



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 100 OF 2018

ABIUD MULWALE ESONGA.....APPLICANT

VERSUS

JANE MAKACHIA KHASHENDI.....RESPONDENT

RULING

1. The application dated 24th February, 2018 seeks orders that this honourable court be pleased to order stay of execution of the order pursuant to the Ruling of Hon. I Orenge (Mr.) Senior Resident Magistrate delivered on 23rd February, 2018 in Chief Magistrate's Court Civil Case No. 7352/15 pending the hearing and determination of the Applicants' appeal.

2. The application is premised on the grounds stated on the face of the application and is supported by the affidavit and further affidavit sworn by the Applicant, Abiud Mulwale Esonga. The Applicant's case is that the Respondent sued him in the lower court claiming the refund of the sum of Ksh.779,342/=. The said sum of money is stated to have been paid to the Applicant for the purchase of a motor vehicle from Japan on behalf of the Respondent.

3. That *ex-parte* judgment was entered against the Applicant who subsequently applied to have the *ex-parte* judgment set aside. It is further averred that before the date set for the ruling the Applicant was arrested and ended up being committed to civil jail without his proposal for payment by installments being considered nor taking into account a further payment of Ksh.50,000/=. It is averred that the Appeal has good chances of success and therefore the Applicant will suffer irreparably if the application herein is not allowed.

4. The application is opposed. It is stated in the replying affidavit that the application at hand is an abuse of the process of court and is based on falsehoods. That there is no offer of security for the due performance of the decree. That a similar application for stay of execution has been filed before the lower court and the ruling is yet to be delivered. That the Applicant's arrest was carried out within the law as there was no order of stay of execution. That although there is admission of the debt, the attempts to settle the matter out of court have failed. That the decretal sum was properly calculated and the instant application is a delaying tactic.

5. I have considered the application, the response to the same and the submissions made by counsel for the respective parties.

6. Under Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 the conditions for stay of execution are as follows:

“No order for stay of execution shall be made under sub-rule (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.”

7. The application at hand was filed on 26th February, 2018. The date of the delivery of the ruling the subject matter of the appeal is reflected as 23rd February, 2018. The application was filed timeously.

8. The Applicant was arrested and committed to civil jail but was subsequently released by this court on a Ksh.500,000/= bond pending the inter-parties hearing of the instant application. Serving the sentence would visit substantial loss on the Applicant as the time served cannot be reversed.

9. Although the Applicant has made an offer to liquidate the decretal sum by monthly installments, the application herein is for stay of execution. The parties are however at liberty to negotiate on the same. It is noted that there is no offer of security for the entire sum. The application for the setting aside of the *ex parte* judgment is yet to be delivered.

10. To balance the competing interests of the parties herein, the application is allowed on condition that the Applicant deposits the decretal sum in a joint interest earning bank account of the counsels for the parties or in court within 30 days from the date hereof. In the alternative the Applicant to deposit security for the sum of Ksh.1,000,000/= within a similar period. Costs in cause.

Dated, signed and delivered at Nairobi this 13th day of Feb., 2020

B. THURANIRA JADEN

JUDGE