



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO.504 OF 2013
MILIMANI LAW COURTS

FLORENCE MUYAKAAPPLICANT

-VERSUS-

KYUNA INVESTMENTS LIMITED & 2 OTHERSRESPONDENT

RULING

1. The application before me is a Notice of Motion dated 30th October, 2013, brought under Order 42 Rule 6 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya and all enabling provisions of the law. The applicant seeks the following orders;

- i. That the honourable court be pleased to order a Stay of execution of the Judgment and decree dated 22nd of October 2012 pending the hearing and determination of this application
- ii. That the Court be pleased to grant the appellant to deposit log books for motor vehicle registration number KBTC 707J and KBR 494K in court as security pending the determination of the Appeal
- iii. The costs of the application

2. The application is based on the grounds on the face of the application and the supporting affidavit of Florence Muyaka she states that; the genesis of the suit before the court arose out of a property she sold to the 1st respondent. The 2nd respondent claims monies it used in settling land rates on the said property. The court via an order issued on 22/10/2012 in CMCC No. 5012 of 2012 gave an interim stay on condition she deposits KShs. 4.8 million. She has been unable to raise the said amount and request the court to allow her deposit log books of two vehicles as security. She has indicated that the amount realised from the said sale had been utilised in paying various expenses of her husband's estate, for general maintenance and running of the estate. She states that she has not been able to obtain the said amount in cash and requests the court to allow her deposit 2 log books of vehicles KTCB 707J valued at KShs. 4,660,000/- and KBR 494K valued at KShs.1,980,000/- as security.

3. The application is opposed and the respondent filed a replying affidavit on 7th November 2013 stating that the application and reliefs sought are misplaced and incapable of being granted, that the matter was before Justice Waweru on the 27th September 2013 when they sought a stay pending the hearing of this appeal, that the applicant raised the issue that she was unable to secure a stay pending appeal deposit sought to deposit by depositing the judgment sum in court, that the court ordered that the appellant deposits the sum of KShs. 4.8 million within 30 days of the order.

4. The application came up for hearing on 8th November, 2013, Mr. Khasiani for the applicant submitted

that the substantive prayer is payer no.3. Giving a brief background of the case, he stated that this matter arose from sale of a piece of property to the 1st Respondent. This was the prime asset in her husband's estate and the amounts realised on 18th November, 2013 were used to offset expenses in her husband's estate. He further submitted that the purchase price was recovered on the 18th November, 2010 and have annexed **FM1** the bank statement of the applicant which sets out the outgoing of the account and the current bank balance. Mr Khasiani further submitted that his client does not have the KShs. 4.8 million she had been ordered to deposit in court. It was Mr. Khasiani's submission that his client be allowed to deposit into court two motor vehicle log books for KBR 494K valued at KShs.1,980,000/- as security. He submitted further that under Order 42 Rule 6(2)(b) the Rules states security should be given by the applicant. That it doesn't order that the applicant deposits the full decretal amount or that the security should be in cash. He submitted that the affidavit by the 1st respondent sworn by Mr. Mwangi on 6th November 2013 did not dispute the assertions of lack of liquid cash by the applicant and the same only challenges the jurisdiction and capability of the orders to be granted and also that the same is sworn by an advocate which is prohibited under the Advocate's Act he urges the court to grant the orders sought.

5. Mr. Mwangi for the respondent opposed the application. On the issue on having sworn an affidavit on behalf of his client he submitted that the matter was in court on 5th and he had to quickly prepare a Replying affidavit which he swore on behalf of his client. That his understanding is that the advocate is prohibited from deponing to contentions matters of fact relating the dispute, but in his case he was careful and only deponed to the matters in the proceedings and those within his personal knowledge and therefore his affidavit was valid and should be considered. He further submitted that the issue before the court is whether the court should allow the applicant to substitute the security previously ordered by this court and in its place deposit log books. In his view he contended that such application was improper. He further added that the respondents had appeared before Justice Waweru on the 27/9/2013 when they sought interim order of stay but failed to give their proposal of alternative security. The court after evaluating our submissions ordered that a security of KShs. 4.8million be deposited in court. By bringing the present application he submitted that the appellant is trying to go around the court order issued on 27th September 2013 in reality she is calling up this court to review the order or sit an appeal on that decision. That the substantive application for stay pending appeal is still pending, and rather than expediting that application the applicant has brought yet another for stay pending appeal on the current application. In his view the applicant appears to dictate to the court what court order the court should impose. He further submitted that the applicant in giving a background of this case carefully failed to bring to the attention of the court is what the 1st respondent seeks from the appellant are rates which were not cleared by the appellant/applicant forcing the 1st respondent to pay to avoid losing the purchase price already paid to the appellant and which the appellant has refused to refund to the 1st respondent. He further submitted that the judgment against the applicant of KShs. 4.8 Million is yet to be set aside. He argued that the itemised list by the applicant indicates she overlooks her primary responsibility to clear the rates or make provisions for clearing them but she had instead paid the legal costs to transfer a property and one only wonders why she didn't make provisions for payment of rates. He submits that although she has other responsibilities she should not shy away from her primary responsibility. That it is important to note that the court is called upon not only to look at her interest but also the interest of the 1st respondent, and in that balance the court is called upon to assess if there will be any money to satisfy the judgment. He further submits that the security offered cannot be ample security and that was the basis which the court on the 27/09/13 declined to accept it as security. He is apprehensive that in the event the vehicles are not present at the time the appeal is concluded it leaves the 1st respondent exposed as they will have a judgment with nothing to recover. He further added that the security offered cannot be sufficient bearing in mind the wear and tear of the vehicles and such interest that could accumulate until such time the appeal is heard.

6. Mr. Khasiani in reply stated that Order 42 rule 69(2) (3) allows a party to make an important application pending the hearing of the formal application. The court has the power to vary an order it is not an appeal or application for review.

7. I have considered the submissions, the affidavits the applicant's main reason to provide an alternative

security is that she has been unable to raise the cash KShs. 4.8 million. I agree with the respondent's counsel submissions that his affidavit is properly on record and the same is valid he has not deposed to any contentious issues. I note that the issues being raised now was not raised before Justice Waweru on the 27th September 2013 hence his order. I have carefully looked at the annexures, in the statement attached the applicant is seen to have made some very large withdrawals and also further transferred money to a fixed deposit on the 11th June 2012 for KShs. 2 million. The valuation of the vehicles show that they are worth over KShs. 5 million the applicant therefore cannot argue that she cannot get deposit the KShs. 4.8 million in court, she has assets she can sell to satisfy the court order am therefore not persuaded that she is not able to raise the security sum in cash. I therefore find no merit in the application before me and order that the applicant deposits the sum KShs.4.8 Million within 14 days from the date of this ruling. Costs shall be in the cause. Orders accordingly

Dated signed and delivered this **9th December 2013.**

R. E. OUGO

JUDGE

In the presence of:-

.....**For the Applicant**

..... **For the Respondent**

.....**Court Clerk**