



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 370 of 2008

DENNIS KIMBUI..... 1ST APPELLANT

HARRISON KIHARA NGUNJIRI

T/A HARIKI ENTERPRISES.....2ND APPELLANT

VERSUS

LUCY GACHERI MBURUGU.....RESPONDENT

R U L I N G

On the 1st July, 2008, the Senior Resident Magistrate, Milimani Commercial Courts issued an order in the following terms:

1. That the defendants be and are hereby ordered to return or put motor vehicle Registration Number KAH 094G Isuzu Matatu into the Plaintiff's possession and the defendants are restrained by an injunction either by themselves, their servants and/or agents from interfering with the plaintiff's possession of the said motor vehicle and/or from transferring its ownership from the plaintiff's name or selling or alienating it in any way forthwith pending the hearing and determination of this suit.
2. That hearing date to be fixed on priority within 60 days from today.

Being dissatisfied with this order the defendants Dennis Kimbui and Harrison Kihara Ngunjiri (hereinafter referred to as the appellants), have appealed to this court against the order. The appellants have now brought a notice of motion seeking to have the execution of that order and all consequential orders stayed pending the hearing and determination of the appeal. The application is supported by an affidavit sworn by Dennis Kimbui.

It is deponed that the plaintiff, Lucy Gacheri Mburugu (hereinafter referred to as the respondent), sold motor vehicle KAH 094G Isuzu Matatu (hereinafter referred to as the said vehicle), to the appellants who in turn sold it to one Stanley Mwangi Irungu. The appellants are therefore unable to comply with the order of the magistrate as the appellants are not in physical control of the said vehicle nor are they aware of its whereabouts. The appellants contend that unless the order for stay of execution is granted they will suffer irreparable loss as they will be exposed to contempt proceedings. The appellants further contend that they have an arguable appeal as the trial magistrate had no jurisdiction to issue the order. The

appellants have indicated that they are amenable to whatever terms of security that the court may impose. In support of the application the appellants have relied on ***Oceanic View Hotel Ltd vs Kenya Commercial Bank Ltd (2002) 2 KLR 338***.

In response to the application, the respondent filed grounds of opposition contending inter alia, that the appellants' application is incurably defective, embarrassing, misconceived, has no merit, and is otherwise an abuse of the court process. It is contended that the applicants being in contempt of the orders issued by the court on 1st July, 2008, in Milimani CMCC No.836 of 2008, ought not to be accorded audience or allowed to enjoy the exercise of this court's discretion, before purging his contempt. It is maintained that the application is mischievous and merely intended to delay the ends of justice, while the respondent continues to suffer losses as a result of the appellant's failure to comply with the orders given by the trial magistrate.

Counsel for the respondent relied on ***Civil Application No. Nai 290 of 1999, The Director of Pensions vs Abdul Majid Cockar***, wherein the court refused to exercise its discretion in favour of an applicant who had manifestly shown that he had no use for and will not obey court orders. Counsel for the respondent further submitted that the appellants do not have a meritorious appeal and the order for stay of execution will only perpetuate an illegality which is what the lower court was trying to redress.

The counsel for the appellants sought to distinguish the case of ***Director of Pensions vs Abdul Majid Cockar*** (Supra) contending that in the Abdul Majid Cockar case, two separate orders had been issued and not complied with. Secondly the Director of Pensions was being asked to do what was within her power unlike this case where the appellants were being asked to do something which is not within their control.

Under Order XLI Rule 4(2) of the Civil Procedure Rules an order for stay of execution pending appeal can only be issued where the court is satisfied:

- (1) That substantial loss may result to the applicant unless the order of execution is made;
- (2) That the application has been made without undue delay;
- (3) That the applicant must also be prepared to provide such security for the due performance of the decree as the court may order.

In this case, the order sought to be executed was made on the 1st of July, and issued on the 2nd of July, 2008. The appellant moved to this court on the 15th July, 2008 when the appeal was filed. The application for stay of execution was filed a day later on 16th July, 2008. It is therefore evident that the application was brought without undue delay. The appellants were apparently served with a notice of penal consequences through their advocate on 4th July, 2008. It is therefore evident that there is a real danger that unless the order for stay of execution is granted the appellants' liberty is likely to be curtailed thereby causing irreparable loss to the appellants. It is therefore necessary that the court protects the interest of the appellants. The court must also however equally protect the interests of the respondent who has an order in her favour. I will therefore issue an order for stay of execution pending appeal on the following conditions:

- (1) That the appellants shall deposit into court a sum of Kshs.400,000/= within 7 days from the date hereof.
- (2) That the appellant shall file a record of appeal within 30 days from the date hereof.
- (3) That the appellant shall take all necessary action to facilitate the speedy disposal of this appeal.

(4) The order for stay of execution pending appeal shall lapse within 12 months from the date hereof unless otherwise extended by this court.

(5) In default of the appellants complying with (1) or (2) above, the order for stay of execution shall be automatically discharged.

Those shall be the orders of this court.

Dated and delivered this 13th day of August, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Maina for the respondent