



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 225 OF 2019**

**AIRCAB TRAVEL SERVICES LIMITED.....1<sup>ST</sup> APPELLANT/APPLICANT**

**DENNIS NAIBEL.....2<sup>ND</sup> APPELLANT/APPLICANT**

**-VERSUS-**

**OLISA ANNE ALIYO.....RESPONDENT**

**RULING**

1. In their Notice of Motion dated 14<sup>th</sup> November, 2019 the 1<sup>st</sup> and 2<sup>nd</sup> appellants/applicants herein sought for the orders hereunder:

***(i) Spent.***

***(ii) Spent.***

***(iii) Spent.***

***(iv) Spent.***

***(v) THAT as a condition for stay pending the hearing and determination of the appeal filed herein, the appellants to deposit the decretal sum in a joint interest earning account to be opened in the names of their respective advocates' firms.***

***(vi) Spent.***

***(vii) THAT there be a stay of execution of the judgment/decreet dated 28<sup>th</sup> March, 2019 in Milimani CMCC NO. 5807 OF 2017 pending the hearing and determination of the preferred appeal.***

***(viii) THAT costs of the application be provided for.***

2. The Motion is supported by the grounds laid out on its body and the facts deponed to in the affidavit of *Eric Mugo*, who stated that upon the trial court entering judgment in favour of the respondent and against the applicants in the aggregate sum of Kshs.236,864/ the applicants sought for and were granted 30 days' stay of execution during which time they filed a memorandum of appeal with the High Court.

3. The deponent also stated that the applicants filed a formal application before the trial court seeking an order for stay of execution until determination of the appeal and was issued with a hearing date for the same, only to be informed that the lower court file had gone missing.

4. It was the deponent's assertion that soon thereafter, the respondent instructed auctioneers to attach the 1<sup>st</sup> applicant's assets/properties and being apprehensive that its property would be taken away from its custody, the 1<sup>st</sup> applicant transferred a sum of Kshs.200,000/ to the auctioneers in a bid to have them return the attached properties to the 1<sup>st</sup> applicant.

5. The deponent narrated that while the auctioneers returned the said properties, they took possession of the 1<sup>st</sup> applicant's motor vehicle registration number KCK 242Y on the premise that the said vehicle would act as security for payment of the decretal amount. It was contended by the deponent that the proclamation was irregular since the proclamation notice was never served upon the directors of the 1<sup>st</sup> applicant or delivered to its registered offices.

6. The deponent finally stated that in view of the foregoing circumstances, it would only be fair for this court to grant an order for stay of execution in addition to ordering the release of the above motor vehicle and a refund of the Kshs.200,000/ paid to the respondent's auctioneers by the 1<sup>st</sup> applicant.
7. The respondent put in a replying affidavit to challenge the Motion, in which she disputed the averments made in the application and supporting affidavit concerning the disappearance of the lower court file; instead, the respondent contended that the applicants failed to prosecute their application for stay before the trial court, causing the same to be stood over generally.
8. The respondent maintained that the proclamation process was undertaken by the book and that service of the proclamation notice was effected prior to the attachment.
9. It was the respondent's contention that the applicants have failed to satisfy the principles on granting a stay of execution, more so, the fact that they have failed to demonstrate the substantial loss that they stand to suffer. In this respect, the respondent stated that she is in a position to repay the decretal sum in the event of a successful appeal.
10. In rejoinder, *John Nyaga Thambu* a director of the 1<sup>st</sup> applicant, swore a further affidavit through which he reiterated that he was never served with a proclamation notice. The deponent restated the facts deponed in the supporting affidavit save to add that the irregular attachment of motor vehicle registration number KCK 242Y caused the 1<sup>st</sup> applicant to suffer financial losses since the vehicle was a major income earner to the 1<sup>st</sup> applicant and a source of employment to its drivers.
11. The Motion was dispensed with through oral arguments. *Mr. Otieno* being the advocate for the applicants essentially reaffirmed the application and its respective supporting affidavits. The advocate went on to submit that unless an order for stay is granted, the motor vehicle in question will continue to waste away.
12. In his reply submissions, *Mr. Waiganjo* counsel for the respondent echoed the facts portrayed in the replying affidavit and argued that execution is a lawful process and in the present instance, the applicants at no point sought to cross examine the auctioneer who attached the subject motor vehicle, neither have they challenged the respondent's inability to refund the decretal amount should the appeal succeed. The advocate concluded with the submission that should this court order the release of the subject motor vehicle, then the applicants should be made to pay auctioneer charges.
13. I have carefully considered the grounds set out on the face of the Motion and the affidavits in support thereof. I have also considered the replying affidavit in opposition thereto as well as the rival oral arguments brought forth by the respective counsels.
14. It is well established that the only substantive order being sought at this stage is that for a stay of execution, keeping in mind that the applicants brought evidence to show that partial execution had been undertaken. That being the case, the relevant provision is **Order 42, Rule 6 (2) of the Civil Procedure Rules** which sets out the conditions to be met by the applicant in order for this court to grant an order for stay of execution.
15. The first condition relates to whether the application has been brought without unreasonable delay. The record shows that the judgment being challenged was delivered on 28<sup>th</sup> March, 2019 while the Motion was lodged on 14<sup>th</sup> November, 2019. It is not disputed that the applicant had previously filed a similar application with the lower court though I am uncertain as to whether the said application was heard and determined. Suffice it to say that while I noted a delay in bringing the present application, in my view, the same has been sufficiently explained.
16. I now turn to the second condition on substantial loss which is deemed as the cornerstone of any application seeking an order for a stay of execution. This was articulated in **Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) 1 KAR 1018** in the following manner:

***“Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.”***
17. Upon perusal of the application and relevant affidavits, I noted that the applicants largely rode on the argument that the respondent is keen on strong-arming the applicants to pay the decretal amount irrespective of the fact that there is an appeal against the judgment giving rise to the decree. Further to this, the further affidavit mentioned that the 1<sup>st</sup> applicant stands to incur huge losses while the subject motor vehicle is in storage with the auctioneers.
18. I also noted the deponent states in his affidavit that the 1<sup>st</sup> applicant's business and contracts of service with its clients continues to bear the brunt of detainment of the subject motor vehicle while storage charges continue to accrue on it.
19. Going by the above authority which I have cited, it is evident that substantial loss is that loss which ought to be prevented. The courts are alive to the fact that a successful party is lawfully entitled to the fruits of his or her judgment, as is the case herein.
20. Suffice it to say that it is not disputed that the applicants paid the sum of Kshs.200,000/ to the respondent's auctioneers, neither is it controverted that the said auctioneers are still holding the subject motor vehicle which, according to the documentation annexed to the further affidavit filed on behalf of the 1<sup>st</sup> applicant is shown to be a source of income and employment for the 1<sup>st</sup> applicant.
21. While I find that the question to do with whether or not the proclamation was regular is debatable, I am persuaded for the above reasons that the applicants have demonstrated that they stand to suffer some degree of substantial loss. Might I add that substantial loss may include

but is not restricted to showing another party's inability to refund the decretal sum.

22. This brings me to the third condition on the provision of security. Though the applicants did not state their position on this in their application, their advocate on record submitted that they would be willing to furnish security. The respondent did not offer any proposals in this respect.

23. In the end, I will allow the Motion and make the following orders consequently:

- a) **There shall be an order for stay of execution of the judgment delivered on 28<sup>th</sup> March, 2019 on the condition that the applicants do deposit the decretal sum in an interest earning account to be opened in the joint names of the parties' respective advocates within 30 days from this day, failing which the order for stay shall automatically lapse.**
- b) **Upon Depositing the decretal sum as ordered in (a) above, the applicant's motor vehicle KCK 242Y Toyota Fielder station wagon currently in possession of the M/S Chador Auctioneers be released unconditionally.**
- c) **The kshs. 200,000/= paid to M/S Chador Auctioneers be held as security for storage and Auctioneers charges for the time being.**
- d) **The Auctioneers charges to be agreed upon by the parties failing which he should file his bill for taxation.**
- e) **Parties to appear before the court to argue on the issue of who between them should meet the Auctioneer's charges.**
- f) **Costs of the application to abide the outcome of the appeal.**

**Dated, Signed and Delivered at Nairobi this 13<sup>th</sup> day of February, 2020.**

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**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the 1<sup>st</sup> and 2<sup>nd</sup> Appellants/Applicants

..... for the Respondent