



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. E351 OF 2020

KAM TRANSPORTERS SAVINGS

AND CREDIT CO-OP SOCIETY LIMITED.....1ST APPLICANT

STEPHEN MUSYOKI MUTUA.....2ND APPLICANT

= VERSUS =

GRACE WAIRIMU WANDATE.....RESPONDENT

RULING

The Applicants filed a Notice of Motion dated 18th January, 2021 under the provisions of Sections 3A, 79G and 95 of the Civil Procedure Act, Cap 21, Order 22 rule 22, Order 42 Rule 6 and Order 50 Rule 2,4 and 6 and Order 51 Rules 1 and 3 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. The prayers before this court for determination are;

1. Spent

2. Spent

3. THAT this Honourable Court be pleased to stay execution of the judgement and decree in Milimani Civil Suit No. 4744 of 2019 pending hearing and determination of the appeal.

4. THAT this Honourable court be pleased to grant an unconditional release of the motor vehicle KCE 909R pending hearing and determination of this Application.

5. THAT the O.C.P.D Umoja phase 3 do supervise the release of the motor vehicle KCE 909R.

6. THAT the Honourable Court do order that the said notification of sale as issued is irregular, null and void by dint of being issued before the lapse of the statutory period of 7 days after issuance of the proclamation notice.

7. THAT this Application be heard interparties on such date and time as this Honourable Court may direct.

8. THAT this Honourable Court be pleased to issue any other orders that it may deem fit, just and expediate in the interests of justice.

9. THAT the costs of this application be in the cause.

The application is premised on the grounds on the face of the application, the supporting affidavit of Purity Wambui Waikwa, an advocate acting for the Applicants, sworn on 18th January, 2021. The Respondent opposed the application through her Replying Affidavit sworn on 5th February, 2021. The parties agreed to have the application canvassed by way of written submissions. The Applicants and the Respondent have filed their submissions dated 3rd March, 2021 and 7th March, 2021 respectively.

The present application is premised on the grounds that the Applicants being aggrieved with the judgement delivered by the trial court on 13th November, 2020 has preferred an appeal by filing a Memorandum of Appeal dated 8th December, 2020 within the statutory timelines. It is the Applicants' contention that the appeal, if successful, will be rendered nugatory and they will stand to suffer substantial and irreparable loss and damage if execution is not stayed pending the appeal. That they are apprehensive that the Respondent who has already proclaimed against their Motor Vehicle KCE 909R may levy execution against them. The Applicants aver that the application is made in good faith and the Respondent will not suffer any prejudice or any damage that cannot be compensated by way of costs and that they are to deposit security

for due performance of the decree.

The Applicant submits that the supporting affidavit of Purity Waikwa, an advocate is properly on record as her firm are on record for the Applicants as instructed by Directline Assurance Company Limited who have insured Motor Vehicle KCE 909R. They have relied on the case of **Joseph Kangethe Kabogo & Anor. V Michael Kinyua Ngari**[2012]eKLR where Ogola J. held that the application was competent and stated an application can be supported by the affidavit of any person who has an explained legal nexus with the Applicant, more so through the explained doctrine of subrogation.

The Applicants have submitted that they filed the Memorandum of Appeal on 8th November, 2020 after judgment was delivered on 13th November, 2020 in CMCC No. 4744 of 2019 which was well within the 30 days statutory timeline for lodging an appeal as provided for under Section 79G of the Civil Procedure Act which provides that;

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

The Applicants submit that they have met the conditions required for stay of execution to be granted and have cited the of **Industrial Cause No. 1715 of 2011, Elena Doudoladova Korir V Kenyatta University** [2014] eKLR where the court cited the case of **Halai & Another v Thornton & Turpin (1963) Ltd** [1990]KLR 365 where the Court of Appeal in setting down criteria to be met in an application for stay of execution held that;

“The High Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.”

It is the Applicants submission that they have a meritorious and arguable appeal with high chances of success which will be rendered nugatory if the orders sought are not granted. The Applicants argue that the Appeal raises substantive issues of laws and of fact as stipulated in the Memorandum of Appeal dated 8th December, 2020.

The Applicants further contend that they will suffer substantial loss as they are apprehensive that they will not be able to recover the substantial amount awarded in the judgment since the Respondent has not furnished the court with evidence of their financial standing. To buttress this position they have relied on the case of **Kenya Orient Insurance Co. Ltd V Paul Mathenge Gichuki & Another** [2014] eKLR, where the Court of Appeal held that the burden of proof on whether a Respondent can refund the decretal sum if the appeal succeeds shifts to the Respondent the moment that the Appellant states that it is unaware of the Respondent’s resources. It is the Applicants contention that the Respondent has already detained and issued a Notification of Sale dated 14th January, 2021 for the Applicant’s Motor Vehicle KCE 909R which is their only source of livelihood.

The Applicant maintains that the present application has been filed without unreasonable delay as the Memorandum of Appeal was filed within 30days of the judgment delivered by the trial court in CMCC No. 4744 of 2019 and the application for stay was filed as soon as instructions were received. The Applicants have also express their willingness to deposit the entire decretal amount in a joint interest earning account in the names of the advocates for the parties to ensure that the Respondent are not prejudiced in any way if the stay is granted.

The Respondent in opposition to the application averred that the Proclamation and Notice of Sale of Motor Vehicle KCE 909R were issued after the expiry of the mandatory notice hence the execution process was proper and as a result, the auctioneers incurred expenses, which ought to be settled by the Applicants. The Respondent further argues that the Applicants have failed to satisfy all the conditions to warrant stay of execution pending appeal because they have not demonstrated in which way they stands to suffer if the orders sought are not granted. The Respondent avers that since the appeal is only on quantum, the court should order release of half of the decretal sum to the Respondent and the other half to be deposited in a joint interest earning account in the names of both advocates.

According to the Respondent,the prerequisite conditions set out under Order 46 Rule 6(2) of the Civil Procedure Rules, must be met simultaneously. It is the Respondent submission that the Applicants have failed to demonstrated how the refusal to grant the stay orders will result in substantial loss for them and the reasons that they are not likely to recover the decretal amount if the same is paid over to the Respondent and as such the burden has not shifted to the Respondent to discharge her evidential burden. They have relied on the cases of **Caneland Ltd . & 2 Others V Delphis Bank Civil Application No. Nai 344 of 399 , Stephen Wanjohi V Central Glass Industries Ltd. Nairobi HCCC No. 6726 of 1991** and the case of **Grace Wangui Ngenye v Capital Group Limited** [2019]eKLR where Justice Njuguna held that it is not sufficient for the applicant to merely state that the respondent lack of financial capabilty to refund the requisite amount but should provide prima facie evidence to that effect.

The Respondent further submit that the Court should balance the parallel interests of the parties. The Respondent has referred to the case of **Samvir Trustee Limited v Guardian Bank Limited Nairobi (Milimani HCCC 795 of 1997)** where Warsame J. stated that the court is empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court by ensuring that orders of stay are granted conditionally. While in the case of **Machira T/A Machira & Co. Advocates V East Africa Standard (No. 2) [2002]KLR 63**, where the court reiterated on the principle that a successful party is entitled to the fruits of his judgment and in applications for stay, the courts should strive to do justice according to the law and prevent the abuse of the court process. The case of **Kenya Shell Limited v Kibiru**[1986] KLR 410 has also been cited in support where it was held that substantial loss being the corner stone on which orders for stay are granted, evidence of substantial loss must be provided so as to aid the court in maintaining the status quo.

The Respondent further submits that the Applicants did not make any averments as to the substantial loss they will suffer in their supporting affidavit since the same is a factual issue. The Respondent contends that the success of the appeal should not be a factor to be considered at this stage of the proceedings and further contends that the Applicant is only challenging the decision on quantum and therefore she will likely not leave court empty handed therefore, the court should order release of half of the decretal sum to the Respondent and the other half in a joint interest earning account in the names of both advocates. It the Respondent submission that there was undue delay in filing the present application as the same was filed on 19th January, when attachment had already been effected.

Analysis:

The only issue for determination in the present application is whether the Applicants are entitled to stay of execution pending hearing of the appeal.

The present application invokes the discretionary powers of the court which must be exercised judiciously. It is brought under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 that empowers this court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided for under Rule 6(2) of Order 42 and states as follows:

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

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(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.”

The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** gave guidance on how a court should exercise discretion and held that:

“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 a stay is; if there is no 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 [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were 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 by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

The Applicants filed a Memorandum of Appeal dated 8th December, 2020 which was within the 30 days stay period provided under section 79G of the Civil Procedure Act. A letter dated 9th December, 2020 was sent to the Chief Magistrate’s Court requesting for original record and proceedings. The current application was filed on 18th January, 2021 after the issuance of Proclamation of Attachment and Notification of sale by Hariki Auctioneers which was dated 16th December, 2020 and 14th January, 2021. There is thus no inordinate delay on the part of the Applicant.

In the Court of Appeal case of **Nairobi Civil Application No. 238 of 2005 National Industrial Credit Bank Limited v Aquinas Francis Wasike & another (UR)** as cited by the High Court in **Stanley Karanja Wainaina & another v Ridon Anyangu Mutubwa [2016] eKLR** it was held;

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a Respondent or lack of them. Once an applicant expresses a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge.”

In the case at hand, the Respondent has not disclosed any source of income that she would use to refund the Applicants the decretal amount should the appeal succeed. On this ground, i am satisfied that the Applicants have established that they will suffer substantial loss if the intended execution is not stayed. The Respondent has already detained the Applicants Motor Vehicle Registration No. KCE 909R and issued a Notification of Sale. It also follows that if the Respondent sells the Motor Vehicle, and the Applicants’ appeal succeeds, then not only will the Applicants suffer substantial loss but the appeal will also be rendered nugatory.

The Applicants have indicated their readiness to furnish security for the due performance of the decree by depositing the decretal sum in a

joint interest earning account in both parties' advocates' names. The Respondent although agreeable to this has proposed that the Applicants pay half of the decretal amount and deposit the other half in an interest joining account since the appeal is only on quantum. I agree with the Appellant that deposit of the decretal amount in an interest joint account of the parties advocate would be sufficient security while balancing the parallel interests of both parties.

The Proclamation of Attachment was issued on 16th December, 2020 while the Notification was issued on 14th January, 2021. The Applicants have not submitted to this court the grounds of illegality but from looking at the Notification of Sale, the same was not irregular.

Accordingly, the application dated 18th January, 2021 has merit and is allowed. The warrants of proclamation and Notice of Sale are hereby set aside on condition that the decretal amount be deposited in a joint interest earning account in the names of the advocates for the parties within thirty (30) days from the date of this ruling. The applicant to meet the auctioneer's charges. The costs of the application shall abide the outcome of the appeal and shall follow the cause.

DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF MARCH, 2021

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S. CHITEMBWE

JUDGE