



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.276 OF 2010

GILGIL DISTRIBUTORS LIMITED.....APPLICANT/APPELLANT

VERSUS

GRACE RWAMBA NJERU.....RESPONDENT

RULING

The applicant herein has challenged on appeal, the decision of the lower court dismissing a notice of preliminary objection to the respondent's notice to show cause on the ground that that court had no jurisdiction to entertain the notice to show cause. That objection was premised on the provision of sections 2 and 64 of the **Registration of Titles Act** as well as the Ruling of Maraga, J in Nkr. HCCC No.65 of 2009.

Simply stated, the objection by the applicant was to the effect that a judgment entered by a court without jurisdiction cannot be a basis of execution. In overruling the objection, the court below (Hon. Atiang', SRM) found that the judgment not having been set aside on appeal, the respondent was entitled to costs.

Being aggrieved, the applicant has preferred this appeal and in the meantime brought an application dated 16th November, 2010 by way of a motion for orders that there be a stay of proceedings in Nakuru CMCC No.2128 of 1996 pending the determination of the appeal.

It has been deposed that should the proceedings in the court below continue, the applicant will suffer

serious prejudice and this appeal will be rendered nugatory. The respondent has filed both grounds of opposition and a replying affidavit the combined effect of which is that the application for stay and indeed the appeal are untenable and bad in law; that the application for stay is without merit; that the respondent is capable of refunding the costs if paid over to her and in the event the appeal succeeds.

I have duly considered those submissions and hold the following view of the matter. The application is brought pursuant to **Order 41 rule 4(1)** of the revoked **Civil Procedure Rules**, even though the 2010 rules had come into effect when this application was made. The correct provision of the law ought to be **order 42 rule 6(1)** of the new rules, which deals with stay of execution and of proceedings. Whether or not to grant a stay of proceedings is a matter of judicial discretion to be exercised in the interest of justice, rationally and not capriciously or whimsically.

In the matter before me, the applicant has challenged the decision of the court below dismissing his notice of preliminary objection challenging that court's jurisdiction. There is a notice to show cause to the applicant which was slated for 24th November, 2010 but for this court's (Wendo, J) order of temporary stay. It is submitted, that the applicant's directors risk civil jail and the applicant's property may be attached and auctioned if stay of proceedings is not granted.

Weighing the applicant's fears and its appeal against the respondent's desire to recover her costs, the scale of justice tilts in favour of the applicant. To insulate the respondent's position and to ensure, at the same time that the appeal is not rendered nugatory, it is ordered that:

- i) there will be a stay of proceedings in Nkr. CMCC No.2128/1996 pending determination of this appeal;
- ii) the applicant will deposit into court security in the sum of Kshs.50,000/= within 21 days failing which these orders will be vacated.

Costs to be costs in the appeal.

Dated, Signed and Delivered at Nakuru this 11th day of October, 2011.

W. OUKO

JUDGE