



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COURTS
CIVIL CASE NO.656 OF 2013

PAUL CHEGE.....1ST APPELLANT
SUSAN NDUNGE MUENDO.....2ND APPELLANT
OLYMPUS INVESTMENT LIMITED.....3RD APPELLANT
PRIME LOGISTICS.....4TH APPELLANT
VERSUS
CHARLES K GITHIOMI.....RESPONDENT

(Being an appeal from the ruling and the order of Hon. Obulusta. Ag. CM of 27th November, 2013
in Chief Magistrate Civil Case Number 4749 of 2010)

RULING

The appellants/applicants have filed a Notice of Motion brought under Order 42 rule 6 of the Civil Procedure Rules, sections 3A and 1A and 1B of the Civil Procedure Act, and all enabling provisions of the law, seeking the following orders;

1. Spent.
2. That pending hearing determination of this application, the court be pleased to grant stay of execution of the warrants of attachment issued by the subordinate court on the 16th August 2013 and or any further execution for the judgment and Decree of the subordinate court issued on the 14th September 2012 in Nairobi CMCC No. 4749 of 2010.
3. That pending hearing and determination of this application, the court be pleased to stay the sale of movable property, motor vehicle KBJ 664C, attached by Kirriyu Merchants/auctioneers on 3rd September 2013.
4. That pending hearing and determination of this appeal, the court be pleased to grant stay of execution of the warrants of attachment issued by the subordinate court on the 16th August 2013

and or any further execution of the judgment and decree of the subordinate court issued on the 14th September 2012.

5. That pending hearing and determination of this appeal, the Court be pleased to order the immediate restitution of Motor vehicle KBJ 664 C attached by Kiriiyu auctioneers on the 3rd September 2013.

6. That the costs of this application be borne by the respondent.

The application is based on the following grounds;

- a. The applicants will suffer substantial loss if this application is not allowed.
- b. The applicants appeal has excellent chances of success.
- c. The appeal will be rendered nugatory if this application is not allowed.
- d. The applicants are willing to furnish security for the due performance of the decree
- e. Such other ground and reasons to be adduced at the hearing hereof.

The application is supported by the affidavit Paul Chege dated 18/12/2013. He depones as follows in brief; that this case started in the lower court sometime in November 2010 when the respondent filed a claim against his co-appellants and him for an injunctive relief, an order for accounts of the 4th appellant for Kshs.585,000/-; that counsel for the 4th applicant filed a preliminary Objection to the suit on the grounds that the court did not have the jurisdiction to try the matter which led to the dismissal of the suit by a ruling of the court delivered on the 4th April 2011 by the Hon. Nditika, Principal Magistrate. He thought the case had been settled; that sometime on the 25th September, 2012 auctioneers visited his home in Akila estate and served him with a notice of proclamation for his household goods; that when his advocate perused the court file he discovered that the respondent had hired another lawyer who had fixed the matter for hearing and then made a request for judgment in default of filing defense against his co-applicant and him; that the Lower Court acceded to the request and entered a final judgment and decree in the matter against his co-applicants and him on the 14th September 2012 for the decretal sum of Kshs. 585,000/- plus costs and interests an order for injunction and order for accounts of the 4th applicants books and that the respondent be paid the proceeds therefrom; that following the decision he instructed his advocate to file an application in court and regularize the position by setting aside the irregular judgment and decree issued by the court together with the warrants of attachment emanating therefrom; that the application was filed on the 31st October 2012 and the court rendered its decision thereon on the 4th February 2013 setting aside the judgment and decree of the court with costs to his co-applicants and him. Once again he considered this to be the end of the matter and let it rest; that on the 3rd September 2013 at about 7 a.m. in the morning he was accosted by auctioneers at his home in Akila estate who came armed with warrants of attachment from the court, orders to break into his house and they had police escort; that he called his advocate, on record and informed him of the situation. He went to his place and after inspecting the documents advised that he offers the auctioneers his personal car and Kshs. 50,000/- which they were demanding as auctioneers fees to avert the imminent intrusion into his home; that the auctioneer took his car. Thereafter they perused the court record and found that the respondent had hired yet another lawyer and instructed him to write a letter to the court requesting the Court to reissue warrants of attachment against his co applicants and him on the basis of the judgment and decree that was issued on the 14th September 2012; that the Court re-issued the warrants of attachment against his co-applicants and him showing the decretal sum, now, as Kshs.830,937/-; that his lawyer filed a fresh application in court seeking to set aside the warrants of attachment and restitution of the motor vehicle which was dismissed by the court on the 27th November 2013; that the Court granted them a further 30 days stay; that he is willing to comply with any condition that the court will impose in granting the requests he has made including the furnishing of reasonable and sufficient security in exchange for the court's grace.

In a Replying affidavit dated 29th December 2013 Mr. Charles K. Githiomi the plaintiff/respondent depones as follows: That the appellants' application dated 18th December 2013 to set aside should be dismissed; that the said application is frivolous, vexatious and basically an abuse of the honourable Court process; that the facts in the Lower Court put straight as follows:- that he obtained a valid judgment in the lower court on the 29th November 2012 for the sum of Kshs. 846,882/- including costs with interests continuing to accrue; that the lower court file disappeared thereafter and it took roughly 10 months to trace it; that his advocates upon tracing it, instructed Stephen K. Karuu of Kiriiyu auctioneers to execute and as at the 16th August 2013 when warrants of attachment and sale were issued to them, the sums outstanding were Kshs.897,470.20/-; that upon proclamation being levied upon the 1st and 2nd appellants filed a motion in the lower court for stay of the execution process entirely and to the committal of his advocates for acting as instructed but they did not apply to set aside the over 1 year old subsisting judgment and decree; that the application was heard and dismissed in its entirety as it had no merit at all in fact and in law; that the appellants at no time sought to have the validly entered judgment set aside nor have they done so in this application and therefore he cannot be stopped from executing whilst he has judgment and decree that have not been impugned; that the appellants to date have never appealed against the lower court judgment and the decree, if at all they were not satisfied with it. The period that they would have exercised that right has long since lapsed; that the appellants have all along been aware of the pending unpaid judgment and the decree; that this is a monetary decree and he is in a position to refund to the appellants the decretal sum if the appeal was to succeed, that the appeal has absolutely no chances of succeeding; that the sums involved in the decree are not in any case substantial to cause substantial damage; that this appeal shall not be rendered nugatory since it is simply about money and no more; that no definite offer for security has been rendered to this Court.

At the hearing of this application Mr. Kabugu informed the Court that they were seeking prayers 5 and 6 of the application. He reiterated what is deposed in the affidavits and submitted further that the applicant is likely to lose his vehicle; that the appeal has a high chance of success; that after the Lower Court set aside the judgment the learned Magistrate overturned the decision through the ruling dated 23rd November, 2013; that no final judgment could be given unless the matter went to formal proof. That they have offered security. That there has never been a valid decree to set aside and that the respondent has not demonstrated that he is able to refund the money.

Mr. Onyango for the respondent too reiterated the contents of the replying affidavit. According to him a decree was issued on the 14th of September by the Lower Court but the memorandum of appeal does not show that the appellants are appealing against the said decree. Therefore the respondent should be allowed to enjoy the fruits of his judgment. That incase the appellant is appealing against the judgment and decree they have not shown the Court the authority they are moving the Court under as time has lapsed; that the current appeal was filed in December 2013; that the appeal has no chances of success even if the appellants were to say they had a right of appeal the same cannot be exercised with without seeking leave to appeal; that under Order 43 rules 1 (a) to (aa) for an application under Order 21 the applicant should have sought leave to appeal as there is no right of appeal; that the applicant did not move the Lower Court and therefore there is no proper appeal before this court. Lastly counsel submitted that the vehicle had been sold.

Mr. Kabugu in reply stated that they are not challenging the judgment and decree of September 2012 because the ruling of the Lower Court of 4th of February 2013 set aside the said judgment and that the ruling of 27th of November 2013 is the one that brought it back to life yet there is no decree or judgment. That according to him where there is a decree a party has a right of appeal under the Civil Procedure Rules.

I have considered the parties affidavits and submissions made. It is evident that the respondent is executing from an order that was given by the lower court on the 27th November, 2013. The applicant claims that the execution is as a result of the *ex parte* judgment being reinstated. As a court I have not had the opportunity of reading the lower court proceedings. The applicant states that they were given 30 days stay by the lower court. This has not been disputed by the respondent. From the memorandum of

appearance filed in this court on the 18th of December 2013 the applicant is aggrieved by the decision rendered by Hon. Obulutsa on the 27th November, 2013 claiming that this decision reinstated an *ex parte* judgment that had been set aside through a ruling delivered on the 4th of February 2013.

In an application like this one am guided by the provisions of Order 42 rule 6(2). It was submitted by the respondent's counsel in court that the vehicle that had been attached had been sold. The applicant fears further execution and has offered to deposit the amount the Court shall decide. The applicant has also explained their position as regards the judgment and decree. In the absence of the lower court file am unable to make a finding on the decree or order. A further execution in the matter could lead to substantial loss if the applicants' properties are to be attached and sold. I note from the memorandum of appeal that the applicants challenge an order that has been made and if his appeal succeeds then there could be a change of events in the matter. Granting a stay of execution under Order 42 is a matter of discretion of the court and has to be exercised judiciously. I find that the application has merit and grant the following orders;

- i. that there will be a stay of execution of judgment and decree of the subordinate court issued on the 14th of September 2012 in Nairobi CMCC No. 4749 of 2010
- ii. the applicant shall deposit Kshs.400,000/- in court within the next 14 days from the date of this ruling in default the stay orders shall vacate.
- iii. The respondent shall give an account of the proceeds of sale of motor vehicle registration number KBJ 664C within 7 days from the date of this ruling to the applicant.
- iv. The parties shall endeavor to have the appeal heard in 2014.
- v. Costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered this **28th** day of **March** 2014.

R. E. OUGO

JUDGE

In the presence of:-

.....For the 1st 2nd, 3rd & 4th Appellants/applicants

.....For the Respondent

.....Court Clerk