



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS

MISC APPLICATION NO. 342 OF 2017

INDO AFRICA FINANCE LIMITED.....APPELLANT

VERSUS

DAVID OMONDI OCHIENG..... RESPONDENT

RULING

The Appellant filed a Notice of Motion dated 24th August, 2017 under the provisions of Order 42 Rule 6 of the Civil Procedure Rules seeking stay of execution of the orders given in CMCC No. 1782 of 2017 pending the hearing and determination of the Appellant's Appeal and that costs be in the cause.

The Application is premised on the grounds on the body of the same as well as on the Supporting Affidavit of **LEON NDUBAI**, the Chief executive officer of the Appellant. The grounds advanced for the application are that the Appellant and the Respondent had a legally enforceable contract whereby the Appellant advanced the Respondent a loan of Kshs. 500,000/=with his vehicle KCD 035S as the security. The Respondent handed over the logbook of the vehicle to the Appellant which logbook was registered in the joint names of the Appellant and the Respondent. The Respondent has substantially repaid the loan with the outstanding loan amount being Kshs.52,071/=. The Appellant claims that the Respondent refused to repay this amount and as a result they repossessed the security motor vehicle and were due to have it sold when the Respondent rushed to Court and obtained interlocutory injunction with a mandatory injunction being issued directing the Appellant to release the car. It is the Appellants averment that the trial magistrate erred in granting the mandatory injunction without requiring him to deposit the outstanding balance as well as the auctioneers fees of Kshs. 68,726/=

The Application was opposed by the Respondent, who filed Grounds of Opposition dated 27th September, 2017 and a Replying Affidavit dated 26th September, 2017 both documents filed on 27th September, 2017.

The Respondent depones that the Applicant did not have authority to act on behalf of the Appellant as no such authority has been attached. That out of the advanced loan amount of Kshs. 500,000/=, the Respondent has paid a cumulative amount of Kshs. 420,000/= and he has committed to pay the balance in due cause. The Respondent avers that he is in the process of repaying the loan that was to be paid over a period of time. The Respondent has produced a search for the vehicle indicating that the vehicle is registered in the joint names of the Appellant and the Respondent and avers that the Appellant will not lose anything in releasing the car. Further that since the Appellant fixed a tracking system, it would be easy for them to monitor the movements of the car. The Respondent relied on the doctrine of **Contra Proferentem Rule** to have the contract interpreted against the maker.

The Application was canvassed by way of oral submissions in Court which I have considered together with the Affidavits filed herein.

Order 42 Rule 6 of the Civil Procedure Rules provides the conditions for granting an order of stay of execution which are;

- a. That the application has been made without unreasonable delay;
- b. That security for costs has been given; and
- c. That substantial loss may result to the Applicant unless the order for stay is made.

What constitutes unreasonable delay depends on the circumstances of each case. The instant application was filed on 24th August, 2017 whereas the ruling the subject of the application was delivered on 21st August, 2017. In the circumstances of this case the Application was made timeously.

Substantial loss is the cornerstone in an application for stay of execution. The Applicant must establish what he stands to lose in case the stay is not granted and the Appeal happens to succeed. The loss to be suffered has to be substantial and it is upon the Appellant to prove that the Respondent will not be in a position to reinstate the Appellant to the position he was before the suit. What constitutes substantial loss was further discussed in the case of **JAMES WANGALWA & ANOTHER V AGNES NALIKA MISC APPLICATION No 42 of 2011 [2012] eKLR (Gikonyo J** stated that:

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, as is the case here, does not in itself 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 successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein Vs .Chesoni [2002] 1KLR 867, and also in the case of MukumaVs.Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

The Respondent herein has substantially paid the loan amount with the outstanding balance being Kshs. 52, 071/=. The court also notes that the vehicle is jointly registered in the names of the Appellant and the Respondent and therefore, the Respondent cannot dispose the same without the knowledge and/or consent of the Appellant. Most of the grounds of the application as adduced in the Application as well as the Supporting Affidavit touch on the substance of the Appeal. These are issues which I am not entitled to determine at this stage but rather to be determined during the hearing of the Appeal.

The Orders sought herein are discretionary orders which this Court will grant only in clear circumstances. The Court will have to balance the interests of the both parties in exercising its discretion. Having considered the application, I find that it does not meet the standard for consideration in granting of a stay pending Appeal and for this reason I dismiss the same but with no orders as to costs.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 13th Day of December, 2017.

.....

L. NJUGUNA

JUDGE

In the Presence of:-

..... for the Appellant

..... for the Respondent