



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISCELLANOUS CIVIL APPLICATION NO. 14 OF 2015**

**ROBERT NJOROGE CHEGE.....DECREE HOLDER/RESPONDENT**

**VERSUS**

**WAWERU PETER.....JUDGMENT DEBTOR/APPLICANT**

**RULING**

1. Before me is a Notice of Motion dated 8<sup>th</sup> January, 2015. It is expressed to be brought under Sections 3A, 75, 78, 79G of the Civil Procedure Act and Order 42 Rule 6 (1) and 7 of the Civil Procedure Rules. The Applicant seeks an order for stay of execution of orders issued in Githunguri Civil Case No. 75 of 2012 on 6<sup>th</sup> January, 2015 pending hearing and determination of appeal against that order.
2. The Applicant in his grounds set out in the body of the Motion and the Supporting Affidavit sworn on 8<sup>th</sup> January, 2015 stated that interlocutory judgment was entered against him on 4<sup>th</sup> November, 2013, whereby he filed an application dated 17<sup>th</sup> December, 2013 seeking to set aside that judgment and for him to be allowed to file a defence out of time. That application was allowed on condition that he files and serves the defence within seven (7) days and pays thrown away costs of KShs. 15,000/= . That his advocates on record at the time filed the defence out of time and never paid the thrown away costs as was required.
3. Pursuant thereto, the Respondent filed an application on 16<sup>th</sup> September, 2014 seeking to strike out the defence for being irregular and that the interlocutory judgment of 4<sup>th</sup> November, 2013 be reinstated. Although the Applicant's advocates were served with the said application they never responded to it as a result of which it was allowed. The Applicant then filed an application dated 21<sup>st</sup> November, 2014 in respect of which a ruling was delivered on 6<sup>th</sup> January, 2015. The Applicant contended that stated that if the orders sought are not granted, he will suffer substantial loss since he will be unable to recover his property once they are disposed of by the Respondent. He stated that he intends to file an appeal which has reasonable chances of success and shall be rendered nugatory if the orders sought are not granted. The Applicant also expressed his willingness to furnish security as may be ordered by this court.
4. In response thereto, the Respondent filed a Replying Affidavit sworn on 9<sup>th</sup> February, 2015. He contended that on 10<sup>th</sup> November, 2014 the Applicant filed a notice of objection and the applications dated 10<sup>th</sup> November, 2014, respectively which application was dismissed on 18<sup>th</sup> November, 2014. That in the application dated 17<sup>th</sup> December, 2013, the Applicant denied ownership of motor vehicle registration number KAB 853F while in the notice of objection and the application dated 7<sup>th</sup> November, 2014 and 21<sup>st</sup> November, 2014 he admits being the owner of the said vehicle. He lamented that the Applicant concealed his identity throughout the lower court

- proceedings. He contended that it is not true that the Applicant was not aware of the order of 7<sup>th</sup> July, 2014 since his advocate was served with the application dated 15<sup>th</sup> September, 2014. The Respondent contended that the Applicant has failed to disclose that the trial court declined to grant his orders because he did not comply with the orders of 7<sup>th</sup> July, 2014. The Respondent urged that that the goods proclaimed should not be sold until this application is determined.
5. I have considered the depositions by parties and the submissions of learned counsel. This is an application for stay under Order 42 Rule 6 of the Civil Procedure Rules. The principles applicable are well settled. These are that; application must be brought timeously; the applicant must show that if the stay orders are not granted he will suffer substantial loss; and he must give security for the performance of the decree or order that might ultimately be binding on him.
  6. Mr. Ngigi learned counsel for the Applicant submitted that this application was brought timeously while Mr. Orege learned counsel for the Respondent contended that there was delay in bringing the application. The statutory time given for filing an Appeal to this court from the lower court is thirty (30) days. I have always taken this period to be the reasonable time envisaged under Rule 6(2) of Order 42. The ruling that the Applicant intends to appeal against was delivered on 6<sup>th</sup> January, 2015. The application was filed on 9<sup>th</sup> January, 2015, which is two days after the delivery of the ruling. I do not therefore agree with the Respondent's counsel that this application has been brought late in the day. The Applicant has satisfied the first condition.
  7. On the issue of substantial loss, Mr. Ngigi submitted that the Applicant stands to suffer loss since proclamation has already been undertaken by two auctioneers for KShs. 768,525/=. On the other hand, Mr. Orege contended that no draft memorandum of appeal has been filed to demonstrate that the appeal would be rendered nugatory. The court in **Mukuma Vs Abuoga (1988) KLR 645** while dealing with the issue of substantial loss held as follows:-

***“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”***

8. An applicant therefore ought to prove that the execution will irreparably affect him as the successful party in the appeal. In the present application, the Applicant only deposed that he will suffer substantial loss if his properties are disposed off and he may be unable to recover them. He, however, did not aver that if he paid over the decretal sum, as this is a money decree, the Respondent will not be able to refund the same if the appeal succeeds. On the other hand, the Respondent has not shown that if the decretal sum is paid to him he will be capable of refunding the same if the appeal succeeds. In the circumstances of this case, considering that what is being executed against is an ex-parte judgment, I am minded to give the Applicant an opportunity to argue his appeal. This is with conditions.
9. In the circumstances, I allow the application in terms of prayer No. (d) of the application on condition that the applicant deposits the sum of **Kshs.696,745/-** in an interest bearing account in the joint names of the Advocates on record within 45 days of the date of this ruling. The Applicant also to file and serve the appeal within the same period. In default the stay shall stand discharged.
10. Since there was an order on 11<sup>th</sup> February, 2015 that the proceedings and Ruling in this matter do apply to **NRB HCCA No. 15 of 2015 Patrick Maina Mwangi Vs Waweru Peter**. This Ruling applies to that files accordingly with the variation that in that case the amount to be deposited is **Ksh.416,435/-**. The Costs shall abide the outcome of the appeal. It is so ordered.

**Dated and Signed at Nairobi this 18<sup>th</sup> June, 2015.**

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**A MABEYA**

**JUDGE**

**Dated, Signed and Delivered at Nairobi this 19<sup>th</sup> day of June, 2015.**

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**D A ONYANCHA**

**JUDGE**