



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KIAMBU

CIVIL APPEAL NO. 101 OF 2020

NCBA BANK KENYA LIMITED (*formerly*

NIC BANK LIMITED).....APPELLANT

VERSUS

PETER WARUI NJOKI.....1ST RESPONDENT

LUCY WAITHIRA WACHU...2ND RESPONDENT

(Being an appeal from the entire ruling and order of the Honourable Principal Magistrate, **Ekhubi B.M.** (Mr. delivered on 6th August, 2002 in Thika CMCC No. 707 of 2019)

RULING

1. The appeal is directed against an order of 6th August, 2020 made by the Thika Chief Magistrate's Court in Civil Case No. 707 of 2019 (hereinafter the Thika case). By order, a mandatory injunction was issued in favour of **PETER WARUI NJOKI** (hereinafter Peter) in the Thika case. The effect of that mandatory injunction was that motor vehicle registration number **KCJ 035T** (the subject vehicle was released to Peter pending hearing and determination of the Thika case. NIC Bank Limited (hereinafter NIC) being aggrieved by that order filed this appeal.

2. By a Notice of Motion application dated 18th August, 2020 NIC seeks stay of the injunction and stay of the proceedings of the Thika case. The stay of the injunction order is sought pending the hearing and determination of this appeal.

BACKGROUND

3. NIC holds the subject vehicle as security advanced to **MEMUKA BROS HARDWARE (Memuka)**. Indeed the logbook of the subject vehicle is registered in both the names of NIC and Memuka.

4. Peter, it would seem from the agreement of sale, agreed to purchase the subject vehicle from **LUCY WAITHIRA WACHU (Lucy)**. Peter sued Lucy and NIC in the Thika court as sought the following orders:-

a. A permanent injunction order restraining the defendants either by themselves or through their agents, servants or employees from selling, disposing off, transferring, using and/or dealing with motor vehicle registration number KCJ 035T.

b. A declaration that the plaintiff is not in breach of his obligations as per the Sale Agreement dated 8th January, 2019 and therefore the seizure/repossession of the subject motor vehicle by the 2nd Defendant was unlawful, null and void.

c. A mandatory injunction do issue against the defendants compelling the defendants to hand over to the plaintiff motor vehicle registration number KCJ 035T, Isuzu Lorry in good condition and repair and service forthwith. ALTERNATIVELY, an order compelling the 1st defendant to refund to the plaintiff all the monies paid to her on account of the purchase of the subject motor vehicle together with interests at commercial rates.

5. In that Thika case the court granted a mandatory injunction as sought in the plaint, pending the hearing and determination of the suit.

ANALYSIS

6. I have considered the application and the parties' submissions. Stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules (hereinafter the Rules). That Rule is in following terms:-

“No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order Appealed from except in so far as the Court Appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court Appealed from, the Court to which such Appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the Appeal is preferred may apply to the appellate Court to have such order set aside.

(2) No order for stay of execution shall be made under sub rule (1) unless:-

(a) the Court is satisfied that substantial loss may result to the 1st 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 1st Applicant.”

7. It will be recognized from the above Rule that for stay of execution to be ordered pending appeal, the applicant must show that substantial loss may result if the stay is not granted. NIC in this respect stated that it would suffer substantial loss and irreparable damage if the order in the Thika case, whether by the subject vehicle was released to Peter, is not stayed pending appeal. Once NIC deponed that it would suffer substantial loss the burden to disprove the same fell on the shoulders of Peter. This is the jurisprudence from the Court of Appeal as discussed in the case of SWAPAN SODHAN BOSE V. KETAN SURENDRA SOMAIA & 3 OTHERS (2006) eKLR thus:-

“That was the finding of the case CA No. NAI 238 of 2005 (UR.144/2005) NATIONAL INDUSTRIAL CREDIT BANK LTD. V AQUINAS FRANCIS WASIKE & ANOTHER where the Court of Appeal had this to say:-

“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 the lack of them. Once an applicant expresses a reasonable fear that 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.””

8. Peter did not discharge that burden of proof other than stating that he would abide by the order made in the Thika case which order required Peter that if he breached his agreement with Lucy he would pay her damages as per their agreement.

9. As set out in the background of this Ruling hereinabove, the subject motor vehicle is registered in the names of NIC and Memuka. Until the rights of those two parties are determined, I am of the view that the subject vehicle must be preserved. Stay of execution pending appeal is an order which is intended to preserve the subject matter pending appeal. This is what was stated in the case of HGE V. SM (2020) eKLR thus:-

“13. The court, in RWW vs. EKW [2019] eKLR, addressed its mind to the purpose of a stay of execution order pending appeal, in the following words:-

‘The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.’

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

10. In the light of the above, holding and bearing in mind that the subject vehicle is security for a facility granted by NIC, I find that the application is merited. I will not order NIC to avail security for due performance of the decree.

11. Peter was correct that the subject vehicle is likely to depreciate in value, as time passes on. It is because of that that, I will order this appeal be heard within the shortest time. I note that NIC has already filed the record of appeal and in it I have noted the typed proceedings of the trial court.

DISPOSITION

12. I make the following orders:-

a. There shall be a stay of execution of the order made on 6th August, 2020 in Thika Chief Magistrate's Court Civil Case No. 707 of 2019 pending the hearing and determination of this appeal.

b. A mention date will be given at the reading of this appeal to ensure that this appeal is heard expeditiously. The Deputy Registrar of this Court shall request for the trial court file to be availed.

c. The costs of the Notice of Motion application dated 18th August, 2020 shall abide with the outcome of this appeal.

RULING DATED, SIGNED AND DELIVERED AT KIAMBU THIS 6TH DAY OF MAY, 2021

MARY KASANGO

JUDGE

Coram:

Court Assistant.....Ndege

Appellant:N/A

For the appellantMiss Kale H/B Omari

For the 1st respondent.....Ms. Njengo

For the 2nd respondent.....N/A

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE