



SHAKILA BANO AKRAM.....APPLICANT

VERSUS

ISMAIL NOORANI.....RESPONDENT

RULING

1. By a Notice of Motion dated 2nd June, 2009, Shakila Bano Akram, hereinafter referred to as the applicant seeks an order of stay of execution pending the hearing of her appeal which she has filed in this Court against the ruling of the lower Court delivered on 26th May, 2009, in Milimani CMCC No. 6594 of 2008. The applicant is aggrieved by the dismissal of her application in the lower Court, to set aside the interlocutory judgment which was entered against her. She maintains that her appeal has high chances of success and that unless the order of stay is granted, she will suffer substantial loss. She contends that the amount involved in the decree is substantial and if paid to the respondent, he will not be able to refund the amount if the appeal succeeds. The applicant further explains that the subject matter of the suit in the lower Court is an agreement for the sale of a motor vehicle. She maintains that the respondent is in possession of both the vehicle and its original logbook.

2. Mr. Nyaribo who appeared for the applicant, contends that the applicant has satisfied the conditions for granting an order of stay of execution as set out under Order XLI Rule 4 of the Civil Procedure Rules, as he has brought this application without an undue delay; has shown that she will suffer substantial loss unless the order sought is granted, and has also deposited Kshs.200,000/= in Court as security. Mr. Nyaribo further urged the Court to strike out the respondent's replying affidavit contending that the same was filed outside the period of ten days given to the respondent for the filing of the affidavit. It was further contended that contrary to the rules of procedure, the replying affidavit contains annextures which are "without prejudice" communication. The affidavit is also alleged to contain annextures which are not certified or signed.

3. Ismail Noorani who is the respondent to this application and the appeal, has sworn a replying affidavit in which he explains the circumstances in which his course of action arose. He depones that the applicant who was duly served with summons, entered appearance to the suit on 18th December, 2008 but did not file a defence. Subsequently, judgment was entered against her on 23rd January, 2009. The applicant swears that he is able to repay the decretal sum in the event that the appeal succeeds, he explains that he is in gainful employment, stays in his own house, owns a car and has an account with Standard Chartered Bank with a cash balance of over Kshs.571,000/=. The applicant has further denied being in possession of the motor vehicle subject of the suit or the transfer documents.

4. Mr. Omwenga who appeared for the respondent, maintains that the applicant has not demonstrated that she has a good appeal, or that she is a person of means. It was further contended that the application

was defective as no certified copy of a decree is annexed to it. It was maintained that the applicant had not complied with the conditions of Order XLI Rule 1A of the Civil Procedure Rules.

5. In support of his submission, Mr. Omwenga relied on the following authorities:

- ***Nairobi Court of Appeal Civil Application No.15 of 1990, Halai & Another vs. Thornton & Turpin [1963] Ltd.***
- ***Nairobi HCCA No. 67 of 2009, Richard Olum Omollo vs. Margaret N. Gicharu.***
- ***Nairobi HCCA No. 579 of 2001, Margaret Wachira vs. Wachira Waruru & Another.***
- ***Nairobi HCCA No.546 of 2007, Shalima Flowers (K) Ltd. vs. Samuel K. Lwoyero.***

6. I have carefully considered the application, the affidavit in support and in reply, the annexures thereto and the submissions made by both counsel. Firstly, it is evident that the issue of the competence of the replying affidavit sworn by the respondent on 6th July, 2009, ought to have been raised as a preliminary issue. Be that as it may, it is apparent from the face of annexure IN3 and IN5 to the replying affidavit that the annexures are letters written on a “without prejudice” basis. Such letters are privileged and cannot be introduced in evidence without the party who wrote the letters waving the right to withhold the communication. Paragraphs 7, 9 and 10 of the replying affidavit which makes reference to “without prejudice” communication are therefore hereby struck out.

7. Objection was also taken to annexures referred to in paragraph 13 of the replying affidavit which annexures IN7, IN8 and IN9 were said not to be certified or signed. I have examined these annexures. Annexure IN7 is a copy of a payslip which bears a stamp from Kenindia Insurance Company Limited. In my view the annexure is properly before the Court. Annexure IN8 is a copy of a member’s statement in the Retirement Benefit Scheme deposit administration account. The document is neither stamped nor signed for. It cannot therefore be vouched for and I would accordingly strike out the document. The third document IN9 is a statement of account for account No.015095239500. The annexure is page 3 of the statement, and it does not show the name of the account holder. There is nothing therefore to connect it with the applicant. For that reason, the document is also struck out.

8. Further it was contended that the replying affidavit was filed out of time, the same having been filed after the ten day period granted to the respondent on the 16th June, 2009. I note from the face of the replying affidavit that it was filed on the 7th July, 2009 which was long after the ten day period within which the replying affidavit was to be filed. The respondent never sought any further extension. The replying affidavit is therefore improperly before the Court and is for this reason, struck out.

9. The above notwithstanding, I have considered the application on merit. It is evident that the application was filed timeously as it was brought within a week from the time the decree sought to be stayed was made. The applicant has also deposited a sum of Kshs.200,000/= in Court as security. It is evident that the respondent will not suffer any prejudice if the orders sought are granted. The applicant has demonstrated that unless the orders sought are granted, her appeal will be rendered a mere academic exercise.

10. The upshot of the above is that I grant the application dated 2nd June, 2009, strike out the replying affidavit, and confirm the orders of stay of execution pending appeal on the following conditions:

- (i) That the sum of Kshs.200,000/= deposited in Court shall remain in Court pending the hearing and determination of the appeal.
- (ii) That the applicant shall file and serve a record of appeal within 90 days from the date hereof.
- (iii) 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 of within 12 months from the date hereof, the orders of stay of execution shall be discharged, and the respondent shall be at liberty to apply for release of the deposited sum to him.

Those shall be the orders of this Court.

Dated and delivered this 16th day of October, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Nyaribo for the applicant

Ms Matunda for the respondent

Eric, court clerk