



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. E008 OF 2020

DIONISIA MUTHANJE NJOGU.....1ST APPELLANT

DENNIS MUNENE NDWIGA.....2ND APPELLANT

VERSUS

LAWRENCE RUTERE T/A GIANT AUCTIONEERS.....RESPONDENT

RULING

1. The applicant filed a notice of motion application dated the 4th November 2020 seeking the following orders: -

i. Spent

ii. That attachment and sale of motor vehicle KBX 286R be specifically stayed and the same be released to the applicant forthwith pending the hearing and determination of this application.

iii. That there be a general stay of execution of the decree in the case pending the hearing and determination of this application and the subsequent appeal.

iv. That the court be pleased to extend time within which to lodge the appeal against the decree in Embu CMCC No. 36 of 2020 and the appeal herein be deemed to have been filed out of time with court leave

v. That cost of this application be borne by the respondent.

2. The application is based on the grounds on the face of it and supported by the annexed affidavit sworn by Dionisia Muthanje Njogu, on the 5th day of November 2020.

3. The application is mainly on the grounds that the applicant's motor vehicle registration No. KBX 286R which was attached on the 28th October 2020 had been set for sale on the 12th November, 2020; that other movable properties of the applicant are in danger of being attached and sold in execution of the decree; that the judgment in the lower court was obtained ex parte without granting the appellant a chance to be heard; that the appeal has good chances of success as it raises triable issue; the award of Kshs. 1,760,000/= is excessive and that the appellant is ready to abide by any condition for stay.

4. The respondent has opposed the application vide a replying affidavit filed on the 12th day of November, 2020 sworn by Simon Muriithi Kamau. He deposes that it is not true that the case proceeded ex parte as the applicant has stated as the interlocutory judgment was set aside and he was given a chance to file a defence and defend the suit.

5. That a consent on liability was recorded in the ratio of 80%:20% in favour of the respondent and parties agreed to file submissions on quantum of damages and the applicant was at all material times aware of what was going on. He avers that the applicant is a rich business lady operating a fleet of matatus and by stating that the attached motor vehicle is her only source of livelihood, she was not being candid to the court.

6. He averred that the applicant filed an application dated 2nd November, 2020 before the lower court wherein the parties agreed and recorded a consent on how to settle the decretal sum and on the release of the attached motor vehicle by the auctioneer upon payment of the auctioneer's costs and in default, execution to issue. That in the circumstance, the application herein is an abuse of court process.

7. The applicant filed a supplementary affidavit in which he deposed that he was not aware of what was going on in the matter as he had not instructed the firm of Kamanze & Partners Advocates who took over the matter from the firm of Ms. Njiru Mbogo & Co. Advocates whom he had instructed.

8. That the consent recorded before the lower court was fraudulently recorded as his consent was never sought, the same is prejudicial to him and that he has instructed his advocate to set it aside.

9. Parties agreed to dispose off the application by way of written submissions which they both filed and which this court has duly considered together with the application and all the affidavits.

10. The principles guiding the grant of a stay of execution pending appeal are well settled. They are provided for under **Order 42 Rule 6(2) of the Civil Procedure Rules** are 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.

11. The question of stay pending appeal has also been canvassed at length in various authorities such as in the Court of Appeal decision in **Chris Munga N. Bichage Vs Richard Nyagake Tongi & 2 Others** where the court stated the principles to be applied in considering an application for stay of execution as thus: -

“.....the law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs; which are first, that the appeal or the intended appeal is arguable, that is to say, it is not frivolous.

Secondly, that if the application is granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”

12. On the issue of substantial loss, the applicant did not address the court on the same. He only deposed that he has an arguable appeal which raises triable issue but did not state how he would suffer substantial loss if the appeal succeeded and there was no order staying execution.

13. The issue of substantial loss is very important in this application and in my view, there was no evidence supporting substantial loss to the applicant, either in the matter of paying damages awarded which would cause difficulty to the applicant himself or because he would lose money if payment was made and the respondent would be unable to repay back the decretal sum. The financial status of the respondent was just mentioned in the submissions, and in passing. It ought to have been deposed to, in the supporting affidavit so that the respondent could answer to it. This was not done.

14. As such, the applicant cannot be said to have raised reasonable grounds for believing that the respondent will not be able to refund the decretal sum. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay of execution. That is what has to be prevented. (see the case of **Kenya Shell Limited Vs Kibiru [1986]**. Therefore, without the evidence, it is difficult to see why the respondent should be kept out of his money.

15. On whether the appeal will be rendered nugatory, I stand guided by the following passage from the case of **Wilson Vs Church (No. 2) [1879] 12ChA 454 at page 458** where the Judge stated;

I will state my opinion that when a party is appealing, exercising his undoubted right, see that the appeal, if successful, is not rendered nugatory. As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given, parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without a just cause.”

16. On the issue of the delay, I find that the same is not inordinate. On security, the applicant has not offered to provide any security as required under Order 42 Rule (6).

17. On whether the application is an abuse of court process, the respondent in his replying affidavit at paragraph 2, has stated that a consent was recorded before the lower court in an application similar to the one before the court wherein, the parties agreed on how to liquidate the decretal sum.

18. The court has perused the court file and can confirm that the consent was recorded and an order extracted and was issued on the 12th November, 2020. In the same order, parties agreed on the release of motor vehicle KBX 286R and who was to pay the auctioneer's fee. That consent has not been challenged in any way and it is still on record. In my view, the consent compromised the whole suit and it has been deposed that the applicant has taken steps to comply with the terms of the consent order.

19. This fact was not denied by the applicant. I concur with the respondent that this application is an abuse of the court process and I hereby

dismiss it with costs.

20. The orders made herein, shall apply to **Civil Appeal No. E009 of 2020 (Dionisia Muthanje Njogu & Another Vs Simon Muriithi & Another).**

21. The respondents are awarded the costs of the application.

22. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 9TH DAY OF JUNE, 2021

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent