



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL CASE NO E023 OF 2021

REPUBLIC.....APPELLANT

VERSUS

SILA JUMA ONGATI.....RESPONDENT

RULING

1. In its Notice of Motion dated and filed on 7th June 2021, the Appellant herein sought orders that Motor Vehicle KCK 339Y (hereinafter referred to as “the subject Motor Vehicle”) that was produced as Pex4, that was currently detained at Kisumu Central Police Station, be detained at its current position pending the hearing and determination of the Appeal herein. Notably, the prayer for detention of the said subject Motor Vehicle pending the hearing and determination of the application herein was spent.
2. S. G. Thuo, Prosecution Counsel with the Appellant swore an Affidavit on 7th June 2021 in support of the said application.
3. The Appellant averred that in a Judgment that was delivered on 27th May 2021 in **Criminal Case No 266 of 2019 Republic vs Sila J. Ongati**, the Respondent was acquitted under Section 215 of the Criminal Procedure Code Cap 75 Laws of Kenya, which decision it had appealed against.
4. It was categorical that the Learned Trial Magistrate erred in failing to consider the legal vis a vis the beneficial ownership of the aforesaid subject Motor Vehicle and that further, the said Learned Trial Magistrate erred in fact and law in placing reliance on non-existent arbitration proceedings, which it had demonstrated were frustrated by the Respondent for failing to timely meet the costs for the said arbitration.
5. It also asserted that the Learned Trial Magistrate failed to appreciate that PW 1, Engineer Silas Nyambok, was the Complainant acting on the instructions of his employer, the State Department for Housing and Urban Development, a State Department in the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works.
6. It was categorical that the release of the subject Motor Vehicle would render the intended appeal nugatory and it stood to suffer irreparable loss.
7. In opposition to the said application, the Respondent herein, who was a Director of Lisets Investment Limited (hereinafter referred to as “the Company”), the registered owner of the subject Motor Vehicle swore a Replying Affidavit on 23rd July 2021. The same was filed on 26th July 2021.
8. He contended that the Appellant did not have a meritorious appeal to warrant the court granting the orders sought and that litigation had to come to an end. He pointed out that there had been seven (7) different proceedings in respect to the subject Motor Vehicle, five (5) of which had been concluded, leaving two (2) pending matters. He was categorical that considering the many proceedings in respect to the subject Motor Vehicle, there was more than met the eye as pertains this appeal.
9. It was his contention that the person behind his case was the aforesaid PW 1 who was the resident engineer of Oyugis Bus Park where he had been sub-contracted to construct, who he stated he did not get along with. He accused him of influencing the police not to release the said subject Motor Vehicle despite the State having washed its hands in the matter and the court having ordered the release of the said subject Motor Vehicle in **Kisumu Criminal Miscellaneous Application No 268 of 2019**.
10. He was categorical that the Appellant never challenged the said order in an appeal and that it was until 12th July 2019 when the Appellants were served with contempt of court application in **Kisumu Cr Misc Application No 268 of 2019** for disobedience of the magistrate’s court order that they rushed to charge him in **Kisumu Cr Case No 266 of 2019**.
11. He pointed out that he purchased the subject Motor Vehicle from CMC Motors on hire purchase and he was yet to finalise payment. It was his assertion that the subject Motor Vehicle was still brand new and had been in police detention for over two (2) years. He added that

the same was deteriorating and his company stood to lose as he was indebted to CMC Motors in servicing the hire purchase to completion.

12. He was emphatic that the police and the State had failed to adduce any evidence that the Motor Vehicle belonged to them and that all records indicated that the Motor Vehicle was purchased by his company and eventually registered in its name.

13. He averred that the Appellant had not come to court with clean hands and that had not demonstrated that it was deserving of the stay orders that it had sought herein. It termed the present application as an afterthought and an abuse of the court process.

14. In his Supplementary Affidavit that he swore and filed on 18th August 2021, the aforesaid S.G. Thuo averred that it was only this court that could determine whether or not it had a meritorious appeal and there was a possibility of matter ending at the Supreme Court.

15. It added that where there were conflicting decisions of courts of the same jurisdiction, the most recent decision was to be upheld. It was emphatic that the Respondent did not adduce receipts of payment to CMC Motors who purportedly sold the subject Motor Vehicle to the aforementioned Company. It reiterated that it was the Complainant in the proceedings.

16. The Appellant's Written Submissions were dated and filed on 19th July 2021 while those of the Respondent were dated 20th September 2021 and filed on 21st September 2021. The Ruling herein is based on the respective Written Submissions which both parties relied upon in their entirety.

LEGAL ANALYSIS

17. The Appellant placed reliance on the case of **Giella vs Cassman Brown 1973 EA 358** which sets out the conditions for granting of interlocutory injunction as the existence of a *prima facie* case with a probability of success and that the applicant must demonstrate that irreparable injury that cannot be adequately compensated by an award of damages exist.

18. It also relied on the Blacks Law Dictionary 8th edition which defines *prima facie* as sufficient to establish a fact or raise a presumption unless disproved or rebutted. It further submitted that it is further provided that a *prima facie* case is one where there exists the establishment of a legally required rebuttable presumption.

19. He also relied on the case of **Republic vs Kamiro Chege [2006]eKLR** where the court cited with approval the case of **Republic vs John Gichamba Mwangi Hccr No 103 of 2005** where the court therein held that a *prima facie* case was a well established case where a closer examination of the circumstances could well lead to a finding that the accused did commit the offence. It was emphatic that the Respondent herein was guilty as charged.

20. It was emphatic that the Kenyan tax payer would be the ultimate loser of the denial of the services of the suit property to the government as payment was funded by the Directorate of Urban and Metropolitan Department and whose ownership the subject Motor Vehicle was to revert to the State upon completion of the project as it would demonstrate in this appeal.

21. It further placed reliance on the case of **Paul Gitonga Wanjau vs Gatuhi Tea Factory Co Ltd & 2 Others [2016] eKLR** where the court held that irreparable harm has not been given a definition of universal application and that its meaning took the shape in the context of each particular case.

22. It was categorical that it had established a *prima facie* case and shall suffer irreparable damage that cannot be adequately compensated by way of damages and thus urged the court to grant the orders sought as it had met the conditions for the grant of such orders.

23. On his part, the Respondent argued that he was charged with stealing the subject Motor Vehicle, but that the trial court in its Judgment delivered on 27th May 2021 found the offence not proven as the subject Motor Vehicle rightfully belonged to the said Company.

24. He argued that in criminal cases, stay was only granted in exceptional circumstances. In this regard, he relied on the case of **Goddy Mwakio & Another vs Republic [2011]eKLR** where the Court of Appeal found that an order of stay pending appeal in criminal cases was to be made sparingly and only in exceptional circumstances.

25. He further cited the case of **Republic vs Wycliffe Okoth Nyakech [2020]eKLR** where the court equated exceptional circumstances to compelling reasons and went further to explain that in Kenya, those compelling reasons or exceptional circumstances had to be demonstrated by the prosecution.

26. He submitted that the Appellant had failed to demonstrate any exceptional circumstances to warrant the stay or that it had an arguable appeal or raised any points of law worthy for consideration. In this respect, he relied on the case of **Dennis Mogambi Mang'are vs Attorney General and 3 Others** (eKLR citation not given) where the court noted that an arguable appeal was not one that must necessarily succeed, it is simply one that is deserving of the court's consideration.

27. He further cited among other cases the case of **Reliance Bank Ltd vs Norlake Investments Ltd (2002) EA 227** where the court held that to refuse or grant an order of stay to the applicant would cause it such hardship as it would be out of proportion to any suffering the respondent might undergo while waiting for the applicants appeal to be heard and determined.

28. He was emphatic that he continued to suffer lack of use of his motor vehicle which was still new at the time of its purchase but currently wasting away and exposed to vandalism at the police station. He argued that the Appellant stood to suffer nothing whether the subject Motor Vehicle was vandalized or released to him.

29. He reiterated that it was his company that purchased the subject Motor Vehicle for its own use and that the Contractor had already purchased a motor vehicle for the resident engineer that was referred in clause 138 of the main contract that was marked as PExh 1. He argued that the motor vehicle for the resident engineer was not the subject Motor Vehicle.

30. He was emphatic that the government had put in place safeguards in the contract agreement to prevent mischief and loss of any kind and therefore the failure by the contractor to avail a motor vehicle to the Resident Engineer did not mean that the government suffered any loss. He further argued that the government was in a position to avail a motor vehicle to its employee, the resident engineer, then seek reimbursement from the contractor by deductions of any monies due to it from the contract.

31. This Court noted that the said subject Motor Vehicle was an Exhibit during trial and was now the subject matter of this Appeal.

32. The Appellant would require to refer to the said vehicle in order to articulate their case before this appellate court. Whereas photographic evidence could be submitted on appeal, the question of who was the beneficial owner was central to the appeal that had been lodged by the Appellant. In the event the Appellant succeeded on appeal and the subject Motor Vehicle would have already been released to the Respondent herein, it would place the Appellant at a disadvantage as it would have to institute recovery proceedings of the said subject Motor Vehicle from the Respondent.

33. There was also no guarantee that the subject Motor Vehicle would still be in the same state. Indeed, there was chances that it could be sold and transferred to a third party and that the financier, if at all, would repossess the same in case of non payment of the payments. Further, there was the risk of the subject Motor Vehicle which was the *sub stratum* of the appeal being dissipated in the event it was involved in an accident and was written off.

34. This court was cognisant of the fact that an arguable appeal only needed to raise a single *bona fide* point worthy of consideration and need not be one that must necessarily succeed as was held in the case of **Co-operative Bank of Kenya Ltd vs Banking Insurance of Finance Union (Kenya) [2015]eKLR**.

35. As the Court of Appeal also held in the case of **UAP Insurance Company Ltd vs Michael John Beckett [2004] eKLR**, all an applicant is required to show is that he has an arguable appeal which is not frivolous and that the appeal will be rendered nugatory if the stay of proceedings is not granted.

36. It was the considered view of this court that the benefits of detaining the vehicle far outweighed the disadvantages that would be occasioned by its release. The said subject Motor Vehicle had already been detained for almost two (2) years and it was thus in the interest of justice that this court make a determination in a matter that had obviously become convoluted going by the number of cases that had been instituted and determined in respect of the subject Motor Vehicle even if some more delay in the release of the same was occasioned.

37. This court was thus satisfied that the Appellant had demonstrated a *prima facie* case. This court was persuaded to find and hold that in the event the Appeal was not successful, the Respondent could pursue the Appellant to recover damages for the detention of the subject Motor Vehicle and loss that he would have suffered as a result of the said detention. In other words, the loss that he would incur in the event the Appellant was unsuccessful in its Appeal was one that could be compensated by way of damages.

DISPOSITION

38. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated and filed 7th June 2021 was merited and the same be and is hereby allowed in terms of Prayer (2) therein. There shall be no order as to costs as the Appellant is a government institution and it would be punitive to award costs in favour of the Government against its citizen.

39. The DR High Court of Kenya Kisumu be and is hereby directed to facilitate the typing of the proceedings of the lower court and the placing of the lower court file herein within ninety days (90) days from the date of this Ruling for the hearing and determination of the Appeal herein.

40. The Appellant be and is hereby directed to file and serve its record of Appeal within one hundred and twenty (120) days from the date of this Ruling.

41. Either party is at liberty to apply.

42. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 14TH DAY OF DECEMBER 2021

J. KAMAU

JUDGE