



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KISII

Civil Appeal 36 of 2007

VIVID COMMUNICATIONS WITH WOMEN

IN THEIR CULTURES. APPELLANT

VERSUS

- 1. MARY MARAGIA KWAMBOKA)**
- 2. BILLIAH NYAMWEYA) RESPONDENTS**
- 3. MAENDELEO YA WANAWAKE)**
- ORGANIZATION CENTRAL KISII)**
- 4. MAENDELEO YA WANAWAKE)**

RULING

The appellant filed an application by way of notice of motion pursuant to the provisions of **Order XL1 rule 4(1)** of the **Civil Procedure Rules**. The order sought was for stay of execution of the decree issued in **C.M.CC. NO.1486 of 2004 at Kisii** pending the hearing and determination of an appeal. The application was supported by an affidavit sworn by Kerstin Hesse, the Deputy Project Leader of the appellant. The application followed a ruling by the trial court wherein the learned trial magistrate dismissed an application for objection to attachment of a motor vehicle registration number KAP 162Z. The application was premised on the ground that the said motor vehicle is jointly owned by the appellant and the third respondent. The appellant contended that it was not a party to the case in which the first respondent obtained judgment against the third and fourth respondents. The application before the trial court was dismissed for reasons that there was no evidence of any partnership between the appellant and the third respondent. The vehicle logbook showed that its owners were “**M.Y.W.O. & C. W**” of P.O. Box 13, Mosoch. The trial court held that there was nothing to show what “**C.W**” stood for.

The appellant annexed to its affidavit a sale agreement in respect of the said vehicle, its logbook and the transfer document. The sale agreement showed that motor vehicle registration number KAP 162Z (herein after referred to as “**the motor vehicle**”) was purchased by the appellant and the third respondent on 18th October, 2002 at a price of

Kshs.1, 700,000/=. The motor vehicle is a Toyota Land Cruiser by make. The transfer document also bore the same particulars. In the motor vehicle log book, the space provided for writing the name of the owner was not sufficient to fit the full names of the purchasers and hence the initials – “**M.Y.W. O & C.W.**”

The appellant stated that ***“if execution is levied for objection proceedings costs or even the judgment sum in Kisii CMCC No.1486 of 2004 the Applicant will suffer substantial loss as the 1st Respondent who was a former employee of the 3rd Respondent will not be in a position financially to refund any monies paid to her in the event that the appeal succeeds”***

The appellant’s application was opposed by the first respondent, who swore an affidavit in response to the affidavit of Kerstin Hesse. Mr. Ochwangi made submissions in opposition to the application. The main grounds raised in the replying affidavit and by Mr. Ochwangi can be summarized as hereunder:

- **the applicant had abused the court process by filing an application for stay on 4th March, 2007 but failing to prosecute the same for 8 months during which time the motor vehicle had been hidden.**
- **after the applicant’s objection was determined on 22/2/2007, the appellant lodged yet another objection proceedings in respect of the same property.**
- **the motor vehicle was not registered in the name of the appellant and consequently the appellant was not going to suffer any substantial loss.**
- **the applicant could not seek stay of the decree in the original suit since it was not a party thereto.**
- **The applicant’s objection having been dismissed, there was no positive order arising from the dismissal capable of being stayed.**

The application by the appellant seeks the following order:

“3. THAT PENDING the hearing and determination of this appeal there be stay of execution of the decree in KISII CM CC.NO.1486 of 2004.”

The applicant was not a party to the aforesaid suit and cannot therefore have capacity to file an appeal against the decree. The decree that was issued by the trial court in that suit was not exhibited and is therefore unknown to this court.

The applicant has no **locus** to seek stay of execution of a decree in a case where it was not a party.

If the applicant intended to apply for stay of execution of the Ruling delivered on 21st February, 2007, its application was not properly framed. And in any event, there is nothing in the said Ruling that is capable of being executed. The trial court dismissed an application filed by the appellant seeking to stop attachment of the motor vehicle. A negative order is not capable of being executed and cannot therefore found an application for stay of execution. In **EXCLUSIVE ESTATES LIMITED VS KENYA POSTS and TELECOMMUNICATIONS & ANOTHER**, Civil application No.Nai 62 of 2004 there was an application seeking, **inter alia**, stay of execution of a dismissal order of the superior court until the hearing and determination of the intended appeal.

The Court of Appeal held:

“The order which dismissed the suit was a negative order, which is not capable of execution.”

Perhaps the appellant should have moved the court under the provisions of **Order XL1 rule 4(6)** to seek

a temporary injunction to restrain the first respondent from attaching the motor vehicle pending the hearing and determination of its appeal.

I am satisfied that the present application is bad in law and cannot be granted. Being so persuaded, it would be superfluous for me to consider the other arguments that were raised. I dismiss with costs the appellant's application.

DATED, SIGNED and DELIVERED at KISII this 25th Day of June, 2008

D. MUSINGA

JUDGE

Delivered in open court in the presence of:

Mr. Minda for the Appellants

Mr. Ochwangi for the Respondents.

D. MUSINGA

JUDGE