



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 112 OF 2011

BETWEEN

H. YOUNG & CO. (E.A) LIMITED APPELLANT/APPLICANT

AND

L B (minor suing through her mother

and next friend **J M B**) **RESPONDENT**

(Being an appeal from the judgment and decree of Hon. P.L. Shinyada, RM,

dated and delivered on 18th May 2011 in Kisii CMCC No.589 of 2009)

RULING

1. The application before me is the Notice of Motion dated 10th November 2012 seeking order:

1. *That this application be certified as urgent and service be dispensed with in the first instance.*
2. *That pending the hearing of this application inter partes, there be a stay of execution of the Honourable Trial Magistrate's court judgment/decree dated 18th May, 2011 in Kisii CMCC No.589 of 2009.*
3. *That there be a stay of execution of the said Honourable Trial Magistrate's court judgment/decree pending hearing and determination of the Appeal filed herein against the ruling/order dated 31st October, 2012 dismissing the applicant's application dated 29th December 2011 the said appeal being Kisii HCCA No.141 of 2012.*
4. *That there be a stay of execution of the said trial court's judgment/decree pending hearing and determination of the appeal instant.*
5. *That the costs of this application be provided for.*

2. The application is premised on 9 grounds marked (a)-(i) set out on the face of the application as well as the supporting affidavit sworn by Deepa Singh on 10th November 2012. The gist of the applicant's case is that the applicant has appealed against the order dated 31st October 2012 dismissing the applicant's application dated 29th December 2011 and that unless the order sought is granted, there is imminent danger of execution by way of attachment at any time of the already proclaimed motor vehicles, the

subject of the appeal; that should execution proceed as feared, appeal herein would be rendered useless.

3. The application is opposed vide the Replying Affidavit sworn by Leah Nyambeki Owuor an advocate with the firm of M/s Erick Ntabo & Co. Advocates who have the conduct of this matter on behalf of the Respondent. It is deponed that by the ruling dated 18th May 2011 of the CM's court at Kisii, which ruling was in favour of the Respondent, the Applicant was ordered to pay to the Respondent half of the decretal sum together with costs while the other half was to be deposited in a joint interest earning account in default execution was to issue. That the applicant failed to comply with the orders as above stated, and consequently, auctioneers proceeded to proclaim the applicant's property in satisfaction of the court orders; that another application dated 29th December 2011 filed by the applicant before the CM's court and after failing to comply with the earlier court orders of 18th May 2011 was dismissed. The deponent further says that up to the date of swearing of her affidavit on 6th December 2012, the applicant was yet to comply with the court orders of 18th May 2011. The deponent urged the court to dismiss this application with costs to the Respondent.

4. Briefly the facts giving rise to this application are that on 18th May 2011, Hon P.L. Shinyada, RM (as she then was) entered judgment in favour of the respondent. The appellant was aggrieved by the said judgment and subsequently filed the Memorandum of Appeal on 16th June 2011. Simultaneously with the filing of the Memorandum of Appeal, the applicant filed a Notice of Motion under certificate of urgency before the trial court seeking stay of execution of the decree of 18th May 2011. The applicant was granted a conditional stay but when it failed to comply Moco Auctioneers, acting on behalf of the respondent proclaimed the applicant's motor vehicles registration number KAS 646 M, KAQ 986Y and KAQ 893A in addition to other moveable property to be found at the applicant's premises. The trial court had granted the conditional stay on 16th June 2011. The applicant blamed the respondent for its inability to comply with the court orders on account of the respondent's advocates allegedly dragging their feet on opening the joint interest earning account; hence the instant application.

5. The instant application proceeded by way of written submissions. In the applicant's submissions dated 5th July 2013 and filed in court on 11th July 2013, it is contended that it is respondent's counsel who refused to cooperate with the applicant's advocate to have the interest earning account opened despite duly receiving the payment cheques for the same. Further, it is contended that the auctioneers proclaimed while the time allowed for compliance was still running. Counsel for the applicant submitted that the applicant had since paid half of the decretal sum and half costs to the respondent and that in the circumstances, justice would be served if the applicant is allowed to prosecute his appeal on merit; and that in any event, the appeal has high chances of success.

6. It is also submitted on behalf of the applicant that the applicant stands to suffer irreparable prejudice in the event that execution is allowed to proceed.

7. The respondent on the other hand submits on three points. First, it is submitted that the applicant was and is still in breach of the conditional stay orders granted on 16th June 2011. Secondly, it is submitted that the applicant only came to court seeking stay when the respondent commenced execution proceedings after the applicant's failure to comply with the conditional stay. Respondent urged this court to find that the applicant has in fact not been keen on complying with the said court order.

8. Thirdly, it is submitted on behalf of the respondent that the applicant has plainly admitted vide paragraph 15 of the supporting affidavit sworn on 10th November 2012 by Deepa Singh that the applicant is ready and willing to pay to the respondent within 7 days the remaining half of party and party costs. The said paragraph reads:-

“15. THAT the Applicant or its Insurer is willing to pay to the Respondent within 7 days the remaining half of the Party and Party costs and to have the remaining half of the decretal sum either deposited in Court or in a joint interest earning account as a sign of good faith and a demonstration of its desire, willingness and determination to have the appeal on the issue of

liability proceed and determined on merits.”

9. After a careful analysis of the application and the submissions, the issue that now arises for determination is whether the applicant has met the threshold for the granting of the orders sought. In other words, has the applicant demonstrated to this court that it has fulfilled the conditions set out under **Order 42 Rule 6** of the **Civil Procedure Rules**, namely:-

a) that substantial loss may result to the applicant unless the order sought is granted;

b) that the application has been made without unreasonable delay; and

c) that such security as the court orders for the due performance of the decree herein has been given by the applicant.

10. I shall start with the third condition requiring security. It is clear from the supporting affidavit and from the submissions that no such security has been given by the applicant although the applicant wants the court to treat the amount already paid out to the respondent as such security. In my considered view, this proposition cannot hold because that amount was paid pursuant to a court order that was not fully complied with. I note from the submissions that the applicant dealt mainly with side shows without addressing the critical issues upon which the instant applicant is anchored.

11. The other condition that must be fulfilled by the applicant is a demonstration that the applicant will suffer substantial loss if the order sought is not granted. The applicant must not just talk about substantial loss but must demonstrate that such loss is imminent. In the instant case, there is no such demonstration and in any event, the conduct of the applicant of not obeying court orders has demonstrated that the applicant has been deliberate in not obeying the court orders.

12. Finally, from the record, the instant application cannot be said to have been filed without undue delay. The lower court orders were given on 16th June 2011 and if the applicant really felt aggrieved by the respondent's delaying tactics, it would have applied to the same court for review of the orders, but instead, the applicant waited until execution commenced before moving to court to seek these orders of stay.

13. In essence therefore, the applicant has not satisfied the conditions for the granting of the order sought and has also been indolent. The application dated 10th November 2013 is found to be without merit and is accordingly dismissed with costs to the Respondent.

14. It is so ordered.

Dated, signed and delivered at Kisii this 13th day of March, 2014

R.N. SITATI

JUDGE

In the presence of:

M/s Erick Ntabo (absent) for Appellant/Applicant

Mr. Ogweno h/b for Ochieng' for Respondent

Mr. Bibu - Court Clerk