



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. E374 OF 2021

BERNARD MBALU NZYUKO.....RESPONDENT

VERSUS

JOSEPH MWANGI KIMANI.....1ST APPELLANT

JAMES NJENGA.....2ND APPELLANT

RULING

1) The appellants took out the motion dated 29th June 2021 whereof they sought for the following orders:

- i. THAT this application be certified urgent, service be dispensed with thereof and the same be heard ex parte in the first instance.*
- ii. THAT the honourable court do issue immediate and unconditional release orders of the said motor vehicle registration number KCH 797T, pending the hearing and determination of this application.*
- iii. THAT an order of stay be issued restraining the respondent whether by himself, employees, servants and/or agents or any other person whatsoever acting on his behalf and/or mandate, from advertising for sale, transferring for sale, selling, transferring or otherwise dealing in any manner with the applicant's motor vehicle registration number KCH 797T as listed in the notification of sale.*
- iv. THAT this honourable court do issue an order directing the OCS Central Police Station to ensure compliance of the orders issued.*
- v. THAT this honourable court be pleased to order a stay of execution of the judgment/decree dated 8th April, 2021 by the honourable M. W. Murage (Ms) Senior Resident Magistrate in Milimani Civil Suit No. 1315 of 2020 pending the hearing and determination of this application.*
- vi. THAT this honourable court be pleased to stay the execution of the judgement/decree obtained herein pending the full hearing and determination of the appellants/ applicants application in Milimani Civil Suit No. E374 of 2021.*
- vii. THAT this honourable court be pleased to stay the execution of the judgment/decree obtained herein pending the full hearing and determination of the appellants/ applicants application in Milimani Civil Suit No. 1315 of 2020 dated 24th June, 2021.*
- viii. THAT the application be heard inter parties on such date and time as this honourable court may direct.*
- ix. THAT the costs of this application abide the outcome of the appeal.*

2) The appellants filed the affidavit sworn by Joseph Mwangi Kimani in support of the motion.

3) Bernard Mbalu Nzyuko filed the replying affidavit he swore to oppose the application. When the motion came up for interpartes hearing, this court directed the parties to file written submissions. At the time of writing this ruling the respondent was the only party who had filed his submissions.

4) I have considered the grounds stated on the face of the motion and the facts deponed in the rival affidavits. I have also considered the written submissions filed by the respondent. It is clear from the motion that the

appellants have sought to be granted various orders. However, this court is alive of the fact that the appeal is against the ruling delivered by the trial magistrate on 28th June 2021. I think the appropriate prayer sought which this court can entertain at this stage is the one for stay pending appeal. The other prayers should await to be determined on appeal.

5) It is the submission of the appellants that the default judgment was entered against them before the trial court on 8th April 2021 and that Taifa Auctioneers on the instructions of the respondent proceeded to proclaim and attach the appellants property in execution of the decree.

6) The appellant aver that they filed an application dated 6th May 2021 seeking to set aside the default judgment. It is said that the aforesaid application was heard *ex parte* on 11th May 2021 under a certificate of urgency but was not certified urgent not fixed for interpartes hearing.

7) The appellants further aver that they filed another application seeking for stay of execution when the auctioneers proceeded to attach their property which application was not also certified as urgent vide the ruling delivered on 28th June 2021.

8) The appellants also stated that they filed this appeal seeking to contest the ruling of the trial court delivered on 28.6.2021. The appellants are now before this court seeking for an order for say of execution of the decree pending the hearing and determination of this appeal.

9) It is their argument that they would suffer substantial loss if the order is not granted in that their property may be sold even before they are heard by this court on appeal.

10) They also averred that the application seeking to set aside the default judgment pending before the trial court will be rendered nugatory if the order is not granted. They offered to provide security for the due performance of the decree.

11) They also stated that the respondent is not in a financial position to refund the decretal amount if the appeal turns successful.

12) The respondent opposed the application arguing that the same lacks foundation in that there is no appeal as against the default judgment of 28.4.2021 which gave rise to the execution proceedings. The respondent further argued that the appellants' application does not meet the requirements for the grant of an order for stay.

13) It is further argued that the judgment sought to be set aside was regular hence the intended appeal has no chance of success. The respondent urged this court to order the appellants to pay him $\frac{3}{4}$ of the decretal amount and to deposit the balance in an interest earning account if it is inclined to grant the for stay.

14) Having considered the material placed before me, it is apparent that the appellants have filed a memorandum of appeal dated 29th June 2021. This therefore dispels the respondent's assertion that no appeal has been filed. It is also admitted by the parties that there is a pending application before the trial court seeking to have the default judgment set aside.

15) In my humble view, if the order for stay is not granted, the respondent will further proceed to execute the decree and sell the appellants' attached goods before the appellants are heard on appeal and the application pending before the trial court.

16) The respondent has not controverted the appellants' assertion that he has no financial ability to refund the decretal sum if the appeal succeeds. I am convinced that if the order for stay is denied the appellants will suffer substantial loss. Consequently, an order for stay is granted pending appeal. An order staying the sale of the attached motor vehicle registration no. KCH 797T is granted. I do not find it appropriate to order the appellants to make a deposit of the decretal sum since their motor vehicle is still being held.

17) The issue should be determined contemporaneously when determining the appeal herein. Costs of the motion to abide the outcome of the appeal. The hearing of the appeal to be expedited.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 1ST DAY OF OCTOBER, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Respondent

..... for the Appellant