



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL 233 OF 2009

MUGANDA WASULWA.....APPELLANT/APPLICANT

VERSUS

MARYANNE FITZGERALDRESPONDENT

R U L I N G

1. Muganda Wasulwa (hereinafter referred to as the applicant), has moved this court by a way of notice of motion dated 12th May, 2009, seeking an order for stay of further proceedings in Nairobi CMCC No.2151 of 2009, pending the hearing and determination of his appeal. The applicant is aggrieved by a ruling which was made by a Senior Principal Magistrate on 5th May, 2009 overruling a preliminary objection which the applicant has raised regarding the pecuniary jurisdiction of the court. The applicant has lodged an appeal in this court against that ruling. He contends that the issue of jurisdiction goes to the root of the proceedings and unless the same is resolved, further proceedings ought not to be entertained. He therefore urges the court to stay further proceedings in CMCC No.2151 of 2009 pending the determination of his appeal.
2. The application was opposed through a replying affidavit sworn by Maryanne Fitzgerald, the respondent herein in which she contends that the real question in her suit in the lower court is the validity of the sale by auction of motor vehicle KAV 508Q. The respondent further contends that the application before this court is spent and bad in law as the respondent's plaint upon which the objection was taken has now been amended. The respondent further maintains that the applicant has not satisfied the conditions for granting an order for stay of proceedings.
3. Mrs. Wambugu who appeared for the respondent submitted that the applicant's prayers in the lower court, were merely preservative orders, and the value of the subject matter was not therefore a relevant issue. She maintained that the applicant had not demonstrated the prejudice he is likely to suffer if the proceedings are not stayed. Relying on the case of *Wanyiri Kihoro vs Surinder Singh Syan & 2 others HCCA.204 of 2008*, Mrs. Wambugu urged the court to dismiss the application as having no merit.
4. I have carefully considered the application before me. I note from the copy of the preliminary objection which was annexed to the applicant's application as "MW3B" that the applicant's preliminary objection was on the question of the court's pecuniary jurisdiction. The central issue in the appeal pending before this court is therefore whether the subordinate court has jurisdiction to hear the suit before it. This is obviously a matter which is crucial to the proceedings and which should be resolved before the hearing of the suit in the lower court can proceed further. It will obviously be a waste of precious judicial time, if this court were to come to a finding that the lower court had no jurisdiction, and the proceedings

before it declared a nullity.

5. I have considered the authority of *Wanyiri Kihoro* (supra), which was relied upon by the respondent. I find however, that the case of *Wanyiri Kihoro* is distinguishable from the present case. Whereas in this case there is an issue regarding the pecuniary jurisdiction of the court trying the suit, the issue in the *Wanyiri* case, was the competence of the suit arising from the alleged failure to swear a verifying affidavit by one of the plaintiffs. For the above reasons, I find that it is fair and just that the proceedings in the lower court should be stayed pending the hearing of the appeal. However, in order to ensure that this appeal is heard and disposed off expeditiously, I will issue the order of stay of proceedings pending appeal on the following conditions:

(i) That the applicant shall file and serve a record of appeal within 90 days from the date hereof.

(ii) That the applicant shall take all necessary action to facilitate the speedy disposal of this appeal. In the event that the appeal is not disposed off within 12 months from the date hereof, the order for stay of proceedings pending appeal shall stand discharged unless otherwise extended by the court.

(iii) Costs of this application shall be costs in the appeal.

Orders accordingly.

Dated and delivered this 12th day of June, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Mungla for the applicant

Ms Kinyua for the respondent