REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 372 OF 2014

1. GUACA STATIONERS LIMITED

2. GUACA CONVERTERS & STATIONERS LIMITED…….....
……..APPELLANTS

VERSUS

INAMDAR & INAMDAR…….....…….RESPONDENT

RULING

1. Before me is the appellants' notice of motion dated 11th September, 2014. The appellant essentially seeks orders that:

a. ***Pending the hearing and determination of the Appeal this court be pleased to order stay to order stay of further execution of the decree in Nairobi CMCC No. 6895 of 2012 Inamdar & Inamdar Advocates v. Guaca Stationers Limited & Another and in particular the sale of motor vehicle registration number KBF 417 D.***
b. ***Pending the hearing and determination of the Appeal this court be pleased to order that the motor vehicle registration number KBF 417 D ('subject vehicle') be returned forthwith to the Appellants.***

2. The application is premised on the supporting affidavit and supplementary affidavit of Chetan Shah sworn on 11 September, 2014 and 26th September, 2014 respectively and grounds that on 15th November, 2013 when this matter was to be mentioned to confirm if parties had reached a settlement, the Respondent's application whose existence, the Appellants were not aware of, was heard with the result that the Appellants' defence was struck out. Judgment was then entered in favour of the Respondent for KShs. 1,024,031.88. Subsequent to entry of judgment the Appellants' subject vehicle was proclaimed. The Appellants then filed an application dated 15th January, 2014 seeking to set aside the earlier orders of the court striking out their defence but their application was dismissed. It is averred that the Respondent instructed auctioneers who have attached the subject vehicle and scheduled it to be sold by public auction on 26th September, 2014. It was averred that the Appellants' were not accorded fair hearing. It is contended that the Appellants will suffer substantial loss and that unless the orders are granted, the appeal which is arguable, will be rendered nugatory.

3. The application was opposed vide the replying affidavit of Gordon Ogado sworn on 24th September, 2014. He averred that an oral application was made to strike out the Appellants' defence when it became apparent that they had not complied with Order 11 of the Civil Procedure Rules as ordered on 6th August, 2013. That instead of filing an appeal against the order of court striking out the defence, they sought to file an application to set aside the order. That this application is incompetent since there is a similar

application before the lower court seeking the same orders and pending ruling on 17th October, 2014 and that the Appellant has not demonstrated a case with probability of success. It was contended that the Appellants have been indolent in pursuing their legal rights and cannot be heard to complain.

4. The application was canvassed by way of written submissions which I have considered. Order 42 Rule 6 (2) of the Civil Procedure Rules lays down the conditions which must be satisfied by an applicant to grant the orders for stay of execution pending appeal. The applicant must establish that; he/she stands to suffer substantial loss if the orders are not granted; the application must be filed timeously and the applicant must offer security for due performance of the decree or order. See: **Halai & Anor v. Thornton Turpin (1963) Ltd (1990) KLR 365**).

5. It is not contended that the application was filed timeously. Substantial loss was defined by Musinga, J (as he then was) in **Daniel Chebutul Rotich & 2 Others v. Emirates Airlines Civic Case No. 368 of 2001** where he stated as follows:

"…substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum."

The Appellant's uncontroverted facts is that their defence was not heard on merit. Whether a defence was triable or not was discussed in **Philip Keipto Chemwolo and another v. Augustine Kubende, Civil Appeal No. 103 of 1984** it was held that:-

"But the court went on to explain (in page 76) that the main concern was to do justice to the parties and would not impose conditions on itself to fetter the wide discretion given to it by the Rules. On the other hand where a regular judgment had been entered, the court would not usually set aside the judgment unless it was satisfied that there were triable issues which raise a prima facie defence which should go for trial…"

In **Baiywo v. Bach (1987) KLR 89 at page 3,** Platt JA stated:

"***The first ground emphasises that if there is no service then ex debito justitiae the judgment by default must be set aside. Of course, judgment by default can only be entered if there has been an initiating process concerning which the defendant is in default…"***

In view of the above, I find that this is an arguable point and the Appellants stand to suffer loss if the order of stay is not granted. In the result this application is allowed.

Dated, Signed and Delivered in open court this 13th day of February, 2015.

J. K. SERGON

JUDGE

In the presence of:

Shah h/b for Rimuni for the Appellant

Ogedo for the Respondent