



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 632 OF 2015

GEORGE GITONGA MUCHIRI T/A FANTASSY AUCTIONEERS.....APPELLANT

- V E R S U S -

THE AUCTIONEERS LICENSING BOARD.....RESPONDENT

RULING

1. The subject matter of this ruling is the motion dated 12th January 2016 taken out by George Gitonga Muchiri T/A Fantassy Auctioneers in which he sought for the following orders:

- 1) THAT this application be certified urgent and be heard exparte in the first instance.***
- 2) THAT this honourable court be pleased to stay the decision of the Auctioneers Licensing Board made on 16th November 2015 pending hearing and determination of this application interpartes.***
- 3) THAT this honourable court be pleased to stay the decision of the Auctioneers Licensing Board made on 16th November 2015 pending hearing and determination of this appeal.***
- 4) THAT this honourable court be pleased to stay further proceedings in Auctioneers Licensing Board disciplinary cause number 25 of 2015 pending interpartes hearing and determination of this application.***
- 5) THAT this honourable court be pleased to stay further proceedings in Auctioneers Licensing Board Disciplinary cause number 25 of 2015 pending hearing and determination of this appeal.***
- 6) THAT costs of this application be provided for.***

2. The motion is supported by the affidavit sworn by the appellant. When served with the motion, the Auctioneers Licensing Board, the respondent herein, filed the replying affidavit of K. L. Kandet, to oppose the motion. When the motion came up for interpartes hearing this court issued an order directing the matter be determined by written submissions. At the time of writing this ruling the respondent and the interested partes were the only parties who had filed their submissions.

3. I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavits filed in support and against the motion. I have also considered the rival written submissions. It is the submission of the appellant/applicant that he was duly instructed by the court to execute the money decree issued vide Nairobi R.M.C.C no. 3043 of 2011 between Aaron Musyoki and Manpower Networks Ltd, Interested party in the sum of ksh.445,225/=. He stated that he issued the proclamation notice and

caused it to be served upon Manpower Networks . The appellant/applicant also claimed that the Interested Party took steps to have the execution process frustrated prompting the appellant to seek for police assistance in executing the warrants of attachment. The Interested Party is said to have paid a sum of ksh.104,225/= as fees and costs and ksh.445,225/= being the decretal sum to forestall its goods being carted away. It is stated that the judgment debtor thereafter made a complainant to the against the applicant claiming *inter alia*, that the applicant had vandalized its goods, failed to issue a proclamation notice and that the respondent had overcharged his fees. The respondent heard and determined the complaint against the appellant/applicant. A fine of ksh.100,000/= was imposed against the appellant/applicant. The appellant was also ordered to pay the Interested Party ksh.30,000/=

4. It is the submission of the appellant/applicant that he was condemned unheard. He now seeks to have an order for stay of execution of the respondent's decision made on 16.11.2015 pending the hearing and determination of this appeal. It is also argued that the appellant/applicant has an arguable appeal.

5. The respondent on the other hand is of the view that the appellant/applicant has only submitted that he has an arguable appeal but has not made an attempt to show the substantial loss he would suffer if the order for stay is denied. It is also stated that the appellant has not offered to provide security for the due performance of the decree.

6. The Interested Party on the other hand gave near similar arguments as those given by the respondent. The Interested Party avers that the appellant/applicant has failed to satisfied the requirements to justify the grant of an order for stay of execution. It is argued that he has not demonstrated the substantial loss he would suffer if the order is denied. It is also submitted that the applicant has not offered security for the due performance of the decree.

7. The matter before this court is an application for stay of execution pending appeal. The principles to be considered in such an application are well settled. A careful consideration of the provisions of Order 42 rule 2(2) of the Civil Procedure Rules will reveal that one of the considerations is that an applicant must show the substantial loss he would suffer if he is denied the order. Secondly an applicant must show that the application for stay was filed without unreasonable delay.

Thirdly, the court should consider the provision of security for the due performance of the decree.

8. On the question on substantial loss, the appellant has stated that unless the order for stay is granted, the respondent will proceed to demand payment of the stated sum thereby rendering the intended appeal nugatory. Before dealing with this ground it is important to consider whether there is an arguable appeal. The main contention argued by the appellant is that he was not heard by the respondent before making the contested decision. I have looked at the proceeding before the respondent and attached to the supporting affidavit of the appellant. It is clear that the appellant/applicant participated in the proceedings before the respondent. Perhaps the ground which may commend itself for consideration on appeal is whether or not the fines imposed against the appellant were lawful.

9. In my view this is an arguable point on appeal. It is a question of Determining whether the figure pronounced was justified.

10. Having come to the conclusion that the appeal has an arguable point, let me now revisit the question as to whether or not the appellant will suffer substantial loss if the order for stay is not granted. It is said that unless the order is given the Interested Party and the respondent may execute the order thus rendering the appeal useless. The record shows that the applicant was ordered to pay a fine of ksh.100,000/= and to further pay a sum of ksh.30,000/= to the Interested Party. I am unable to comprehend how the appeal will be rendered nugatory in the circumstances of this case. There is no allegation that if the aforesaid amounts are paid it will not be refunded if the appeal is successful. I have come to the conclusion that the applicant will not suffer any substantial loss if the order for stay is denied.

11. This court has the discretion to decide the sort of security to be given for the due performance of the decree even when there is no offer made. However, since there is no proof that the appellant/applicant

will suffer substantial loss, the order for stay cannot be issued. For the above reasons, I find no merit in the motion. The same is dismissed with costs to the respondent and the Interested party.

Dated, Signed and Delivered in open court this 9th day of December, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent