



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 114 OF 2011

(An appeal from the Judgment of Hon. P. N. Areri Esq., Resident Magistrate in

Kakamega Chief Magistrate's Court Civil Case No. 309 of 2009

delivered on 8th July, 2011)

MORDEKAI MWANGA NANDWA..... APPELLANT/APPLICANT

VERSUS

C.F.C. STANBIC BANK LTD.RESPONDENT

RULING

Before me is an application by way of Notice of Motion under Order 42 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act (Cap 21). The application has four (4) prayers, 2 of which have been spent as follows -

1. (spent)
2. (spent)
3. That pending the hearing and determination of the appeal lodged herein, there be a stay of the decree passed in Kakamega CMCC No. 309 of 2009.
4. That the costs of this application be in the cause.

The application was filed with a supporting affidavit sworn by Mordekai Mwangi Nandwa, the applicant on 12th October, 2011.

The application has grounds on the face of the Notice of Motion. The grounds are that an appeal has already been lodged. That the appeal raises triable issues. That the respondent has attempted several times to repossess the applicant's motor vehicle Reg. No. KAX 248U Mitsubishi pick up, the subject matter of the appeal. That the applicant has paid up the total hire purchase price of Kshs.1,285,164/=. That the dispute herein is only in respect of extra charges. That the applicant stands to suffer irreparable or substantial loss, should the vehicle be repossessed. That it will be in the interest of justice that the appeal be heard and determined on merits first. The applicant through counsel, Amasakha & Company also filed written submissions on 8th November, 2011.

The application is opposed. Grounds of opposition were filed. The respondent also filed written

submissions through their counsel Kairu & McCourt.

Counsel who appeared in court at the hearing, Miss Makokha for the applicant and Ms Andia for the respondent, relied on the written submissions filed, which I have perused.

This is an application for stay of execution of decree pending appeal. Order 42 rule 6 (2) of the Civil Procedure Rules 2010 provides as follows -

“6 (2) No order of stay of execution shall be made under sub-rule (1) unless

.....

- a. the court is 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. that such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”***

The applicant herein has stated that the total hire purchase amount has already been paid. The respondent has not denied this. Grant of stay of execution of decree orders are an act of the exercise of discretionary powers of the court. Indeed, the respondent herein appears to be an institution with means to repay the money or any damages. However, it is not practicable to assess the hardship that would be suffered by the applicant if the said motor vehicle is impounded and he loses use of it, assuming he has paid the principal hire purchase amount.

The exercise of discretionary powers of the court has to be done in accordance with established legal principles. In the case of ***Patani & Another -vs- Patani [2003] KLR 518*** the Court of Appeal stated at page 519 as follows -

“The principles on which this court grants stay are well settled. The applicant must show that he has an arguable appeal and that the same would be rendered nugatory if a stay is not granted.”

The above principles relate to rules applicable in the Court of Appeal under the Court of Appeal rules. In the High Court the guiding principles are the provisions of Order 42 rule 6 (2) of the Civil Procedure Rules above.

I have seen a memorandum of appeal filed herein. One of the grounds is that the appellant has fully re-paid the loan and has even paid in excess of the loan. In my view, with the above position in mind, I find that the applicant will suffer substantial loss if the stay herein requested is not granted. Consequently, I will allow the application. I allow the application and grant prayer 3. However, the applicant should ensure that the appeal is heard within the year 2014. Costs of the application will be in the cause.

Dated at Kakamega this 31st day of October, 2013

George Dulu

J U D G E