



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 179 OF 2017

PHILIP ORWA T/A ASQUIRE DIVERSITY.....APPELLANT

VERSUS

EQUITY BANK LTD.....RESPONDENT

RULING

The Appellant filed a Notice of Motion dated 26th April, 2017 under the provisions of Order 42 Rule 6 of the Civil Procedure Rules seeking the following Orders :-

(a) ...spent

(b) **THAT** there be a temporary order of injunction barring the Defendant/Respondent from selling, advertising or wasting the motor vehicle number KCD 379A in any way whatsoever pending the hearing of the application interpartes.

(c) **THAT** at the interpartes hearing the Honourable Court be pleased to confirm and/or grant prayer 2 herein above pending the hearing and determination of the appeal.

(d) Costs of the application.

This Application is premised on the grounds set out on the body of the same and its supported by the Affidavit of **PHILIP ORWA** the Appellant. The grounds in support of the application are that the appeal has high chances of success and failure to grant the orders shall render the appeal nugatory. That the trial Court did not consider the principle application thereby leading to wrong decision.

The Respondent filed a Replying Affidavit dated 25th May, 2017, sworn by **MERCY KIMANI**, the credit manager of the Respondent's Tom Mboya Branch, who avers that it is not true that the trial magistrate determined only one application in isolation to the other. She avers that both applications were determined together. The Respondent also avers that the Appellant has not met the conditions for grant of a temporary injunction. She contends that the Appellant does not deny that he owes the Respondent and further depones that the Appellant has not offered any security for the debt as his means of income are unknown.

The Application was canvassed by way of oral submissions which I have duly considered together with the authorities cited. The applicant seeks an injunction pending appeal under *Order 42 of rule 6(6)* of the Civil Procedure Rules, 2010, which provide as follows:-

“Notwithstanding anything contained in sub-rule 1 of this rule, the High Court shall have power

in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or Tribunal has been complied with.”

The sub-rule gives this court discretionary power to grant an injunction on terms that it thinks just so long as the procedure for filing an appeal from the subordinate court has been complied with.

When a court is considering an application for injunction pending appeal, it should be guided by the principles as stated by Visram J(as he then was) in the case of **Patricia Njeri & 3 others v National Museum of Kenya** [2004] eKLR namely:-

- a) an order of injunction pending appeal is a discretionary one and the discretion will not be exercised against an applicant whose appeal is frivolous.**
- b) The discretion should be refused where it would inflict greater hardship than it would avoid.**
- c) The applicant must show that to refuse the injunction, would render the appeal nugatory.**
- d) The court should also be guided by the principles in Giella v Casman Brown Ltd1973 EA 358.**

In **Bilha Mideva Buluku v Everlyne Kanyere** [2016] eKLR, where the court was considering an application under Order 42 Rule 6(6) **Justice E.C Mwita** stated that,

“Even though the court is dealing with an application for injunction at appeal stage, the court would have to be satisfied that the applicant has made a case in terms of Giella v Casman Brown 1973 EA 358, that he has a prima facie case with a probability of success, that he will suffer irreparable damage which cannot be compensated by an award of damages or that if in doubt the court should decide the case on a balance of convenience. The court should at the same time bear in mind that there is an appeal pending and therefore consider the prospects of that appeal succeeding in order to determine whether an applicant has a prima facie case, the ultimate objective of course being to safe guard rights of the appellant in the appeal.

As was held in the case of Butt v The Rent Restriction Tribunal, Civil Appeal No.6 of 1979, in the case of a party appealing, exercising his undoubted right of appeal, the court ought to see that the appeal is not rendered nugatory. It should therefore preserve the status quo until the appeal is heard. The same position was taken by the Court of Appeal in the case of Mukuma v Abuoga [1988] KLR 645, where the court held that where a party is exercising his undoubted right of appeal, the court ought to see that the appeal is not rendered nugatory by preserving the status quo until the appeal is heard.”

The subject matter of the suit is a motor vehicle which was repossessed by the Respondent and is being held by the 2nd Defendant. The said 2nd Defendant is not a party to this appeal and in his Supporting Affidavit, the Appellant has stated that during the hearing of the application dated 3rd August, 2016, the 2nd Respondent who had attached his motor vehicle did not have instructions to do so.

It is trite that the power of the court in an application for an interlocutory injunction is discretionary. Such discretion is judicial. And as is always the case judicial discretion has to be exercised on the basis of the law and evidence.

From the facts in support of the application and the replying affidavit, it is clear that the Applicant is indebted to the Respondent and he has defaulted in the repayment of the loan amount. The subject motor vehicle is the security for that loan. Though he has stated that he has been making payments, there is no evidence that has been availed to court to that effect.

The Appellant avers that he had filed two applications in the lower court, one dated 3rd August, 2016, seeking an interlocutory order of injunction barring the defendant from selling/disposing of motor vehicle registration number KCD 379A, release of the said vehicle by M/s Nyaluonyo Auctioneers and a permanent order of injunction restraining the defendants from recovering, attaching and/or selling the aforesaid vehicle.

On the other hand, the application dated the 24/10/2016 sought release of motor vehicle KCD 379A which was being held by Nyaluonyo Auctioneers and that the said auctioneer or any other auctioneer be barred from repossessing and/or attaching the said motor vehicle.

I have perused the ruling delivered by the learned magistrate and its true that he did not consider the application dated 3rd August, 2016 yet parties had agreed that both applications be heard together. In my view, the applicant ought to have moved the lower court by way of review and not by way of Appeal.

In the premises, I find that the applicant has not come to court with clean hands and I dismiss the application as having no merits.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 22nd Day of November, 2017.

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L. NJUGUNA

JUDGE

In the Presence of

..... For the Appellant

..... For the Respondent