



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO. 9 OF 2020

PERMINUS MAINA MWANGI.....APPELLANT

VERSUS

MARTIN KINYUA GICHUA.....RESPONDENT

RULING

1. The appellant prays for *stay of execution* of the decree pending the determination of this appeal.
2. The judgment was delivered on 7th July 2020 in *Murang'a Chief Magistrates Court Civil Case 240 of 2017*. The court ordered the appellant to refund the respondent Kshs 626,095 for breach of contract of sale of motor vehicle KCF 594U and costs of improvements on the chattel.
3. The appellant lodged a *memorandum of appeal* on 21st July 2020. The main points taken are that the learned trial magistrate misapprehended or failed to take into account the two agreements dated 2nd December 2016 and 7th March 2017 and the duties and rights of both parties. In a synopsis, the appellant contends that the respondent did not prove his case.
4. The instant notice of motion is dated 21st July 2020. The appellant contends that he has an arguable appeal; that the respondent is a man of straw; and, that unless stay is granted, he will suffer substantial loss thereby rendering the appeal nugatory. Reliance was placed on his deposition of even date. He deposed further that he is willing to furnish security for due performance of the decree.
5. The motion is contested through *grounds of opposition* dated 23rd July 2020. The objection is that the that the applicant has neither demonstrated that he will suffer substantial loss nor met the threshold for grant of the discretionary remedy of stay. The respondent argued that the decree has not been annexed; that the appeal is unmerited; and, that there is no evidence of execution.
6. On 23rd September 2020, learned counsel for both parties consented that the motion be dispensed with by written submissions; and, that the ruling be transmitted to them electronically. The appellant lodged the submissions on 2nd October 2020 while the respondent replied on 3rd December 2020.
7. The present motion is largely predicated upon Order 42 rules 6 of the **Civil Procedure Rules**. The court *may* grant a stay if *substantial loss* may occur; that the application has been made *without delay*; and, that the applicant furnishes *security* for the due performance of the decree that may ultimately be binding on him.
8. The impugned order was made on 7th July 2020. The *memorandum of appeal* was filed on 21st July 2020 contemporaneously with the present motion for stay. I thus find that the application was made timeously.
9. In ***Butt v Rent Restriction Tribunal*** [1982] KLR 417, Madan JA (as he then was) quoted with approval the views of Cotton L.J. in ***Wilson v Church*** (No 2) 12 Ch. D [1879] 454 at 459-

I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful is not nugatory.
10. I am satisfied that the respondent has an *arguable* appeal revolving around the interpretation by the trial court of the combined provisions of the two agreements above. However, the applicant has not annexed any evidence to show that execution has been threatened or has commenced. The supporting affidavit is completely silent on the matter. No decree was attached with the filing of the motion although the respondent concedes that one has since been extracted.
11. There is hence a sense in which the motion is premature. The applicant must demonstrate that he will suffer *substantial loss* if the decree

is executed. See *James Wangalwa & Another v Agnes Naliaka Cheseto*, High Court, Bungoma, Misc. Appl. 42 of 2011 [2012] eKLR. As a general proposition, the execution of a *money decree* does *not* constitute substantial loss. *Kenya Shell v Benjamin Karuga* [1982-88] 1 KLR 1018.

12. I note that the applicant has *offered* to furnish security. He also avers that the respondent is a man of straw. The respondent has *not* filed an *affidavit of means* to counter the argument. See generally, *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another*, Court of Appeal, Nairobi, Civil Appeal No. 238 of 2005 [2006] eKLR. To that extent, I am satisfied that the appellant may never recover the decretal sum if his appeal succeeds. I have already found that there is an *arguable* appeal. This does *not* mean that the appeal will succeed.

13. I will thus grant a *conditional* stay as follows-

- a) That there shall be a stay of execution of the decree pending the hearing and determination of this appeal.
- b) That the stay is granted upon the *condition* that the appellant deposits the decretal sum of Kshs 626,095 into a joint interest earning account of both counsel within *21 days* of today's date.
- c) That in default of condition (b) above, execution shall issue.
- d) That in the interests of justice, the appellant shall cause the record of appeal to be lodged not more than *ninety days* from today's date; and, shall ensure that the appeal is presented to the judge in chambers for admission or directions within a *further thirty days*.
- e) That costs shall be in the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 6TH DAY OF MAY 2021.

KANYI KIMONDO

JUDGE

ORDER

Notice of delivery of this ruling was transmitted electronically on 15th April 2021. Pursuant to the Practice Directions of 17th April 2020 in Gazette Notice No. 3137; and, the parties' consent dated 23rd September 2020, this ruling has been delivered to the parties by electronic mail. Both parties have accordingly waived compliance with Order 21 Rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

KANYI KIMONDO

JUDGE

Ruling read in chambers in the presence of:

Ms. Dorcas Waichuhi, Court Assistant.