



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 199 OF 2016

DIAMOND TRUST BANK KENYA LIMITED.....PLAINTIFF

VERSUS

GEORGE MWIHIA WARUKIRA.....DEFENDANT

RULING

1. On 27th April 2016 the learned trial magistrate granted judgment in favour of the Plaintiff, **GEORGE MWIHIA WARUKIRA**, against the Defendant, **DIAMOND TRUST BANK KENYA LIMITED**.
2. It was the finding of the trial court that the Plaintiff was the bona fide owner of the motor vehicle registration number **KAV 953J**.
3. The trial court held that the Plaintiff was entitled to compensation for the loss he had suffered during the period when the Defendant's executing agents held the vehicle. The said agents were named **KGB INVESTIGATORS & REPOSSESSION AGENTS**, and they had forcefully taken the vehicle from the Plaintiff, with a view to having it sold-off to recover money which had been loaned to **PROSTEM LIMITED**.
4. A Chattels Transfer Instrument had been registered in respect to the vehicle, so that it was the security for the loan to Prostem Limited.
5. Although the Chattels Transfer Instrument was allegedly still valid until the loan was cleared, (*which had not yet happened*), the vehicle was transferred to the Plaintiff after he purchased it.
6. According to the Defendant, the purchase by the Plaintiff was fraudulent, and was therefore void.
7. However, the trial court found that the Plaintiff was a bona fide purchaser for value.
8. It is in those circumstances that the trial court awarded to the Plaintiff the sum of Kshs. 1,449,000/= as Special damages, in respect to the inconvenience which he suffered when the Defendant's executing agents had held the car.
9. The trial court also awarded to the Plaintiff the sum of Kshs. 158,050/= being a refund of the money which he spent on the repairs to the vehicle after the Plaintiff recovered the said vehicle from the executing agents.

10. The plaintiff was also awarded the costs of the suit, together with interest at court rates from the date of the judgment.
11. The Defendant was aggrieved with the judgment, and has preferred an appeal to the High Court.
12. Whilst awaiting the hearing and determination of the appeal, the Defendant has asked this court to stay the execution of the Decree.
13. The Defendant asserted that if the execution was not stayed, it would suffer substantial loss and prejudice, as the Plaintiff would be unable to refund the decretal amount, in the event that the appeal was ultimately successful.
14. It was the contention of the Applicant that the Respondent had no known source of income and/or assets.
15. Therefore, the Applicant formed the opinion that the Respondent would be unable to satisfy the sums awarded, if the Applicant's appeal was finally successful. It is for that reason that the Applicant asked the court to stay execution until the appeal is heard and determined.
16. And whilst the appeal was still pending, the Applicant offered to deposit the decretal amount in an Interest-earning account.
17. It was the Applicant's contention that the appeal has high chances of success, as the trial court awarded General Damages without any proof of the Hire Charges.
18. Secondly, the Applicant noted that the Respondent was awarded kshs. 1.4 million as compensation, whereas the value of the vehicle which was the subject matter of the suit was kshs. 500,000/=.
19. Thirdly, the Applicant expressed the view that the Respondent did not mitigate his loss.
20. In answer to the application, the Respondent pointed out that whereas the Applicant had alleged that the Respondent was a man of straw, the Applicant failed to tender proof of that allegation.
21. To support his submission, the Respondent cited **JOSEPH GACHIE T/A JOSKA METAL WORKS VS SIMON NDETI MUEMA, CIVIL APPEAL NO. 372 OF 2012**. In that case, the High Court held as follows:

“Where the allegation is that the Respondent will not be able to refund the decretal sum, the burden is upon the Applicant to prove that the Respondent will not be able to refund to the Defendants any sums paid in satisfaction of the decree.”

22. However, it must also be pointed out that the learned Judge went on to make the following position clear;

“The law, however appreciates that it may not be possible for the Applicant to know the Respondent's financial means. The law is therefore that all an applicant can reasonably be expected to do, is to swear upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed, but it is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there.

The property a man has is a matter so peculiarly within his knowledge that an Applicant may not be reasonably expected to know them. In the circumstances, the legal burden still remains on the Applicant, but the evidential burden would have been shifted to the Respondent to show that he would be in a position to refund the decretal sum.”

23. I am in full agreement with those words of my learned brother, Odunga J.

24. Therefore, if the Applicant had laid down a basis for its belief about the Respondent's lack of ability to refund the decretal amount, the evidentiary burden shifted to the Respondent, to show that he has the ability to reimburse the decretal amount if he should be called upon to do so.

25. The second authority cited by the Respondent was **PAMELA AKINYI OPUNDO Vs BARCLAYS BANK OF KENYA LIMITED HCCC NO. 800 OF 2003**. In that case Njagi J held that a successful party ought not to be denied the benefit of the judgment, just because he was poor.

26. It would be a travesty of justice to deprive a successful party, the right to immediately start deriving the benefit of the judgment, just because he was poor. Poverty does not render a person dishonourable. Therefore, poverty, of itself, should not even be the foundation upon which the court grants an order for stay of execution.

27. Njagi J. said;

“Unless there is evidence to show that the Respondent cannot be trusted with the money in question, and that he/she is likely to squander the same before the appeal is heard and determined, thereby rendering the appeal nugatory, there is no reason why a litigant should be denied the fruits of his litigation.”

28. I regret that I am unable to share that view of my learned brother. I think that he set the bar too high.

29. In my considered view, it would be an almost impossible task for an applicant to demonstrate that the Respondent cannot be trusted with the money, or that the Respondent would squander the money before the appeal was heard and determined.

30. The Respondent could actually put the money to very appropriate use. He would then not have squandered it. But, if the Respondent was thereafter unable to reimburse the money, in the event that the appeal against him was successful, the Applicant would have suffered a substantial loss.

31. It is neither the financial muscle of the Applicant or the impecuniosity of the Respondent, of themselves, that determines whether or not there ought to be a stay of execution pending appeal.

32. Ringera J, explained the situation as follows, in the case of **LALJI BHIMJI SANGHANI BUILDERS & CONTRACTORS LTD Vs NAIROBI GOLF HOTELS (K) LTD HCCC NO. 1900 OF 1995**.

“...He (the Applicant) must persuade the court that the decree holder is a man of straw from whom it will be nigh impossible or at least very difficult to obtain back the decretal amount in the event of the intended appeal succeeding. Such persuasion must spring from the affidavits or evidence on record.”

33. In effect the financial challenges of a decree holder is a relevant factor for consideration in applications for stay of execution pending appeal.

34. In this case the Respondent cannot be described as a man of straw. He purchased the motor vehicle in issue, and he had even enhanced its value by installing a new engine.

35. Secondly, after the court permitted him to reclaim the vehicle from the Applicant's agents, the Respondent spent kshs. 158,050/= to return the vehicle to a motorable state.

36. But I am also alive to the fact that the vehicle in issue was being claimed by both the Applicant and the Respondent. Therefore, if the appeal were to succeed, it is possible that the vehicle might be held to rightfully belong to the Applicant. In such a situation, the only known asset *“belonging to the*

Respondent” would no longer be his, and therefore it may be difficult for the Applicant to recover the decretal amount from the Respondent.

37. In the result, I am convinced that if the decretal amount was paid to the Respondent now, it may later be difficult, if not impossible, to recover the same from the Respondent, in the event that the appeal succeeded.

38. Therefore, I now order that pending the hearing and determination of the appeal, there shall be a stay of execution. However, as a condition for the stay order remaining in force, the applicant must have the decretal amount deposited in an Interest-earning account within the next 14 days.

39. In calculating the 14 days, the period between 21st December 2016 and 6th January 2017 shall be excluded.

40. Finally, the costs of the Application shall abide the outcome of the appeal. If the appeal is successful, the costs of the application dated 23rd May 2016 shall be awarded to the applicant. But if the appeal fails, the Respondent shall also get the costs of the application dated 23rd May 2016.

DATED, SIGNED and DELIVERED at NAIROBI this 19th day of December 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Kissinga for the Plaintiff

Chege for Miss Mwangi for the Defendant

Collins Odhiambo – Court clerk.