



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Civil Appeal 141 of 2007

RICHARD FRED AMUNZE APPELLANT

V E R S U S

GLANT KOTSEKI NANDWA RESPONDENT

R U L I N G

This is an application for stay of execution pending the hearing and determination of an appeal.

The applicant contends that if stay was not granted, his appeal would be rendered nugatory.

He also pointed out that the attached goods, which were still in the hands of the court broker, were his tools of work or trade. Therefore, he feared that unless there was an order for stay of execution, the said goods would be auctioned at any time.

The execution process which the applicant seeks to stop arose in **BUTERE SRMCC NO.10 OF 2006**. In that case, the applicant herein had been sued for the recovery of the purchase price which the respondent had paid to him, in respect of a motor vehicle. The respondent had also sued the applicant for general damages.

After a full trial, the learned trial magistrate delivered judgement in which the applicant was ordered to pay to the respondent KShs.124,000/=.

The trial court also ordered that the vehicle would be returned to the applicant as soon as he had paid the decretal amount.

According to the applicant, the judgement of the trial court was handed down on 16th November 2007. Being dissatisfied with the judgment, the applicant says that he instructed Mr. D. A. Ongechi Advocate to prefer an appeal, and to also seek a stay of execution.

It is common ground that Mr. D. A. Ongechi Advocate passed away shortly after the trial court had delivered its judgement.

It is the applicant's case that it was not until the 11th of December 2007 that he learnt that his lawyer had passed away, before he had filed either an appeal or an application for stay of execution.

The applicant immediately took steps to file a Memorandum of Appeal on the same day. He then instructed his new lawyers, M/S Elizabeth Chung & Company Advocates to apply for stay of execution.

It is common ground that the application which was filed before the trial court, was heard and was ultimately dismissed on 2nd July 2008.

Prior to the filing of the application before the trial court, the applicant's property had already been attached. However, the applicant deponed that the said attachment was effected irregularly as no Notice of Proclamation was ever served upon him.

As the respondent did not file any replying affidavit, the assertion by the applicant, that the court broker effected actual attachment without first issuing a prior Notification, is uncontroverted. That being the position, I find that the attachment was irregular.

Once the attachment is irregular it would be improper to allow it to proceed.

The respondent contends that there has been an unexplained delay in bringing the application, and also that the applicant did not demonstrate that there was an appeal in place.

As regards the delay, I find that the applicant did offer a reasonable explanation. The said explanation was in the nature of the application which the applicant had first made before the trial court. Obviously, once there was one application which was for stay, the applicant was entitled to await the determination thereof, before bringing the current application.

This application was filed on the very day that the trial court dismissed the earlier application. In other words, this application was instituted promptly.

But then, the respondent submitted that the memorandum of appeal was invalid, because it was only filed after about 2 years had lapsed since the order being challenged was made.

There is no consensus between the parties about the date when the order being appealed against was made. The respondent says that the order was made on 2nd February 2006, whilst the applicant says that the order was made on 19th November 2007.

However, from the Notification of Sale issued by Kuronya Auctioneers, the date of the Decree which the said Court Brokers were executing, was given as 16th November 2007. Secondly, in the applicant's affidavit sworn on 26th March 2008, it was expressly deponed that the judgement of the that court was dated 16th November 2007.

Therefore, on a prima facie basis, there is no material to back the respondent's contention that the judgement of the trial court was dated 2nd February 2006. In effect, there is a valid memorandum of appeal on record.

The applicant asserted that the motor cycle which was attached, was his "tools of trade", because it is what he used to operate a "Boda Boda" business.

Even assuming that the said motor cycle was the applicant's "tools of trade", that would not have exonerated the other attached goods from execution.

Pursuant to the proviso to **section 44 (1)** of the Civil Procedure Act;

" (ii) the tools and implements of a person necessary

for the performance by him of his trade or profession"

shall not be liable to attachment or sale.

Accordingly, as the applicant needs his motor cycle to operate his “Boda Boda” business or trade, the same was not liable to attachment. However, the other goods could have been attached, provided that the execution process was carried out regularly, by the Court Broker.

As regards the failure by the applicant to demonstrate that he did file a copy of the decree together with the memorandum of appeal, I find that that does not , by itself, invalidate the appeal.

In my considered opinion, by virtue of the provisions of **Order 41 rule 1A** of the Civil Procedure Rules, it was perfectly alright to file a certified copy of the decree after the memorandum of appeal had been filed, if the appeal in question is one made to the High Court. The said rule provides as follows:-

“Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy of as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79 B of the Act until such certified copy is filed.”

According to the respondent, he is capable of repaying the decretal amount, in the event that he is obliged to do so.

However, that statement, regarding the ability of the respondent was made from the bar. He did not swear an affidavit to state his position. He only left it to his advocate to inform the court about his alleged ability.

Although I have no reason to disbelieve the advocate for the respondent, I hold the view that parties ought to spell out facts through their very own affidavits.

As the respondent did not state the facts about himself, I have no material to go by, in terms of his ability or otherwise to repay the decretal amount. I am therefore unable to determine if the respondent would be in a position to reimburse the applicant, in the event that it became necessary to do so, when the appeal is determined.

The applicant says that the respondent has possession of the vehicle which he purchased from the applicant. I believe that that statement is meant to suggest that even if execution were to be stayed, the respondent would not be prejudiced.

If that were the intention of the applicant, I am afraid that I do not share his views, in that respect. I say so because the respondent clearly does not want to have anything to do with the vehicle. He is ready to give it back to the applicant, as soon as the applicant pays the decretal amount. In other words, whilst the applicant feels that the vehicle was valuable, the respondent does not share that view at all.

In that respect, the applicant was therefore right to have offered to provide security. He was right not just because the vehicle was not actually valuable, but even more so because by virtue of **Order 41 rule 4 (2) (b)** of the Civil Procedure Rules;

“No order for stay of execution shall be made under subrule (1) unless –

(a)

(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

Meanwhile the respondent submitted that an order for stay of execution cannot be given after execution.

Of course, once the process of execution of a decree was complete, it cannot be stayed.

However, in this case, the respondent did not dispute the applicant's contention that the attached goods were still being held by the court broker. That being the position, the process of execution would be incomplete. Therefore, the process may still be put on hold.

For all the reasons hereinabove, I find this application to be merited. I therefore order that there shall be a stay of execution in **BUTERE SRMCC NO.10 OF 2006**, until the appeal herein is heard and determined. However, although this order shall take effect forthwith, it shall stand vacated if the applicant herein will not have deposited the decretal amount in court within **TEN (10) DAYS** from today.

I further order that the attached goods be released to the applicant against the deposit of the sum of **KShs.50,000/=** , in court. The said deposit would provide security for the court broker's charges, subject to his satisfying the court that he was entitled to the said charges.

Of course, I have found that the court broker acted irregularly by carting away the attached goods without first giving the requisite notice, upon the taking of an inventory, at the time he effected attachment. However, that finding was arrived at on the strength of the material before the court. In other words, the finding is one on a prima facie basis.

As the court broker was not a party to the application, he may well have not been accorded an opportunity to justify his actions. It would therefore have been inequitable to have issued final orders, for the unconditional release of the attached goods, without first giving to the court broker an opportunity to be heard.

To that end, the applicant herein and the Court Broker are both given liberty to apply.

Finally, the costs of the application for stay of execution shall abide the outcome of the appeal.

It is so ordered.

Dated, Signed and Delivered at Kakamega, this 15th day of October 2008

FRED A. OCHIENG

J U D G E