



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL CASE NO. E305 OF 2021**

**ELISHA WEWA.....1<sup>ST</sup> APPELLANT/RESPONDENT**

**GRAIN INDUSTRIES LIMITED.....2<sup>ND</sup> APPELLANT/RESPONDENT**

**VERSUS**

**GRACE MUTHONI KAMAU.....RESPONDENT**

**RULING**

The application dated 16<sup>th</sup> September, 2021 seeks the following orders:-

- 1. THAT this matter be certified urgent and service hereof be dispensed with in the first instance.**
- 2. THAT this Honourable Court be pleased to stay its orders of 15/09/2021 granting prayer (c) of the Appellant's Application dated 10/09/2021- to wit lifting of the warrants of sale of movable property granted by the trial court and ordering the unconditional release of the attached vehicles belonging to the appellants - pending the hearing and determination of this application inter partes.**
- 3. THAT the Honourable Court does review its orders of 15/09/2021 granting prayers (b) and (c) of the Appellant's Application dated 10/09/2021.**
- 4. THAT in the alternative to prayer 3 above, this Honourable Court does order the Appellants to deposit the sum of Ksh 4,641,725 in court being the decretal sum awarded in NAIROBI CMCC NO. E3667 OF 2020 GRACE MUTHONI KAMAU - VS-ELISHA WEWA & GRAIN INDUSTRIES pending the hearing and determination of their application dated 21/07/2021.**
- 5. THAT the Appellants be ordered to bear the auctioneer's charges and the storage charges arising from the attachment of their motor vehicles by M/s Chador Auctioneers in the event that the attachment of the same is to be lifted."**

The affidavit of Grace Muthoni sworn on the same date supports the application. The respondent filed a replying affidavit sworn by June Njoki advocate on 23<sup>rd</sup> September, 2021 together with grounds of opposition of the same date.

Counsel for the applicant submitted that the appellants/respondents were granted interim orders of stay of execution on 22<sup>nd</sup> July 2021 by Justice Thurania Jaden. Those orders lapsed and its only on 10<sup>th</sup> August, 2021 when counsel for the appellants sent an e-mail inviting them to fix the application for hearing. It was further argued that the letter of 10<sup>th</sup> August 2021 did indicate that there were some orders but the same were not annexed to the letter and had lapsed three days after they were issued due to non-service.

The applicant also contend that decree holder was entitled to execute as there was judgment in her favour. It is the execution process which triggered the appellants to file a second application date 10<sup>th</sup> September 2021 seeking the release of the attached vehicles. According to counsel for the applicant, the orders for the release of the vehicles were granted by the court on the allegation by the appellants that proclamation was illegal sine there were interim orders. These orders have prejudiced the applicant who cannot be faulted for enforcing her favourable judgment. Counsel urged the court to return her to her positive position by vacating the orders which released the vehicles.

It was additionally submitted that the orders granted to the appellants amount to equitable reliefs and whoever seeks equitable reliefs has to act equitably. Whereas the orders of 22<sup>nd</sup> July, 2021 were not served on the allegation that it took some time to extract them, those of 16<sup>th</sup> September, 2021 were extracted and served on the same day. Counsel urged the court to either vacate the orders of 16<sup>th</sup> September, 2021 or order the appellants to deposit the decretal sum in court or in a joint account.

The application was vehemently opposed. Counsel for the appellants/ respondents submitted that he became aware of the interim orders on

9<sup>th</sup> August, 2021 and sent an e-mail to the respondent's advocates on 10<sup>th</sup> August 2021 enclosing the orders. It would not have made any sense for them to obtain orders and fail to serve them. The orders were served on 10<sup>th</sup> August, 2021 as it took some time to have them extracted.

Counsel for the appellants further contend that parties entered into negotiations and the only pending issue related to costs payable to counsel for the respondent. While in the process of negotiations the appellants' vehicles were attached while on the road without any warrants or notification of sale having been served. This necessitated the filing of the second application for the release of the vehicles. No proclamation has been produced and the attachment was contrary to the auctioneers' rules which require 7 days' proclamation.

It was further argued that the applicant filed a cross appeal against the judgment of the trial court yet she is executing the same judgment. Five vehicles were attached, no valuation was done and the vehicles were under valued. The appellants had to deposit KShs.500,000 with the auctioneer and pay the storage charges before the vehicles were released.

The issue for determination is whether the orders granted on 16<sup>th</sup> September 2021 should be vacated or set aside. Counsel for the applicant contend that the orders lapsed after a period of three days as provided under order 40 rule 4(3). The orders were issued on 22<sup>nd</sup> July 2021 and were never served. Even if the letter from the appellants' counsel of 10<sup>th</sup> August 2021 was to be taken as proper service, three days had already lapsed.

Order 40 Rule 4(3) states as follows:

**“In any case where the court grants an *ex parte* injunction the applicant shall within three days from the date of issue of the order serve the order, the application and pleading on the party sought to be restrained. In default of service of any of the documents specified under this rule, the injunction shall automatically lapse.”**

Order 40 rule 4(3) falls with the general order 40 which deals with Temporary injunctions and interlocutory orders. The appellant's application dated 21<sup>st</sup> July, 2021 sought an order for stay of execution pending *inter partes* hearing at the first instance and subsequently pending the hearing of the appeal. This cannot be an order of injunction as provided under order 40. The application was made under Section 3, 3A, 63E, 79G and order 51 of the Civil Procedure Act. It was simply an application seeking stay of execution of the judgment of the trial court. In my view this cannot be equated to an order of injunction under order 40 of the Civil Procedure Rules.

Order 48 Rule 2 states as follows:-

**“All orders, notices and documents required by these Rules to be given to or served on any person shall, save where other provision is made, be served in the manner provided for the service of summons.”**

An order for stay of execution can as well be categorized as an interlocutory order under Section 63E of the Civil Procedure Act. However, the non-service of such order within three days should not render such orders ineffective. In any case the order that was granted by Justice Thurania Jaden states partly as follows:-

**“.....the application to be served for hearing interparties on a date to be given in the registry on priority basis. Interim stay of execution to issue for 30 days.”**

The orders were to be in force for 30 days from 22<sup>nd</sup> July 2021. I do find that the order cannot be deemed to have lapsed three days after it was issued. By 10<sup>th</sup> August, 2021 when the e-mail was sent to the applicant's counsel, the order was still in force. The order must have lapsed on 21<sup>st</sup> August, 2021.

Counsel for the appellants contend that parties were negotiating when the applicant executed. The letter of 10<sup>th</sup> August 2021 made reference to some orders. Even if the same were not annexed, counsel for the applicant was aware that there was reference to an order and ought to have enquired as to the nature of those orders. It is therefore my finding that the interim orders granted by Justice Thurania did not lapse three days after they were issued due to non-service. The orders were not officially extracted. It is what the Judge worked on that became the order. The appellants cannot be held to have seen the order soon after it was issued. Ordinarily, an order is extracted, sealed and signed by the Deputy Registrar. The online operations at times lead to delay in conveying the orders granted by the parties to the court. The orders are available on the judiciary portal and counsel for the applicant could have seen it.

According to the appellants, their vehicles were attached on 9<sup>th</sup> September 2021. This was after the court order had lapsed as there is no indication that between 21<sup>st</sup> August 2021 and 15<sup>th</sup> September 2021 the interim orders were extended. It is not clear when the proclamation was made. The proclamation would have enabled the court to know whether it was made after the orders had lapsed or was done while the orders were subsisting.

The appellant's other contention is that she had a valid judgment and cannot be faulted for having executed. Parties were negotiating on the way forward. There was also a cross appeal dated 9<sup>th</sup> June, 2021 indicating that the trial court's award is too low and amount to an error in the exercise of discretion in the assessment of damages. The execution was hurriedly carried out. It is true that there is no official counter offer on the amount to be paid pending appeal from the appellants' advocates. However, the spirit of negotiation was there and the contention that all what was pending was the legal fees payable is not made without basis.

The appellants were granted orders releasing the attached vehicles. Even if the orders were granted on a misrepresentation that the interim orders has been served and therefore the applicant was somehow in contempt of those orders, I do find that the circumstances of the case

requires that those orders be in place pending *inter partes* hearing of the application dated 21<sup>st</sup> July 2021. This will make the parties approach the matter on equal footing. I do further find that the sum of Kshs.500,000 paid by appellant is not auctioneer's fees but part payment of the decretal sum. The auctioneer's fees ought to be agreed upon failing which parties to apply in court so that a determination is made on how the execution was made, and if found to have been properly done, an order on the fees can be made.

Since the application for stay of execution has not been heard and determined, I do find that it would be improper at this stage to order for the deposit of the decretal sum or any part thereof.

The upshot is that the application dated 16<sup>th</sup> September 2021 lacks merit and is hereby dismissed. Parties shall meet their own respective costs.

**DATED DELIVERED AND SIGNED AT NAIROBI THIS 13TH DAY OF OCTOBER, 2021**

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**S. CHITEMBWE**

**JUDGE**