



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CIVIL APPEAL NO. 13 OF 2014**

**PHILLIP RIREI.....APPELLANT**

**VERSUS**

**BULLS TRUCKS LIMITED.....1<sup>ST</sup> RESPONDENT**

**CHRISTOPHER KIBET.....2<sup>ND</sup> RESPONDENT**

**DANIEL KORIR KIMUTAI.....3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the judgment and decree of B. J. Bartoo, Resident*

*Magistrate, in Eldoret RMCC No. 260 of 2013 delivered on 14<sup>th</sup> February 2014)*

**RULING**

1. The appellant is aggrieved by the decree of the lower court made on 14<sup>th</sup> February 2014. The appellant had sued the respondents for recovery of a truck registration number KAB 148L; its log book; special damages for loss of use; and, general damages for wrongful attachment. After considering the evidence, the learned trial magistrate found that the appellant failed to discharge his onus of proof. The suit was dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> respondents only.

2. The appellant lodged a memorandum of appeal the same day. The record of appeal has since been filed on 6<sup>th</sup> August 2015. Contemporaneously with the appeal, the appellant filed a notice of motion praying that the truck be stored at the 1<sup>st</sup> respondent's Kobil Petrol Station along Uganda Road, Eldoret pending the determination of the appeal. There are also prayers to injunct the 2<sup>nd</sup> respondent from transferring the ownership of the truck; and, for costs.

3. The motion is expressed to be brought under sections 1A, 1B and 3A and 63 of the Civil Procedure Act; and, Order 42 Rule 6 of the Civil Procedure Rules 2010. There is a supporting affidavit sworn by the appellant on 14<sup>th</sup> February 2014. In addition, the appellant has sworn a further affidavit on 27<sup>th</sup> March 2014.

4. The appellant avers that the appeal has high chances of success; that he will suffer irreparable damage; and, that the lower court had on 27<sup>th</sup> May 2013 ordered that the truck be stored under safe custody. The appellant avers that prior to the suit in the lower court he had possession of the truck. It was impounded by the respondents. He then obtained the orders to have it stored at Eldoret Police Station. Due to

vandalism at the station, the parties consented that the vehicle be stored at the 1<sup>st</sup> respondent's Kobil Petrol Station along Uganda Road Eldoret. He avers that the 3<sup>rd</sup> respondent entered into a loan agreement with the 1<sup>st</sup> respondent; and, that the truck was fraudulently transferred. It was submitted that if the orders are not granted, the appeal will be rendered nugatory. The applicant has offered to provide security for the due performance of the decree.

5. The motion is contested. There is filed a replying affidavit of the 2<sup>nd</sup> respondent sworn on 3<sup>rd</sup> March 2014; and, a further deposition by the same deponent sworn on 10<sup>th</sup> April 2014. He is a director of the 1<sup>st</sup> respondent company. The 1<sup>st</sup> and 2<sup>nd</sup> respondents' case is that the application lacks merit. The 2<sup>nd</sup> respondent is now the registered owner of the truck. He contends that he will suffer great loss if the vehicle remains stationary at the 1<sup>st</sup> respondent's petrol station. He avers that he has incurred storage charges of Kshs 135,000. In the further affidavit, the 2<sup>nd</sup> respondent avers that the Automobile Association has valued the truck at Kshs 680,000. The valuation is annexed. He states that he is willing to provide a bank guarantee in that sum. In a nutshell, the 1<sup>st</sup> and 2<sup>nd</sup> respondents' position is that the motion and the appeal are hopeless.

6. The 3<sup>rd</sup> respondent has not made any representations to the court. The true disputants would seem to be the appellant and the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

7. On 30<sup>th</sup> September 2015, learned counsel for the appellant made brief oral submissions. The respondents did not appear notwithstanding that the hearing date was taken in their presence on 22<sup>nd</sup> July 2015. I have considered the submissions by the appellant, the records before me, the notice of motion, and the pleadings and depositions.

8. I cannot make a final finding on the appeal at this stage. The appeal has not been admitted. As I stated, the record of appeal has now been filed. This court has wide and unfettered discretion to grant stay pending appeal. Order 42 Rule 6 of the Civil Procedure Rules 2010. The rationale is *to see that the appeal, if successful, is not rendered nugatory*. See Wilson v Church (No. 2) 12 Ch D [1879] 454 at 458, Butt v Rent Restriction Tribunal [1982] KLR 417 at 419, Attorney General v Emerson and others 24 QBD [1889] 56 at 59, Madhupaper International Limited v Kerr [1985] KLR 840 at 846.

9. The present motion was brought to court immediately after delivery of the impugned judgment. The application is not truly one for stay of execution. The dismissal of the suit was a *negative* order. The application falls more within the genre of *preserving* the subject matter of the appeal. From the annexure marked CK2b in the replying affidavit, the vehicle was transferred and registered in the name of the 2<sup>nd</sup> respondent. This is evident from the copy of records dated 23<sup>rd</sup> May 2013. The appellant has not controverted that fact. What the appellant contends is that the transfer was fraudulent. It will be for the appellate court at the hearing to make a finding on that matter. What is relevant this stage is that the vehicle's value can be *ascertained*. From the unilateral action by the respondents, the vehicle has been valued at Kshs 680,000. The appellant's suit was dismissed in the lower court. There is no allegation that the 1<sup>st</sup> and 2<sup>nd</sup> respondents would not be in a position to reconstitute if the appeal is successful. Granted those circumstances, I cannot say that the appellant will suffer *substantial* loss as *defined* by the courts in applications of this nature. See Kenya Shell v Benjamin Karuga [1982-88] 1 KLR 1018, Jaribu Credit Traders Ltd v Mumias Sugar Company Ltd High Court, Nairobi, Commercial Case 465 of 2009 [2014] eKLR. I cannot also say that the appeal will be rendered *nugatory*. See Sirgoi Holdings Limited v Martha Kamunu Eldoret, High Court Civil Appeal 26 of 2014 [2014] eKLR. *In a synopsis, the appellant has not demonstrated sufficient cause for grant of stay.*

10. I will now turn to the prayer for injunctive relief. Section 63 of the Civil Procedure Act and Order 40 of the Civil Procedure Rules give the court wide discretion to grant interlocutory injunctions. The rationale is to avoid the ends of justice from being defeated. The principles governing the grant of prohibitive injunctions are well settled. See Giella v Cassman Brown and Company Limited [1973] E.A 358. Those principles are first, that the applicant must show a *prima facie* case with a probability of success; secondly that he stands to suffer irreparable harm not compensable in damages; and thirdly, if in

doubt, the court must assess the balance of convenience. In addition, this court is enjoined by article 159 of the Constitution; and, by sections 1A and 1B of the Civil Procedure Act, to do *substantial justice* to the parties. That is the court's overriding objective. Harit Sheth Advocate v Shamas Charania Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR.

11. I have already made reference to the annexure marked *CK2b* in the replying affidavit. The vehicle was transferred and registered in the name of the 2<sup>nd</sup> respondent. This is evident from the copy of records dated 23<sup>rd</sup> May 2013. The appellant has not controverted that fact. I remain alive that the appellant alleges the transfer was fraudulent. That matter is within the true province of the appellate court at the time of hearing the main appeal. The vehicle's value can be ascertained. The vehicle has been valued at Kshs 680,000. The valuation by Automobile Association is annexed. I am cognizant of the protestations by the appellant of the unilateral valuation. There is however no allegation by the appellant that the 1<sup>st</sup> and 2<sup>nd</sup> respondents would not be in a position to restate if the appeal is successful. Immobilizing the truck has attendant costs. In the circumstances I find that the appellant has not made out a *prima facie* case. In any event, damages would be available. I *cannot* then say that the appellant will suffer *irreparable harm*. Having so found, I need not deal with the balance of convenience. Kenya Commercial Finance Company Ltd Vs Afraha Education Society [2001] 1 E.A. 86.

12. The upshot is that the appellant's notice of motion dated 14<sup>th</sup> February 2014 is devoid of merit. It is dismissed. As the respondents did *not* attend to the hearing of this motion, I will make *no* orders on costs.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **ELDORET** this 17<sup>th</sup> day of November 2015

**GEORGE KANYI KIMONDO**

**JUDGE**

**Ruling read in open court in the presence of-**

Mr. Makuto for Mr. Songok for the appellant instructed by Nyaundi Tuiyott & Company Advocates.

No appearance for the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

No appearance for the 3<sup>rd</sup> respondent.

Mr. J. Kemboi, Court clerk.