



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL APPEAL NO. 193 OF 2012

NIC BANK LTD.....1ST APPELLANT

PURPLE ROYAL INVESTMENTS.....2ND APPELLANT

VERSUS

EVELYN KANYUA MIRITI.....RESPONDENT

RULING

The application dated 27/03/2013 is made pursuant to **Order 42 Rule 6** and **Order 51 Rule 1**, and seeks that orders staying the ruling from **Nakuru CMCC No.927 of 2011** given on **26 / 10/2012** do issue and remain in force pending hearing of the appeal preferred against that ruling.

The application is premised on grounds on its face and supporting affidavit to effect that the contested ruling granted an order for mandatory injunction to compel the applicants to release motor vehicle registration No. KAW 811B to the respondent, and an order for temporary injunction to restrain the applicants from interfering with the respondent's use and possession of the said motor vehicle pending the hearing and determination of the suit. The respondent's execution of the order is looming and will cause substantial and irreparable harm to the applicants as its effect will be to render the appeal nugatory.

The appeal is described as having high chances of success.

In opposing the application, the respondent deposes in her replying affidavit that the application for stay was properly rejected by the magistrate's court, and the present application is not merited and should be dismissed.

In a supplementary affidavit sworn by the applicant's counsel, it is deposed that, the effect of the contested ruling is that it directed the applicants to release the motor vehicle to the respondent without any condition for its availability for purposes of trial and determination of the suit, yet the motor vehicle had been repossessed by virtue of a hire purchase transaction. The effect of the ruling, it is signed, results in complete disposal of the suit.

The matter was disposed of by way of written submissions. The background to the matter is that, the applicant had advanced two finance facilities to the late Ephantus Miriti Nkanata by way of hire purchase agreement, with regard to the earlier mentioned motor vehicle and motor vehicle KBB 529X Mitsubishi FH215 Truck. One of the conditions for granting the second facility, was advancing as a

collateral, motor vehicle No.KAW 811B which was subsequently registered in the name of the 1st applicant and Ephantus Mirigi Nkanata.

There was default in repayment of the facility pertaining to motor vehicle KBB 811B.

The 1st applicant's effort to repossess motor vehicle KBB 529X were thwarted by the hirer's lack of co-operation to establish the whereabouts of the subject vehicle. Consequently the 1st applicant invoked the right to set-off and collateral security as provided under Clauses 11 and 12 of the Hire Purchase Agreements, and repossessed the subject motor vehicle.

The respondent challenged this repossession by filing CMCC No.927 of 2011, and she sought inter alia, the mandatory injunction compelling the applicants to release the motor vehicle to her - this was granted.

It is submitted on behalf of the applicant that the purpose of seeking stay, is so as to preserve the subject matter as was enunciated in the case of **KEZIAH WANJIRU MBURU V WHITE FARM KENYA LTD [2010] e KLR**. This court is further urged to consider the views expressed by Wendoh J in **AFRIC PAK MOTOR LTD V ELIZABETH WANJIRU NGATIA (Nku Civil Appeal No.186 of 2012)** when granting an order for stay pending appeal as follows:-

"..... As the respondent continues to use the vehicle, it continues to depreciate and the vehicle may be put beyond the reach of the applicant and there is no guarantee that the vehicle will still be available at the time the case is heard."

It is further argued by counsel for the applicant, that there is a likelihood of substantial loss being suffered by the applicant if the orders issued are not stayed. Counsel points out that, what predisposes the appeal to success is:-

- a) The invocation of Clauses 11 and 12 of the Hire Purchase Agreements by the applicant.
- b) The attempts to recover motor vehicle KBB 529X (which was a collateral). was to act under Clause 11 and 12, then the only remedy would be to raid the hirer's accounts and recover the money.

Mr. Mugambi further submits on behalf of the respondent that no likely substantial loss has been demonstrated on behalf of the applicant who is holding the registration documents for the subject motor vehicle, and the respondent cannot dispose of that motor vehicle without those documents.

What the court takes into account in an application for stay orders is set out clearly under Order 42 Rule 4 (6) to the effect that:-

- (a) The court must be satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay and
- (b) Such security as the court orders for the due performance of such decree.

The contested orders were issued on 26th October 2012, and on 5th November, the applicant filed an application seeking stay before the trial. The trial court delivered its ruling dismissing the application on 22/03/2013 and by 27/03/2013, a span of only five days - that cannot be described as delay. Infact applicant acted expeditiously.

Has the applicant demonstrated likelihood of substantial loss?

As aptly submitted by the applicant's counsel, the objective of stay pending appeal, is to preserve the subject matter yet the effect of the mandatory orders given is that the suit is as good as determined. There is also the fear that as the respondent continues to use the motor vehicle, it depreciates even more, but of greater significance is the fact that there is a real risk of the

respondent putting the motor beyond the applicant's reach, with no guarantee of its availability by the time the appeal is heard and determined. This fear is not unfounded as attempts to get the other motor vehicle are said to have been thwarted by respondent, and this allegation is not denied.

This is further fortified by the respondent's own deposition that repossession of motor vehicle registration KBB 529X having failed then the only recourse open to applicant is invasion of its accounts - meaning the respondent is likely to make every possible effort to ensure the motor vehicle in question is unavailable.

There is no evidence offered to confirm that were the respondent to make the motor vehicle unavailable, she has sufficient funds in her account to settle what is owing to the applicant. This would thus result in substantial loss being suffered by the applicant, especially in view of the contest between the two parties regarding interpretation of Clause 11 and 12 of the Hire Purchase Agreements. In light of this, I am persuaded that it is indeed desirable that the subject motor vehicle be preserved by ordering stay of the orders issued by the lower court. This is granted on condition that the applicants must not dispose of the motor vehicle either by sale, auction, transfer or any other manner as to dispossess the respondent of her interest in the motor vehicle, pending hearing and determination of the appeal.

The costs of this application shall be in cause.

Delivered and dated this 22nd day of September 2014 at Nakuru

H. A. OMONDI

JUDGE