REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 74 OF 2016

KENJAP MOTORS LIMITED..…….....APPELLANT

VERSUS

ISAAC KUTO…….RESPONDENT

(Being an application for stay of the ruling and order of H. Barasa, Principal Magistrate, in Eldoret CMCC No. 191 of 2016 delivered on 28th April 2016)

RULING

1. The appellant is aggrieved by the order of the lower court made on 28th April 2016. The court ordered the appellant to immediately return motor vehicle registration number KCA 350D to the respondent pending the hearing of the suit. The appellant was also condemned to pay costs of the application.
2. The appellant filed the memorandum of appeal on 11th May 2016. The appellant has now presented a notice of motion dated 10th May 2016 praying for stay of execution of the impugned order pending the hearing of this appeal. It is expressed to be brought under sections 1A and 3A of the Civil Procedure Act; and, Orders 22 and 42 of the Civil Procedure Rules 2010. The application is supported by a deposition sworn by *Ellen Kagiri*, a manager of the appellant.
3. The deponent avers that the appellant is not in possession or control of the vehicle. At paragraphs 4, 5 and 7 of the affidavit, she deposes the following: that the respondent bought the vehicle from *Zeki Motors* who had no capacity to sell; that the respondent was not a bona fide purchaser; that the vehicle was repossessed by an order of court in Kisumu Miscellaneous Application 21 of 2016; and, lastly, that the vehicle has been sold to a third party.
4. The appellant is apprehensive that it might be cited for contempt of court; that it stands to suffer substantial loss; and, that unless the order of stay is granted, the appeal will be rendered nugatory.
5. The motion is contested. The respondent filed a replying affidavit on 19th May 2016. He avers that he bought the suit vehicle from *Zeki Wanjala* for Kshs 2,100,000. The agreement for sale is annexed. He contends that the appellant and *Zeki Wanjala* are motor vehicle dealers; and, that he only dealt with the latter. He states that *Zeki* had bought the vehicle from the appellant. The respondent was thus surprised when the motor vehicle was attached by auctioneers.
6. The respondent obtained an interlocutory order in the lower court on 7th March 2016 restraining the appellant from selling the vehicle. He avers that he served the order upon the appellant on 11th March 2016. He states that the appellant never intimated to the lower court that it had sold the vehicle. He says the interim orders were extended from time to time until the date of the ruling. The respondent avers that it is only after delivery of the impugned ruling of 28th April 2016, that the appellant claimed it had disposed of the vehicle. That precipitated the application for contempt against *Veadnayagam Arumairajarishi* that is pending in the lower court.

7. On 24th May 2016, learned counsel for both parties made brief oral submissions. I have considered the rival arguments. I have also paid heed to the records before me, the notice of motion, the pleadings, and depositions.
8. Sections 3A and 63 of the Civil Procedure Act give the court wide *discretion* to grant interlocutory orders to prevent the ends of justice from being defeated. By dint of Order 42 of the Civil Procedure Rules 2010, the court also has *power* to grant stay of execution pending appeal. Order 42 Rule 6 provides as follows-

> *"6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*
>
> *(2) No order for stay of execution shall be made under subrule (1) unless (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and*
>
> *(b) 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."*

9. In *Butt v Rent Restriction Tribunal* [1982] KLR 417, Madan JA (as he then was), cited with approval the views of Brett L.J. in *Wilson v Church* (No 2) 12 Ch D [1879] 454 at 459-

> *"I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful is not nugatory"*

10. Justice Madan delivered himself thus in the *Butt* case (Supra) at page 419,

> *"If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal if successful may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings"*

11. Again the court will grant a stay if special circumstances of the case dictate so. See *Attorney General v Emerson and others* 24 QBD [1889] 56 at page 59. In the *Butt* decision (Supra) at page 420, the court found that since there was a large amount of rent in dispute between the parties, it was a "special circumstance" that gave the applicant an undoubted right of appeal. Those general principles were restated in *Madhupaper International Limited v Kerr* [1985] KLR 840 at page 846.
12. This court is now enjoined by article 159 of the Constitution and sections 1A and 1B of the Civil Procedure Act to do substantial justice to the parties. That is the overriding objective. *Harit Sheth Advocate v Shamas Charania* Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR, *Stephen Boro Gitiha v Family Finance Bank & 3 others*. Nairobi, Court of Appeal, Civ. Appl. 263 of 2009 (UR 183/09) [2009] eKLR.
13. The present motion was presented to court on 11th May 2016. The impugned ruling was delivered on 28th April 2016. I thus find the present motion was brought without undue delay.
14. The next key question is whether the appellant has demonstrated *substantial loss*. The impugned order is for *restitution*. Paraphrased, it is for return of the suit vehicle to the respondent pending the hearing and determination of the suit. I am alive that the main suit is pending in the lower court; and so is this appeal. It would be inappropriate in the circumstances to make any conclusive findings over title of the vehicle. But I can state the following: If this appeal succeeds; or, if the

main suit in the lower court is finally lost, the appeal would *not* be rendered *nugatory*. The value of the motor vehicle can be ascertained. The respondent states he bought it for Kshs 2,100,000. So much so that damages would be available.

15. Granted those reasons, I am *not* satisfied that the order to return the vehicle constitutes *substantial loss* as known in Order 42 of the Civil Procedure Rules. See *Kenya Shell v Benjamin Karuga* [1982-88] 1 KLR 1018, *Jaribu Credit Traders Ltd v Mumias Sugar Company Ltd* High Court, Nairobi, Commercial Case 465 of 2009 [2014] eKLR, *Sirgoi Holdings Limited v Martha Kamunu Eldoret, High Court Civil Appeal 26 of 2014 [2014] eKLR.*
16. The respondent claims it had long *disposed* of the vehicle. Its director is genuinely apprehensive that he might be cited for *contempt*. It is not an idle proposition. The respondent has confirmed that he has filed an application for contempt against *Veadnayagam Arumairajarishi* in the lower court. I cannot again comment on the merits of that matter. It will be the true province of the lower court to find out whether the offence is established to the required standard of proof. There are legal safeguards available to the alleged contemnor in proceedings for contempt. Granted those circumstances, I cannot say that the appellant will suffer *substantial loss* merely by the *institution* of proceedings for contempt of court.
17. The respondent states that he served the interlocutory order upon the appellant on 11th March 2016. Although the appellant claims he sold the vehicle, the *date* of sale has *not* been stated in the affidavit. The annexed sale agreement (annexture *EK4*) from the appellant to *Joel Sikamoi* has *no* date. I got the distinct impression that the appellant wanted to leave this court in a blind spot. It is also not lost on me that the appellant failed to disclose to the lower court about the sale during the hearing of the motion. Nothing could have been easier. The disclosure was only made after the impugned ruling. The *material non-disclosure* in turn militates against the grant of a *discretionary* order by this court. It is anathema to the overriding objective stipulated in sections 1A and 1B of the Civil Procedure Act. It is an irony that the present motion is predicated upon those very sections of the law.
18. The appellant has *not* offered any security for due performance of the order. There is *no* such reference in the body of the motion or the supporting affidavit. Order 42 Rule 6 (2) (b) provides that *no* order for stay of execution shall be made *unless* 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. In the absence of an offer, the motion for stay is on a legal quicksand.
19. For all those reasons, I am not satisfied that the appellant has demonstrated *sufficient cause* to grant an *order of stay* pending appeal. The upshot is that the appellant's notice of motion dated 10th May 2016 is devoid of merit. It is hereby dismissed. Costs shall abide the main appeal.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET this 16th day of June 2016**

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

Mr. Maina for the appellant instructed by Ikua Mwangi & Company Advocates.

No appearance by the respondent.

Mr. J. Kemboi, Court Clerk.