



IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL SUIT NO. 244 OF 2010
SAVANNA INTERNATIONAL LIMITED.....APPELLANT
VERSUS
LEONARD WANYONYI KARANI.....RESPONDENT

RULING

Savanna International Limited, the appellant herein, is aggrieved by the decision of the Principal Magistrate in Naivasha SPMC No. 90 of 2010 delivered on 24th August 2010 where judgment was entered against it for Kshs.150,000/- less 10% contributory negligence. The Motion is brought pursuant to **Orders 50 Rule 1, 41 Rule 4(1), (2) and (4)** of the **Civil Procedure Rules** where by the applicant seeks stay of execution of the decree pending hearing and determination of this appeal. The applicant contends that his appeal has high chances of success and he has already taken steps and filed a memorandum of appeal and is ready to abide by any orders that this court may make. That on 9th September the court ordered that he deposits the decretal sum in court and that direction has been complied with. In the further affidavit filed by David Waswa on behalf of the appellant, the applicant's main contention is the issue of liability alleging that the respondent was not injured at his place of employment. Counsel relied on two authorities; **Keziah Mburu V Estate of Simon Mburu Nairobi HCC No. 3132 of 1995** and **Mary Kina V Menengai Refiners, Embu HCC No. 60 of 2003** where the courts set out the principles to be considered on whether or not to grant a stay of execution pending hearing of the appeal.

On 20th September 2010, the applicant again filed another application dated 17th September 2010, pursuant to Section 3A, 63(e) of the Civil Procedure Act seeking orders of immediate release of motor vehicle registration number KBF 614H, Mitsubishi truck held by Keysian Auctioneers on the instructions of the respondent, Leonard Wanyonyi Karani. The second prayer is that the court do find that the purported execution of the decree in Naivasha PMCC No. 90 of 2010 and the attachment of the appellant's motor vehicle on 13th September 2010 is illegal, unlawful, unreasonable, unwarranted and constitutes harassment of the appellant and is meant to defeat the cause of justice. It is the applicant's contention that on 9th September 2010, it served the respondent with this court's order dated 8th September, 2010 staying execution. Despite the said service, the respondent's advocate went ahead to instruct the auctioneers who went to attach the applicant's motor vehicle. That upon attachment, the auctioneer was informed of the court order but refused to release the vehicle despite the fact that it was transporting flowers to the airport for export. Ultimately, the said flowers went to waste and the applicants suffered loss. That before they carried out the attachment, they had not served the proclamation notice.

In opposing the application the respondent contended that upon delivery of judgment on 24th August 2010, a notice was served on the applicant (LWK 1). A decree was extracted and the auctioneers proceeded to the respondent's premises and proclaimed 4 vehicles as per proclamation notice (LWK 2). When the proclamation period expired, motor vehicle KBF 614H was attached. It is denied that any court order was served on the respondent and it is not until 14th September 2010 that the order of stay was left at the respondent's advocate's doorstep. That the respondent's advocate's secretary never declined to receive service for she was unwell and absent. In respect to the issue of flowers it was deposed that the applicant's driver was allowed to off load the flowers before the vehicle was attached and no loss was suffered. That the auctioneers released the attached vehicle once they were shown the court order on 20th

September 2010.

Mr. Ombachi who argued the application on behalf of the respondent urged that if the court is persuaded to grant the orders, that two thirds of the decretal sum be released to the respondents. He relied on the replying affidavit sworn by the respondent.

I have now considered the pleadings before me and the rival arguments. I now turn to consider whether the requirements for grant of stay under **Order 41 Rule 4** of the **CPR** have been satisfied. Judgment was entered in the lower court on 24th August 2010 and the applicant moved this court for stay orders on 3rd September 2010 which is ten (10) days later. The applicant also filed a memorandum of appeal on the same date and I find that the application was brought without undue delay.

The applicant was heard ex-parte on 8th September 2010 and the court granted an order of stay on condition that the decretal sum of Kshs.182,330/- was deposited in court within 14 days. The said sum was deposited on 27th September 2010. The applicant has therefore furnished sufficient security for the due performance of the decree as was required of him.

In his affidavit the respondent depones that he has no means of livelihood having lost his job as a result of the injuries that he suffered. He contends that if the appeal succeeds, he has his ancestral land which can be attached to refund the decretal sum. The respondent has not availed any evidence to show in whose name the said land is registered or its worth. Once the applicants have alleged that the respondent is a person who cannot be able to repay the decretal sum in the event the appeal succeeds, the burden of proof shifted to the respondent to show that he is a man of means and able to refund. In **KENYA POST AND COMMUNICATION CORPORATION V. NDARUA [2001] LLR 1405 (CAK)** the Court of Appeal said as follows:-

“Ordinarily the burden was on the corporation to show that were its appeal to succeed, the success would be rendered nugatory because the respondent would be unable to restore the decretal sum if that sum was immediately paid out to the respondent. But in a case such as this where it is alleged that the respondent has no known assets, the evidential burden must shift to him to show he has assets from which he can refund the decretal sum. That must be so because the property a man has is a matter so peculiar within his knowledge that an applicant such as the corporation may not reasonably be expected to know them. He did not.”

The respondent has failed to discharge the burden placed on him to demonstrate that he has assets that can be used to refund the applicants.

By this appeal and application of stay the applicants seek to preserve the subject matter herein, so that if the decretal sum is paid the appeal is not rendered nugatory. The court also takes note of the fact that the respondent has a decree and should be allowed to enjoy the fruits of his judgment. It is the duty of the court to balance the divergent interests. The applicant is challenging both liability and quantum and if the decretal sum is paid to the respondent, the applicant is likely to suffer loss.

For the above reasons, I would grant the application for stay and order that the money deposited with the court as security do remain with the court until the appeal is heard and determined.

On the Notice of Motion dated 17th September 2010 challenging attachment of the applicant's motor vehicle, I find that the court issued an order staying execution on 8th September 2010. The order was extracted on the same date. As per the affidavit of service sworn by Simon Nzioka dated 15th September 2010, the order was served on the office of Omwoyo Masese and Co. Advocates on 9th September, 2010. Though the respondents contend that there could have been no service because the secretary was unwell, the said secretary has not sworn any affidavit to that effect. The court will agree with the applicant that service of the court order was effected on the secretary on 9/9/2010, and she refused to acknowledge service. By 13th September 2010 when attachment was carried out, the respondents were aware of the court's order staying execution. Further to the above, I will agree with the applicants that

service of the proclamation notice is curious because it has not stated on whom it was served, what time and the place of proclamation. The whole process of proclamation and attachment seems to be irregular in that the warrants of attachment and sale of property seem to have been issued on 1st September 2010 before an application for execution was made. For all the above reasons I find that the execution of the decree in PMCC No. 90 of 2010 (**Leonard Wanyonyi Karani v. Savanna Ltd**) and attachment of motor vehicle KBF 614H Mitsubishi truck carried out by Keysian Auctioneers to be illegal. The vehicle has already been released and there is no need to make another order as regards its release. The costs of the attachment be borne by the respondent. In respect of the application dated 2nd September 2010, costs will abide the appeal.

DATED and delivered at Nakuru this 22nd day of October, 2010.

R.P.V. WENDOH
JUDGE

PRESENT:

M. Nzioka for appellant
Kennedy Court Clerk