate to refer to the case of Vaswani Trading Co. v Savalankh & Co. [1972] 7 NSCC 692 (1 ALL NLR 483) the Supreme Court of Nigeria observed as follows:

“When it is stated that the circumstances or conditions for granting a stay should be special or strong, we take it as involving consideration of some collateral circumstances or and perhaps in some cases inherent matters which may, unless the order for stay is granted will destroy the subject matter of the proceedings or foist upon the court, especially the court of appeal, a situation of complete helplessness or render nugatory any order or orders of the court of appeal or paralyse, in one way or the other, the exercise by the litigant of his constitutional right of appeal, or generally provide a situation in which whatever happens to the case, and in particular even if the appellant succeeds, in the court of appeal, there could be no return to status quo.”

These principles will feature in close proximity in my exercise of discretion to grant the orders sought. By the order of the learned trial magistrate the vehicle ownership was to revert to one Michael Leshan. The sale agreement between Mbaya Charles Ochanda and Michael Leshan Isaack dated 25/2/2016 and the logbook particulars are at variance. The trial magistrate record does not reveal any evidence of transfer documents between Fatma and Michael Leshan. There is also no evidence of transfer documents between Charles Ochanda and Michael Leshan.

As a consequence the pending appeal and stay of execution would serve better justice for the appellate court to understand the genesis of the dispute and subsequent impugned order. I take note that from the sale agreement the value of the motor vehicle was indicated as 1,800,000 as at 28/2/2010. The loan advance agreement was executed on 28/6/2016 for Ksh.250,000 growing at a rate of interest of 30% within a period of 30 days. That issue does not seem to have been addressed by the trial court. It has not been shown that if the appeal succeeds in favour of the applicant the respondent would be in a position to refund the value of the motor vehicle. This is what substantial loss would entail; a question the respondent has not controverted the averment on the applicant’s claim on substantial loss. That to me demonstrates that substantial loss may result to the party applying for this order of stay of execution pending appeal.

Thirdly, the element on security for due performance of the decree:

I have paid particular attention to the affidavit evidence by both parties and submissions by each counsel. The facts presented in this case revolve around motor vehicle registration KBV 717F. This is one case insistence of some other security besides the motor vehicle is likely to stifle the appeal.

Applying the above principles I am of the conceded view:

Justice between the parties to a case is the epitome of procedural law. This court in construing the provisions of Order 42 rule 6 of the CPR should primarily do so with the sole purpose to achieve the ends of justice. The threshold issue should not be strictly interpreted so as to deny a litigant right to access the doors of justices for an appellate court to have a revisit on the matter. The nature of the grounds in the memorandum of appeal raises an arguable case to be canvassed by the applicant and he has shown that he should not be declined that right.

In this case the applicant urgently motion has established sufficient cause to warrant this court to rule in his favour on the application for stay of execution in the following terms:

(1) That stay of execution of the order dated 11/10/2017 be and is hereby issued pending the

hearing and determination of the appeal.

(2) That in the interim period the applicant/respondent motor vehicle reg. No. KBV 717F do continue being held at Kitengela police station until the final orders from this court.

(3) That the record of appeal be served upon the respondent within 14 days from today's date.

(4) That the parties do appear before me on 19/12/2017 for compliance.

(5) That the parties to file written submissions on the issues in this matter to accompany the affidavit material.

(6) The costs of this application to abide the outcome of the appeal.

Dated, delivered and signed in open court at Kajiado this 30th day of November, 2017

.....

R. NYAKUNDI

JUDGE

In the presence of:

Mr. Waiganjo for the applicant present

Mr. Wachira for Mutsili present

Mr. Mateli Court Assistant