



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL APPEAL NO. 17 OF 2013

PHILIP MWAURA T/A GILETTE

TRADERS:.....APPELLANT

VERSUS

DAVID ONKOBA NYAKUNDI)

JANET N. ONKOBA

).....

RESPONDENTS

RULING

The Applicant filed a memorandum of appeal against a ruling delivered on 2nd May, 2013 in Kitale CMCC No. 645 of 2007, in which his application dated 11th April, 2011 was dismissed.

The appeal is intended to have the said application allowed to the extent that the order dated 19th October, 2010, be reviewed and/or set aside and that the order for the issuance of a warrant of arrest be quashed and/or set aside. The appeal was lodged on 30th May, 2013 together with the present application made vide a Notice of motion dated 29th May, 2013 seeking orders for stay of execution of the ruling dated 19th October, 2010 and the lifting of the warrant of arrest issued against the applicant pending hearing and determination of the appeal among other prayers.

The grounds for the application are those contained in the body of the material Notice of Motion as supported by the averments in the applicant's supporting affidavit deponed on the 29th May, 2013. The Respondents are opposed to the application on the basis of the facts contained in their replying affidavit dated 11th December, 2013. At the hearing of the application, the applicant was represented by the Learned Counsel **Mr. Njuguna** while **M/S Munialo**, learned counsel, appeared for the Respondents.

Order 42 Rules 6 (1) (2) of the Civil Procedure Rules is the actual enabling provision of the law for this application as it essentially provides for stay of execution of proceedings pending appeal on condition that the court is satisfied that substantial loss may result to the applicant unless stay is granted and that the application is made without unreasonable delay.

The applicant may also be required to deposit security for the due performance of such decree or order as may ultimately be binding on him.

Basically, the present application is a repetition of the applicants' application dated 11th April, 2011 made in Kitale CMCC 645 of 2007 in which the applicant sought for a stay of execution of the order made on 19th October, 2010 and a review or setting aside of the same. The applicant also sought for a stay of proceedings pending hearing and determination of **Kitale HCCC No. 113 of 2010 between CFC Stanbic Bank Ltd Vs. J.M. Wafula & Others.**

The application was dismissed by a ruling of the court made on 2nd May, 2013 but which was not annexed to the present application. It is also not clear whether the ruling was made on 2nd May, 2013 or 5th May, 2013.

Be that as it may, the order made by the lower court dated 19th October, 2010 was to the effect that the applicant deposit in court the sum of Kshs.1,463,000/= which he was holding within fourteen (14) days and that his bill of costs be filed for assessment by the court.

The order was apparently not complied with resulting in a warrant of arrest being issued against the appellant who presented himself before the court and was released on bond.

He contends and reiterates herein that the warrants of attachment and sale issued in Kitale CMCC No. 645 of 2007 were not executed and therefore no sale by public auction took place nor was he holding a sum of Kshs.1,463,000/= from such sale. That, the alleged sale respecting Kitale CMCC No. 645 of 2007 was the subject of dispute in Kitale HCCC No. 113 of 2010 and that the sale he conducted was in relation to warrants of attachment and sale issued in separate suits viz Kitale CMCC Nos 432, 499 and 500 of 2007 in which a motor vehicle Registration No. KAY 726X was involved.

The applicant further contends that his appeal has high chances of success and that it may be rendered nugatory if stay is not granted herein.

The contentions by the Respondents are that the applicant did not appeal against the order made on the 19th October, 2010 and waited for a period of about 2 ½ years before filing the appeal on 30th May, 2013. That, no leave of the court was sought to file the appeal out of time and in any event, there is no valid appeal before this court as the appeal intended is not against the order made on 5th May, 2013. That, the proclamation made by the applicant in Kitale CMCC No. 645 of 2007 related to the aforementioned motor vehicle Registration No. KAY 726X. That, the letter by the applicant to the court dated 18th January, 2010 was conveniently written to avoid the payment of the money being held by the applicant after selling the said vehicle. That, the said letter is an after thought and was never received by the Respondent's advocate.

The submissions made by counsels for both sides were geared towards upholding and reiterating the parties respective contentions which evidently show that warrants for sale and attachment were issued in Kitale CMCC 645 of 2007 in which the Respondents had sued an organization known as Excel Entrepreneurs Foundation and obtained judgment and the resultant decree which was to be executed by way of attachment and sale of the judgment debtor's property. In that regard the necessary warrants of attachment and sale were issued to the applicant trading as Gillete Traders Auctioneers.

The applicant on receipt of the warrants commenced execution by proclaiming a motor vehicle Registration No. KAY 726X on the 9th December, 2009. But, on the 8th January, 2010, the applicant returned the warrants to the court on grounds that the vehicle was not registered in the name of the judgment debtor and therefore execution could not proceed. The applicant requested the judgment creditor's advocates to change the mode of execution. The necessary letter was copied to the Respondent's advocate but they alleged herein that they did not receive it.

The action on the said motor vehicle in relation to CMCC No. 645 of 2007 ceased at that point. However, the vehicle was attached and sold by public auction in respect of other suits viz:- CMCC No. 432, 499 and 500 of 2007.

The said sale is now a subject of the dispute in Kitale HCCC No. 113 of 2010 where an order was made on 22nd March, 2012 to have the vehicle surrendered to the police to be held in safe custody pending hearing and determination of an intended appeal. It was confirmed herein that the vehicle has since been surrendered to the police.

The surrender of the vehicle to the police effectively removed it from the applicant's possession and/or control and implied that any sale proceeds kept by himself were subject to the outcome of the High Court case whose genesis was not Kitale CMCC 645 of 2007 but Kitale CMCC 432 of 2007 pitting CFC Stanbic Bank and others including the applicant and Excel Entrepreneurs Foundation which was also the defendant in CMCC 645 of 2007.

All these circumstances clearly indicate that when the disputed order dated 19th October, 2010, was made by the lower court in CMCC No. 645 of 2007 the applicant had not carried out a complete execution of the warrants issued in that case and could not therefore deposit in court the sum of Kshs. 1,463,000/= nor file any bill of costs for assessment. Any money held by him from the sale of the material vehicle was clearly in respect of other cases. He simply could not comply with the order and this led to a warrant of arrest being issued against him. Therefore, his application dated 11th April, 2011 was merited as it intended to alter the order made on 19th October, 2010 and staying proceedings in CMCC No. 645 of 2007.

However, the application dated 11th April, 2011, was dismissed by the Lower Court in a ruling delivered on the 2nd May, 2013 thereby giving rise to this present appeal and application dated 29th May, 2013 seeking stay of execution of the disputed order dated 19th October, 2010 and all consequential orders pending hearing and determination of the appeal.

Accordingly, the applicant has shown why he is apprehensive of being thrown into the “gallows” if stay is not granted now that he cannot comply with the orders and a warrant of arrest hangs immediately above him. He has however, failed to demonstrate whether he shall suffer substantial loss should stay not be granted. He has not shown that he is likely to permanently lose his money in the event that it is paid out to the Respondents or deposited in court and the appeal succeeds. He has not shown that the Respondents would be unable to refund the money if it is released to them. In any event, substantial loss is more than mere paying out of money especially if it may not be out of reach of the applicant. Although it is recognized that suffering a substantial loss pending appeal may render the appeal if successful nugatory, herein the applicant would not be crippled if he were to pay out or deposit in court a sum not exceeding Kshs.1.5 million. He would not in the circumstances suffer substantial financial loss. (see, **Kenya Shell Ltd Vs. Kibiru & Another 1986] KLR 410**) and **Mukuma Vs. Abuoga [1988] KLR 645**).

Nonetheless, the circumstances, existing in Kitale CMCC 645 of 2007 have created confusion and an overlapping situation in relation to motor vehicle Registration No. KAY 726 X such that it would be in the interest of Justice that the “status quo” existing between the parties prior to the application dated 11th April, 2011 be restored and maintained pending the hearing and determination of this appeal and so that it is not rendered nugatory in the event of success.

As to the alleged delay in filing the appeal, no such delay was demonstrated as the disputed ruling of the court was made on 2nd or 5th May, 2013 and the appeal was filed on 30th May, 2013. If there was any delay from the time the disputed order was made on the 19th October, 2010, the blame lay squarely with the court for delivering the ruling on the application dated 11th April, 2011 rather belatedly.

Suffice to hold that the appeal raises arguable grounds and ought not therefore be hoisted to a position were it would be rendered nugatory should stay be refused.

In the upshot, the present application is allowed in terms of prayers (c) and (d) of the Notice of Motion dated 29th May, 2013. the applicant shall be entitled to the costs of the application.

Ordered accordingly.

J. R. KARANJA

JUDGE

25/11/2014

[Read & signed this 25th day of November, 2014]

**in the presence of Mr. Chebii for Njuguna for Applicant
and Mr M. Wafula for M/S Munialo for Respondent]**