



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 460 of 2007

STANBIC BANK OF KENYA.....APPELLANT

VERSUS

GEOFFREY NDIKU MUTISYA & ANOTHER.....RESPONDENT

RULING

The applicant/appellant herein has come to this court vide an application by way of notice of motion brought under Section 3A of the Civil Procedure Act 21 laws of Kenya, order 41 rule 4 and Order L rule 1 of the Civil Procedure Rules and all enabling provisions of the law seeking among others an order for stay of execution of the ruling of the honourable Mrs Odero delivered on 25th May 2007 in Civil case number 2248 of 2007 pending the hearing and determination of the applicants appeal, that the said order to act as a stay to all proceedings in the subordinate court. An interim stay was also sought pending the hearing of the application and that costs be provided for. The application is cemented on the grounds in the body of the application, supporting affidavit, annexure and oral submissions in Court.

The major grounds are that:-

1. The first respondent and the appellant/applicant have a hire purchase agreement between them ELI (a) by virtue of which the first respondent took from the applicant two motor vehicles registration number KAS 535 Y and KAW 143D. It was a term of the said hire purchase agreement that the first respondent was to pay rental value at a monthly rate as shown in annexure EL2. The first Respondent made some remittances as shown in EL4 but then fell into arrears prompting the appellant/applicant to repossess the said motor vehicles.
2. Upon repossession the 1st respondent moved to the lower court and filed Nairobi Milimani CMCC No.2248/2007. The initial plaint annexure EL5 contained a declaration that the purported repossession of the suit motor vehicle was illegal and the same should be set aside. It also contained a prayer for a restraint order restraining the defendant who is the current applicant from enforcing any purported rights derived thereby including selling, disposing off and or in any other manner interfering with the plaintiffs possession of the said vehicles. The Plaint was accompanied by a chamber application seeking interim reliefs. The application was heard ex parte and it gave rise to an order annexure EL6. The order was to the effect that the defendants, their servants and or agents be and are hereby restrained from selling, alienating and or in any other manner disposing of motor vehicles registration No. KA S535 Y and KAW 143 D pending ruling.
3. Before delivery of the ruling the appellant applicant appeared before the lower court complaining that they had not been served properly hence their inability to file papers in opposition and that they

should be heard before the anticipated ruling is given. The court was informed that the learned magistrate informed them that she will attend to that when the ruling is delivered.

4. Upon delivery of the ruling the appellant perused the surrounding factors and came to the conclusion that the said ex parte orders should be discharged under orders 39 rule 4 Civil Procedure Rules. An application contained in annexure EL.8 was presented to the lower Court seeking to set aside those orders and or discharge them. The grounds advanced were that the Court lacked jurisdiction and that there were irregularities on the record. The lower court declined to discharge the lower courts' orders.

5. Refusal to discharge the ex parte orders by the lower court gave rise to the filing of the appeal herein vide a memo of appeal dated 28th May 2007 and filed the same date. It has four grounds of appeal. The appeal is against the refusal to discharge the exparte orders ruling of the lower court dated 25.5.2003

6. It is their stand that if stay is not granted their appeal will be rendered nugatory. They maintain their appeal is arguable as they intend to raise the issue of lack of jurisdiction by the lower court, issues of irregular procedure condoned by the lower court and failure to seek the injunctive relief with clean hands as it is required by equity as an injunctive relief is an equitable relief. Further issues for consideration on appeal are the issues that the lower Court unprocedurally granted amandatory injunction and not an interim injunction. This plus the fact that a wrong procedure was followed to obtain those orders gives their appeal a high chances of success. They will also argue that they had a genuine complaint, which they put before the lower court namely that they were not properly served and therefore they were condemned unheard. Further the relief granted had not been properly anchored in the plaint and so the applicant is a victim of irregularities which should not be allowed to stand to benefit the respondent who is the perpetrator.

7. Failure to grant stay will mean that the 1st Respondent will continue enjoying the use of the Chattels without making payment as no safeguards were made to protect money owed to them by the lower court. This will be an unfair advantage to the 1st Respondent who is in default of payment of the circumstances and he has not denied owing the money. It will also be an unfair advantage to the first respondent who had come to court with unclean hands.

8. The court was also urged to take into consideration the fact that if the appeal takes long and then the appellant succeeds the judgment might be an empty shell to them since the subject matter of the appeal are items of value whose value can depreciate or be wasted.

9. The Court should also consider the fact that although the first respondent is contending that the hire purchase agreements are illegal and are not binding which arguments is being used to deny the appellant/applicant the enforcement of the hire purchase agreement. This being the case the 1st respondent should not also be allowed to benefit from an illegality.

10. The Court was also urged to take into consideration the fact that when the applicant came to this court and obtained interim stay and communicated the said orders to counsel for the first respondent, instead of complying they went a head and took back one of the subject vehicles whose condition is not known to the applicant. That the said vehicle is not protected and as such runs the risk of being wasted.

The applicants Counsel also relied on the case law that the court will revert to at a later stage of these proceedings.

Counsel for the first respondent had filed an application herein seeking to have a discharge of the interim order of stay granted to the applicant exparte on 28.5.2007. That application came up before the duty judge on 31.5.2007. The learned judge declined to have the orders set aside and instead ordered that the supporting affidavit as well as all the annexures annexed there to be used as the replying affidavit to the applicants application of 28.5.2007 and that matters be heard inter partes. For purposes of the record the first respondents/application dated 30.5.2007 is the one from which the grounds in opposition to the appellant/applicants application are extracted as per this courts order of 31.5.2007.

The said first respondent opposes the application and the major grounds relied upon by them are:-

1. That it is correct that they filed the suit in the lower court and no interim orders were ordered in the first instance as they were directed to serve the appellant first. That they duly effected service and on coming back to Court they produced proof of service and the court being satisfied that the service was proper was when it gave the orders.
2. That the applicant came on record on 30.3.2007 and filed a defence and then put in an application to set aside the interim orders using a wrong procedure which was fatal to his application and the same was dismissed.
3. On stay, pending appeal it is their argument that the ingredients for stay pending appeal are now settled. On the ingredient of having an arguable appeal, it is their stand that the applicant has no arguable appeal of they chose to appeal against the orders refusing to discharge the injunctive orders and not the order of injunction granted exparte. It is their stand that a refusal to set aside the exparte order is not applicable as the learned trial magistrate was being asked to sit on an appeal over her orders which jurisdiction had not been properly invoked. Since the main reason for seeking discharge was lack of service which service was never disputed as it had been proved by entry of appearance there is nothing arguable on appeal.
4. The lower court rightly declined review as there was no error apparent on the face of the record and so the intended appeal has no remote chance of success. The major grounds of appeal is lack of jurisdiction and yet they went back to the same court seeking setting aside. The same orders allegedly made by the court appealed from are the same ones being sought to be indicated by the stay orders.
5. As the ingredients for stay pending appeal are well settled. The ingredient for presentation of the application without undue delay is conceded. As for proof of substantial loss it is their stand that this has not been shown to exist as the transaction subject of the proceedings arises out of hire purchase agreements which are invalid and yet the respondent has paid more than 2/3rds of the agreed hire purchase. It is their stand that payments were upto date. This being the position then the applicants were not entitled to repossess. They could only recover the balance under civil suit. It is their stand that if stay is granted the appeal court will be sanctioning repossession which is being challenged.
6. Concerning the ingredients of offer of security for the decree that may be passed against them should the appeal fail none has been offered and so the major ingredients for stay pending appeal have not been satisfied and so the same should be refused.
7. That the Auctioneer who was sued as an agent of the appellant has not filed any papers either in the lower court or on appeal. Since the appellant never disowned the Auctioneer, the Auctioneers' failure to file any papers can be taken as an admission of wrong doing and this is fatal to the appellant's case. It is their stand further that if the action of the Auctioneer is disclaimed then the right of possession is lost.
8. The orders made by the lower court whose review was refused were just temporary in nature and if stay is granted pending appeal then the appellant can repossess the vehicles and can sell them and this will defeat the suit filed in the court below. More so when the lower court must have been convinced that they had come within the principles governing the granting of injunctive orders before granting them. On the basis of the foregoing they urge the court not to grant stay pending appeal.

In response to the respondent counsels' submissions counsel for the appellant/applicant stressed the points that the plaint which was on record on 19.3.2007 is the one which should be looked at, they could not put in a reply to the application because the learned trial magistrate had intimated to them that they could not do so till after she had given her ruling and when the ruling was given is when it was discovered that the lower court had no jurisdiction and they put in an application to discharge the orders which application was refused leading to this appeal and application for stay.

2. They still maintain that the respondent cannot argue that the hire purchase agreements were illegal

and at the same time claim to benefit from the same by seeking to keep the subject matters of those illegal hire purchase.

3. They still maintain that they have an arguable appeal on all issues raised especially on the issue of jurisdiction where the value of the hire purchase agreement exceeded the pecuniary jurisdiction of the lower court. Also the issue of the relief granted not being properly anchored in the plaint as there was no prayer for permanent injunction in the plaint and so there was no basis for granting the injunctive orders.

4. They still maintain that their application to discharge the injunctive orders in the lower court was proper and even if wrong provisions of law were cited this is not fatal as the same is curable under order 50 rule 12 Civil Procedure Rules.

5. The question as to whether the hire purchase agreements are illegal or not is a matter of interpretation of the sections being relied upon.

6. They still maintain that their client was entitled to repossess the subject matter of the proceedings upon default and so the injunctive order should not have been issued.

7. Concerning the satisfaction of the ingredients for stay they contend the same are in their favour as they came to court without undue delay, they are likely to suffer irreparable loss if stay is not granted because the subject matter of the proceedings is the very security offered and if not protected it is liable to being wasted or alienated and yet there was no order made compelling the respondent to continue making payment. The current figure is 5 million and if there is delay in the finalization of the matter the figure is likely to go up due to interest and the loss will therefore be substantial to the applicant.

8. They dispute the assertion by the respondent that he is a man of means because if that had been the case he would have paid off his indebtedness to the applicant promptly and these proceedings would have been rendered unnecessary. Further he has not made any offer of continuing to liquidate his indebtedness to the applicant.

9. That failure to offer security is not a bar to their being granted the relief sought as the court can order the same and they undertake to comply with the orders that may be made by the court as regards security.

In addition to submission both parties referred the court to legal authorities both on stay pending appeal and on the appeal. This court has perused all of them and has only selected to refer to those that deal with stay pending appeal and not the ingredients of an arguable appeal as in doing so the court would be preempting the appeal herein. There are also authorities which go to attack the initial interim injunction application whose interim orders were sought to be discharged which prayer was rejected giving rise to this appeal and application for stay. This court will mention them peripherally more so when it is on record that the inter parties hearing application in the lower court has not been done.

The first issue to be dealt with is the issue of locus standi of the appellant/applicant to seek the orders which were rejected giving rise to the appeal. The applicant has annexed documentation this court believes to be the papers filed in the lower court marked as annexure EL 1(a) (b), 2, 3, 4,5,6,7,8 and 9 annexed to the supporting affidavit. The court has traced a plaint as well as a chamber summons seeking interim reliefs both dated and filed on the same date of 19th March 2007 marked as EL 5. In the same annexures the court has traced a replying affidavit by the applicant herein date stamped 3rd April 2007. Although in the body of the application it does not say that it is in opposition to the interim application in that proceeding, its contents show clearly that it was responding to the interim application in that matter.

The filing of the replying affidavit gave the appellant/applicant locus standi to oppose the interim application only. Authority for this is Order 50 rule 16 (1) Civil Procedure Rules which states “*Any respondent who wishes to oppose any motion or other application shall file and serve on the applicant a replying affidavit or a statement of grounds of opposition if any not less than three clear days before the date of hearing*”. This rule confers locus standi limited to the filing of the replying affidavit. This being the case it means that in order for the appellant/applicant to have locus standi to file any processes in the

lower court, such as an application to seek the discharge of the interim orders in the lower court Counsel needed to file a notice of appointment and entry of appearance. These two documents are missing from papers filed by both parties herein. The replying affidavit by an official of the applicant was drawn in the person of that official and so it needed to be preceded by the filing of a notice of appointment to confer locus standi. Should these two papers be missing on the lower court record then all the proceedings right from the filing of the replying affidavit, application to pray for the discharge of the interim orders leading to this appeal would all be null and void. If that is the correct position then the appeal would not be validity originated and would be tainted with invalidity. That would rest the matter there and there would be no need for this court to go into the merits of stay.

However, should the concerned papers be inexistence on the lower Court record but in advertently not brought to the attention of this court, then the court proceeds to assess the merits of the application for stay pending appeal. As ably submitted by both Counsels the ingredients for stay pending appeal are well settled. These fall under two categories. The statutory requirements under Order 41 rule 4(2) Civil Procedure Rules and those falling under establishment by judicial practice and notoriety. Those falling under statutory requirements are three namely presentation of the application without undue delay.

(ii) Proof that if not granted the applicant will suffer irreparable loss.

(iii) Provisions for security for costs. On the other hand those established by judicial practice and notoriety are namely that there should be an arguable appeal with a probability of success and secondly that the court should also consider the fact that a successful litigant should not be unreasonably withheld from the enjoyment of the fruits of his judgment unnecessarily.

These principles have been expanded in numerous case law expounded by both the court of appeal and the superior Court. Some of these have been availed to this court by both Counsels for use herein and shall refer to a few.

In the case of **KENYA SHELL LTD VERSUS BENJAMIN KARIGE AND ANOTHER, NAIROBI C.A. NAI. 97 OF 1986**. At page 7 of the judgment the court of appeal at the 4th paragraph from the top stated, “*substantial loss in its various forms is the corner stone of both jurisdiction for granting stay that is what has to be prevented. Therefore without this evidence it is difficult to see why the respondent should be kept out of their money*”.

In the case of **VISRAM RAVJI HALAI AND VAIJI MUILJI PATEL (Trading as Vakkep Building Contractors) AFIRM VERSUS THORNTON & TURPIN (1963) LTD, NAIROBI C.A. NO. NAI.15 OF 1990 (U.R.)** at page 4 of the judgment the last paragraph. It is stated that before “*A court makes an order for stay of execution it must have regard to order 41 rule 4(2) Civil Procedure Rules under which the applicant had to satisfy the court of two matters. Firstly that substantial loss may result to the applicant unless the application is granted, which prima facie mean that if the appeal succeeds, the respondent would not be in a position to make full restitution. Secondly the applicant to give full security as the court may order. Those are the requirements under order 41 rule 4(2)*”.

In the same case at page 8 of the judgment line 9 from the bottom it is observed “*The court ought not to place a successful litigant in such disadvantageous position that should the appeal not be proceeded with or withdrawn or fail the respondent would find it difficult to realize the fruits of his litigation due to the inadequacy of the security ordered:*”.

In the case of **BUTT VERSUS RENT RESTRICTIN TRIBUNAL [1982] KLR 417**, the holdings in this case sum up the correct position in law as regards stay pending appeal which are

(1) The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

(2) The general principle in granting or refusing stay is, if there is not other overwhelming hindrance a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the

judge's discretion.

- (3) A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
- (4) The court in exercising its discretion whether to grant and refuse an application for stay will consider the special circumstances unique requirements. The special circumstances in this case was that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
- (5) The court in exercising its powers under Order XLI rule 4(2) (b) of the Civil Procedure Rules can order security upon application either party or on its own motion. Failure to put security for costs ordered will cause the order for stay of execution to lapse.

On the arguability of the appeal, the Counsel for the applicant referred the Court to the case of the owners of the Motor Vessel '**LILLIANS" VERSUS CALTEX OIL K.LTD (1989) KLR 1**. In this case it was held inter alia that a question of jurisdiction may be raised by a party or by a court on its own motion and must be decided forthwith on the evidence before the court. At page 14 of the judgment line 22-26 it is observed

“Jurisdiction is everything without it a court has no power to make one more step where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law down stools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

In the case of **KIHARA VERSUS BARCLAYS BANK (K) LTD** it was held inter alia that where the application is under order 39 rule 2 of the Civil Procedure Rules it is an express requirement that the suit in which the temporary injunction is sought must be one for restraining the defendant from committing a breach of contract or committing the tort complained of.

In the case of **MORIS AND COMPANY LIMITED VERSUS K.C.B. AND 2 OTHERS. NAIROBI MILIMANI COMMERCIAL COURT, HCCC NO.729 OF 2003, at page 8 of the ruling** line 5 from the bottom it was held that there being no prayer of a permanent injunction to restrain the defendant from appointing receiver or to restrain the appointed receivers from exercising their powers, it follows that the plaintiffs application for interlocutory injunction is incompetent and is for striking out on that ground.

Applying the above mentioned principles to the facts herein, it is common ground that the ingredient of bringing the application without undue delay is not being contested and so that has been satisfied. Those being contested are those relating to security for costs, existence of an arguable appeal and proof of substantial loss.

On offer of security, there is no doubt that this is an ingredient that should be satisfied. Indeed as pointed out by the Respondents Counsel, the applicant has not offered the same. But as submitted by the applicant's Counsel and proved by the principle in the case of Butt, supra failing to offer the same is not a bar to the court seized of the matter ordering that the same be complied with. In other words there is jurisdiction to order a conditional stay if the circumstances of the case so warrant. Herein whether this court is going to order a conditional stay or a non conditional stay will depend on the application passing the remaining two of establishing presence of an arguable appeal and proof of likelihood of suffering irreparable loss.

On the issue of existence of an arguable appeal, several grounds have been suggested with the salient ones being the issue of lack of jurisdiction by the lower court to issue the grieving orders due to lack of monetary or pecuniary jurisdiction, and the issue of the injunctive relief granted not being properly anchored in the plaint which are arguable on appeal on the basis of the authorities cited above. On the other hand the arguments raised by the respondent's counsel that the application giving rise to the appeal was incompetent and could not lie is also a point that can be taken up on appeal. On that ground it is the

finding of this court that both parties have raised issues that can form a basis for argument on appeal. This court cannot go into the merits of these arguments as a ground for stay as in doing so the court would be pre-empting and or short circuiting the intended appeal.

As regards proof of existence of likelihood of suffering substantial loss, it is common ground that the dispute arises from default of payment on hire purchase agreements. Part payment has been made. The applicant exercised its rights under the said agreements and repossessed vehicles sparking off the proceedings in the lower court. The subject matter is two vehicles. As at now the agreement has not been brought to an end. The rental charges have not been fully paid and so they are still accruing. What is queer and trying is that the accruing of rental charges together with attendant interest is detrimental to both parties. The applicants stands to lose the vehicles and the excess accrued rentals beyond the value of the repossessed vehicles. The 1st respondent also stands to lose in that as long as the agreement stands he is liable to be followed to make good for the accrued rentals. It therefore follows that if stay is granted and the vehicles are repossessed and the rental installments are not forestalled or stopped from running he will be called upon to meet huge accumulated rentals and yet he is not making use of the repossessed vehicles to earn income as he has been using them before.

This awkward situation that the court finds itself in has been compounded by the fact that when interim stay orders were granted one chattel was repossessed by the applicant while the other one is being held by the first respondent.

This calls for this court to summon all its judicial wisdom and bring it to the fore and perform balancing act for ends of justice to be met to both parties.

This court has weighted the interests of both parties and finds that if it makes a conditional stay ordering the vehicle in the possession of the applicant to be returned to the 1st respondent it will be making a mandatory order not allowed to be made in such an application. Likewise if it orders that the vehicle held by the first respondent be released to the applicant then it will be making a mandatory order as well.

The difficult also arises because there are allegations of the agreements giving rise to the transaction being alleged to be illegal. On an allegation of existence of an illegality neither party is supposed to benefit from it. But this is yet to be proved.

If the 1st respondent plaintiff is asserting it then he cannot seek to benefit from the same more so when it is evident that the applicant is a co-owner until all the rentals are paid off. It is on record that the lower court attached no conditions to the restraint order like requiring the continuation of the payment of the rentals.

Either way the 1st respondent's interests have to be considered. This makes it inevitable for a conditional stay to be made. This takes care of the fact that the lower court's orders which have conferred a benefit on to the 1st respondent remain valid until declared otherwise and the beneficiary should not unprocedurally be deprived of the same.

In view of the foregoing this court makes the following orders:

(1). As observed earlier on in this ruling order 50 rule 16(1) gave locus to the appellant/applicant to oppose the interim application by filing a replying affidavit. Other processes and steps taken in the matter besides the filing of a replying affidavit required the appellant/applicant to file a notice of appointment either alone or with memorandum of appearance. As observed these two documents have not been exhibited. Should this procedural step not have been complied with by the applicant in the lower court, then the entire process becomes flawed and the matter ends here. Meaning that the applicant will have to go back to the lower court regularize his status and then begin all over again. If however the correct position is that those papers are in place in the lower court file then the following orders will follow.

- (2) The applicant is granted conditional stay pending appeal, on the ground that they applicant retain the vehicle that is in their custody and file an undertaking within 30 days from the date of the making of this order to the effect that the same will be kept and maintained in a good mechanical condition pending the hearing of the intended appeal.
- (3) That the said applicant do give an undertaking to receive half the monthly rentals plus interest on account of the vehicle which is still being held by the first respondent/plaintiff pending the hearing and determination of the appeal.
- (4) That the said applicant do undertake not to charge further half monthly rentals and interest in reflection of the vehicle in their possession.
- (5) That the said applicant also do accept an undertaking from the 1st respondent that the vehicle in the first respondents' possession will be kept in good mechanical condition and be fully insured at all times pending the hearing and determination of the appeal.
- (6). The said applicant also do accept an undertaking from the 1st respondent/plaintiff on account of paying of half the monthly rental value as well as the relevant interest on account of them keeping the vehicle that is still in their possession. This arises from the fact that parties can only be released from their obligations under the agreement after a determination is made on the validity or otherwise of the hire purchase agreements.
- (7). Compliance in no 2,3,4,5,6 be within a period of 30 days from the date of the making of this order.
- (8). There will be liberty to apply by either party.
- (9). Costs to the first respondent

DATED, READ AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY 2007.

R. NAMBUYE

JUDGE