



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CIVIL APPEAL NO. 117 OF 2014

BENJAMIN ODIARA AHINDA.....APPELLANT/APPLICANT

VERSUS

KENYA WOMEN FINANCE TRUST (KWFT)

KAKAMEGA REGIONAL OFFICE.....RESPONDENT

RULING

INTRODUCTION:

1. By the Notice of Motion dated 06/10/2014 brought under Sections 1A,1B & 3A of the Civil Procedure Act and Order 42 Rule 6(1) of the Civil Procedure Rules, the Appellant/Applicant is seeking the following orders:
 1. ***That this application be certified as extremely urgent and service thereof upon the respondent be dispensed with in the first instance.***
 2. ***That pending the hearing inter parties of this application a temporary stay of execution of the Ruling and or orders made on 22/9/2014 in Kakamega CMCC No. 214 of 2014 be granted.***
 3. ***That a temporary stay of execution of the said Ruling and or orders made on 22/9/2014 in Kakamega CMCC 214 of 2014 be granted pending the hearing and or final determination of the appeal herein.***
 4. ***That this honourable court be pleased to order the attachment of the applicant's motor vehicle registration No. KBD 486G ISUZU LORRY be lifted pending the outcome of the appeal herein.***
 5. ***That the costs of this application be provided for.***
2. The application was made on the grounds appearing on the body of the said Notice of Motion and supported by the Affidavit of the Applicant sworn on 06/10/2014.
3. The Respondent in opposition to the said Notice of Motion filed a Replying Affidavit sworn by one PAUL WENDO the Respondent's Unit Manager Kakamega Branch on 15/10/2014.
4. The parties appeared before this Court on 19/11/2014 for the hearing of the application by way of oral submissions and the matter set for this ruling.

THE APPLICANT'S CASE AND SUBMISSIONS:

5. The Applicant lodged an appeal against the orders of Hon. J.O. Ong'ondo, Principal Magistrate

made on 22/09/2014 in Kakamega Chief Magistrate Court Civil Suit No. 214 of 2014 (hereinafter referred to as “the suit”). The Applicant simultaneously in filing the suit in the lower Court filed the Notice of Motion dated 30/07/2014 which was heard and the ruling in issue in this appeal delivered on 25/09/2014 aforesaid.

6. The suit in the lower Court and the resultant Notice of Motion thereto arose out of a transaction which took place between one LORNA MBAYI SIMIYU (hereinafter referred to as “**Lorna**”) and the parties in this matter.

By a Letter of Offer dated 29/01/2013, the Respondent herein advanced the sum of Kshs. 3,000,000/= to Lorna on terms and conditions as contained in the said instrument which a true copy thereof has been so exhibited by the Applicant. The said advancement was conditional on Lorna providing security which included Chattel Mortgages to be executed by the Applicant for Kshs. 4,240,000/=, by DORCAS PAULINE for Kshs. 437,000/=, by CHRISTABEL MARIA BUKWI for Kshs. 404,000/= and by JOSEPHINE NALIKA MULONGO for Kshs. 370,500/=. Further, the deposits and/or savings of Lorna and all the above grantors held by the Respondent also formed part of the security. The repayment period was 3 years.

7. Pursuant thereto, the Applicant who was the first Grantor executed a Chattels Mortgage under the Chattels Transfer Act, Chapter 28 of the Laws of Kenya. The same is dated 12/06/2014 and was registered on 01/07/2014.
8. It appears that Lorna defaulted in repaying the advancement and sometimes on 28/07/2014 the Respondent exercised its opinion under the Chattel Mortgage as executed by the Applicant and impounded a Motor Vehicle registration number KBD 486D make Isuzu Lorry the property of the Applicant.
9. The Applicant decries lack of prior notice to him of the Lorna’s default and that he was not given an opportunity to make good the then outstanding balance moreso in view of Lorna’s principal obligation on the repayment of the advancement. The Applicant further states that he approached the Respondent to be favored with the financial statements of Lorna and to allow him to make arrangements towards repayment but all in vain. He depones that had he been notified in advance of Lorna’s default he would have taken all reasonable steps to avert the current situation, but for the notice. It is the Applicant’s position that the attachment was premature, unlawful, unprocedural, unjustifiable and without basis in law and the same ought to be lifted.
10. Further the Applicant challenges the Chattels Mortgage alleging that the same was altered, null and void, improperly attested and executed after the loan was long approved and advanced and all this in his absence without any explanation. To him, the Chattels Mortgage remains unenforceable and it cannot be the basis of the attachment.
11. On submissions, the Applicant indicated that he is suffering colossal losses of income as the Motor Vehicle in issue KBD 486G make Isuzu Lorry (hereinafter referred to as “**the Lorry**”) was his sole source of income and given that the same is under unlawful attachment he is not earning and neither is the Respondent benefiting from the same. To mitigate on the loss, the Applicant prays that the Lorry be released to him pending the determination of the appeal. On security, the Applicant undertakes not to dispose of the lorry pending the determination of the appeal and expresses his willingness to abide by any and all orders being precedent to the grant of the orders sought herein. He relied on the judicial decisions of **Act Fast Security Limited vs Equity Bank Limited (2014) eKLR**, **Rose Sandra Ndube vs Equity Bank Limited (2014)eKLR** and **Court of Appeal at Nairobi Civil Appeal No. 114 of 2013 (UR 77/2013) Kenya Airports Authority vs Mitu-Bell Welfare Society & The Hon. Attorney General (unreported)** in support of his application.

THE RESPONDENT’S CASE & SUBMISSIONS:

12. The Respondent is opposed to the application and sees it as an attempt to run away from his financial obligations which arose out of the loan advancement to Lorna who was then the Applicant's wife. The Respondent states that the Applicant pursuant to the Letter of Offer which he executed on 29/01/2013 freely and voluntarily executed a Chattels Mortgage on 12/06/2014. It was deponed that the Applicant included his Motor Vehicle registration number KBD 456G (hereinafter referred to as '**the Lorry**') in the Schedule to the Chattels Mortgage which said Lorry formed a substantial part of the security and personal guarantee by the Applicant.

13. The Respondent further deponed that the allegation of the lapse of time between the signing of the Letter of Offer and the Chattels Mortgage ought not to be an excuse to allow the Applicant not repay the loan since the Applicant has all along been aware of the advancement and in most occasions he has been submitting the repayment installments on behalf of Lorna and without the Respondent's request or notification. He cannot therefore relent on not having been in the know.

To the Respondent, the Applicant is in Court with unclean hands as he is guilty of non-payment of the loan and yet wants the release of the lorry. The Respondent further proceeded to make quite detailed averments on oath demonstrating why the orders sought ought not to issue to the Applicant and carefully took the Court on what transpired before the lower Court including the examination of some witnesses.

14. The Respondent bolstered its above position by tendering submissions thereto and relied on the judicial decisions of **Peter Abuga t/a Senta view Studio vs Imaging Solutions Limited (2007) eKLR** and **John Edward Ouko vs National Industrial Credit Bank Ltd (2013) eKLR**. The Respondent closed its submissions by strongly calling for the dismissal of the application with costs.

ANALYSIS AND DETERMINATIONS:

15. This Court is therefore called to determine quite an intricate issue. On one hand the suit is yet to be heard and determined by the trial Court. What was only heard was an interlocutory application whose ruling has now become the subject of an appeal. On the other hand the appeal is yet to be heard and determined. On the consideration of the circumstances before Court and the law, this Court is to decide on whether or not a stay pending appeal ought to issue.

16. The conditions to be considered in dealing with an application seeking a stay of execution pending appeal in the High Court are clearly provided for under Order 40 Rule 6 of the Civil Procedure Rules 2010 being:

- a. Applicant to demonstrate substantial loss that may result if stay is not granted;
- b. There should be no delay in the making of the application; and,
- c. The Applicant must provide security for the due performance of such decree or order which the court may ultimately grant.

17. **On the issue of substantial loss**, it is not in dispute that Lorna was advanced the sum of Kshs. 3,000,000/= by the Respondent on the strength of a Letter of Offer. It is also not in dispute that Lorna's advancement aforesaid was secured by a Chattels Mortgage executed by the Applicant which was duly registered. The Applicant however raises several issues on the Chattels Mortgage which go to the root of its validity and submits that the same is a nullity and therefore unenforceable in law. Whether the issues are legally sound or otherwise is a different thing altogether.

18. I have intensely looked at the Chattels Mortgage document on record and I have no difficulty in finding that the same was truly executed by the Applicant. The omissions of not dating on page 6 thereof and the incompleteness on page 7 do not go to the root of the document. I say so because the document is duly dated on the face of it hence that date can be taken to be the date the parties appeared before the said Advocate. The omission on page 7 is easily and fully taken care of by the Affidavit on Registration of Instrument executed by CONSTABEL BUKURU on 12/06/2014

whose contents confirm that the Applicant truly executed the Chattels Mortgage.

19. But there is the issue of the legal effect, if any, of executing the Letter of Offer on 29/01/2013 and executing the Chattels Mortgage on 12/06/2014 and registering only the latter. There is also the issue of the constitutionality of the notice; that is whether or not the Applicant ought to have been notified before attachment given that he was not the principal borrower. These are some of the issues to be canvassed at the hearing of the appeal.

20. Be that as it may, on further scrutiny of the Chattels Mortgage the Court had a look at the Schedule on page 5 thereof. The said Schedule comprises of several items allegedly belonging to the Applicant which would ordinarily be attached once the repayment plan is breached. This Schedule is therefore a very crucial component of the Chattels Mortgage. Item 15 of the Schedule is tailored as follows:

'15. Motor Vehicle (Lorry/Truck) 3,120,000/=

At paragraph 9 of the Replying Affidavit, the deponent states as follows:

“9 THAT the Chattels Mortgage had a schedule hereinbefore referred to included the motor vehicle KBD 486G Isuzu Lorry (see annexure marked as PW3) which motor vehicle formed substantial part of security and personal guarantee by the first Grantor as evidenced and acquiesced to by paragraph 3 of the said Affidavit.”

The Schedule referred to did not state the registration number of the Motor Vehicle which secured the loan advancement but only indicated it to be a Lorry/Truck worth around 3,120,000/-. A Chattels Mortgage is usually created over definite property and in the case of a motor vehicle the registration number must be availed and an Official Search conducted prior to execution to ascertain if the vehicle truly belongs to the person giving it as security. In the absence of the registration number of the motor vehicle over which a Chattels Mortgage was allegedly created one wonders the nexus between the Chattels Mortgage and the attachment of the lorry. Since the Schedule has been introduced to this Court by the Respondent, then this Court has no option than to deem it as the true record of the Chattels Mortgage in issue. This Court therefore finds that to the extent of not mentioning or describing the registration number of the lorry/truck in the Schedule over which a Chattels Mortgage was being created, the attachment of the motor vehicle registration number KBD 486G make Isuzu Lorry (though it belongs to the Applicant) on the basis of that Chattels Mortgage is but without any legal footing and therefore unlawful. To this end, the Applicant who has had his said vehicle under attachment has been and continues to suffer loss.

21. **On the issue of delay** in bringing the application in issue, the ruling under appeal was delivered on 25/09/2014. On 02/10/2014 the Applicant applied for the proceedings and on 06/10/2014 he filed the application under consideration. To the mind of the Court by taking into account the intricacies of filing an appeal, there is no inordinate delay in bringing the application.

22. The last issue of consideration is that of **security**. The Applicant stated that he remained willing not to part with the possession of the lorry pending the determination of the appeal herein in the event the lorry is released. In case the lorry is released to the Applicant then it means that there will be no security at all. As the legality of the Chattels Mortgage shall form the centre-stage on the appeal and with the likelihood of the lorry being released at this stage, the Applicant shall have to offer such security as this Court shall direct.

CONCLUSION:

23. From the foregone and bearing the circumstances of this matter the Court proceeds to make the following orders:-

a. ***There shall be stay of execution of the Ruling and Orders made on 22/09/2014 in Kakamega***

CMCC No. 214 of 2014 pending the hearing and determination of the appeal herein.

- b. The Applicant shall deposit the sum of Kshs. 347,518/24 into Court within 30 days of today's date alongside the Original Vehicle Registration Book for the vehicle registration number KBD 486G (except if the same in the custody of the Respondent) and in default the stay in (a) above shall stand discharged and the Notice of Motion dated 06/10/2014 deemed dismissed with costs.*
- c. The Motor vehicle registration number KBD 486G shall be forthwith released by the Respondent herein unto the Appellant/Applicant.*
- d. The Applicant shall file the Record of Appeal within 45 days of the date hereof and in any event the appeal shall be listed for directions within the next 90 days of today's date.*
- e. Costs of the application shall be in the appeal.*

DATED, DELIVERED AND SIGNED AT KAKAMEGA THIS 12th DAY OF February 2015.

A.C. MRIMA

JUDGE