

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Appeal 114 of 2006

LOCHAB BROTHERS LTD:.....
APPLICANT

VERSUS

LILIAN MUNABI NGANGA1ST
RESPONDENT

MOSES NYONGESA:.....2ND
RESPONDENT

MARY MWAURA:.....3RD
RESPONDENT

R U L I N G

This application by the applicant/appellant is brought under S. 3, 3A 63(e), 75(h) of CPA and Orders 41 rule 4(1) and order 50 CPR. The main prayer which is prayer 3 is framed as follows:-

“ 3. That the order of security to make cash deposit for stay in court of first instance be set aside and an order of to deposit a motor vehicle logbook be substituted as a condition of stay of execution thereof pending the ;hearing and determination of this appeal.”

The appellant had been sued by the respondent in Eldoret Chief Magistrate’s court. It is not clear from the application or from the application what the claim was but judgement was entered against him. Again it is not clear what the decretal sum was but in paragraph 4 of the supporting affidavit it is deponed that the decretal sum plus costs are in the region of Shs.654,000/=. The applicant made an application for stay in the trial court. The application was allowed but on condition that the applicant/appellant deposit the decretal sum in an interest earning account in joint names of counsels for the parties. The applicant being dissatisfied with the order has now made this application seeking court to set aside the order by the trial court to deposit the decretal amount and instead order the applicant to deposit log book of a motor vehicle as a security.

It was deponed in the supporting affidavit that the applicant is unable to raise the decretal sum but he is willing to deposit log book of a motor vehicle as security Mr. Manani submitted that the motor vehicle Reg. No. KAG 385A has been valued at Shs.2.6 million. The valuation report was annexed to the supporting affidavit. He said the applicant is undergoing financial problems and is therefore unable to meet the condition set.

The application was opposed. Mr. Abok said that security of a motor vehicle log book is not adequate. The court cannot guarantee the condition of the vehicle in future.

I have considered the application and submissions under Order 41 rule 4(1) CPR an appellant court has jurisdiction to hear application to set aside an order of stay given by the trial court. However in exercising that discretion the court must satisfy itself that the trial court erred and failed to take into

account some relevant facts or took into account some irrelevant facts. The ruling of the trial court was never annexed to this application. The court is therefore not able to know the reasons the court have to make the orders that it made. However that as it may be it is clear that the court ordered applicant to deposit the decretal sum in an account and that is what the court is being asked to set aside. A log book and valuation report of M/V KAG 385A it shows that the vehicle is worth Shs.2.6 million and the decretal sum is only 654,000/=. However as it was submitted by counsel for the respondent there is no guarantee that by the time the appeal will be heard and determined the vehicle will be worth the same money or it be their at all. The vehicle is still under the control and use of the applicant. Many things can happen to it before the appeal is heard. It can be wasted and its value diminished or it can even be involved in an accident and be completely damaged. I am not saying that this is gang to happen but it can happen. If that happens then there will be no security for the respondent to fall back on if the appeal is not successful. Deposit of motor vehicle log book is therefore not a satisfactory security.

There are no good reasons for court to set aside the orders by the trial court to deposit the decretal sum. The respondent has a judgement which has not been set aside. He needs to secure the same and the best way is by way of deposit of the decretal sum. Applicant cannot hide behind a blank allegation that its business is facing financial problems. If the appeal fails, and I am not saying it will, he still would have to pay.

From the above therefore I find no merit in the application and the same is dismissed with costs. Applicant to deposit decretal sum on account within 30 days from today.

Dated and Delivered at Eldoret this 4th day of July,2007

KABURU BAUNI

JUDGE

Delivered in the presence of:-

C/C - David

Mr. Mwetich for applicant

Mr. Buluma for Kirundi for 1st Respondent