



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 126 OF 2019

JOBU MUTHIGANIAPPELLANT/APPLICANT

-VS-

SHADRACK MACHARIA NDEKERE1ST RESPONDENT

MBAABU JACON JULIUS2ND RESPONDENT

RULING

1. This matter relates to the Notice of Motion dated 14/10/2019 brought pursuant to **Order 42 Rule 6 of the Civil Procedure Rules, Section 1A, 1B, 3 and 3A of the Civil Procedure Act CAP 21 Laws of Kenya** and all other enabling provisions of the law. The applicant seeks among other orders for stay of execution pending appeal; temporary injunction restraining the 1st respondent from repossessing, selling, modifying, transferring, hiring, charging, disposing or any other dealing with M/V KCA 946W pending the hearing and determination of this appeal; as well as placement of M/V KCA 946W in custody of this honorable court or Meru Police Station.

2. The grounds upon which the application is grounded upon are set out in the body of the Application and the supporting and supplementary affidavit of Jobu Muthigani sworn on 14/10/2019 and 5/11/2019 respectively. It is contended that the appellant having been aggrieved by the decision delivered on 26/9/2019 in Maua CMCC Civil Case No. 62 of 2018 filed this appeal. There was a fourteen (14) days temporary stay of execution which the 1st respondent manipulated and took the suit motor vehicle from Maua Police Station. The Applicant averred that in order to maintain the substance of the suit the Motor vehicle in question should be kept in custody of the court. If the orders sought are not granted the appellant will suffer substantial loss as the respondents will execute the judgment/decreed affecting his right to appeal.

3. This matter was canvassed of written submissions. The appellant submitted that danger lies on the appellant to suffer irreparable loss if orders sought are not granted. Since the 1st respondent has shown that he is not a trustworthy person for he has defied court orders repeatedly. Furthermore, the 1st respondent has depicted tendencies of secretly and illegally dealing with the suit m/v and therefore, the m/v should be placed in custody pending the hearing and determination of the appeal. He relied on the **Osumo Apima Nyaundi v Charles Isaboke Onyancha Kibondori & 3 others [1996] eKLR** in which it was held that property in a motor vehicle passes to the purchaser upon sale and delivery the same to the purchaser.

4. The 1st Respondent submitted that the Appellant has not met the requirements stated under **Order 42 Rule 6 of the Civil Procedure Rules**. He stated that he has not disobeyed any court order for no evidence has been adduced to show that the 1st Respondent was served with the stay orders of the lower court. Besides the said order seems to have been issued in a court file that is totally different from this one neither does it state what is being stayed or the coram present. Therefore, it is not a proper court order. That the appellant has no interest in the suit m/v as his main interest is to buy time so that he does not pay the decretal amount. He relied on **G. N. Muema P/A (Sic) Mt View Maternity & Nursing Home v Miriam Maalim Bishar & another [2018] eKLR** where the court ordered for security to be provided before granting the stay pending appeal and **Francis Kakeu Muunda v Josephine Mulinge Kiluu & another [2019] eKLR** where security in the form of Ksh. 361,935/- was ordered to be within 30 days as a pre-condition to orders of stay.

5. The issue for determination before the court is ***whether the application is merited.***

6. **Order 42 Rule 6 (2) of the Civil Procedure Rules** lays down the conditions an applicant needs to meet as:

“(2) No order for stay of execution shall be made under subrule (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.”

An order for stay of execution is a discretionary remedy to be exercised by the court judiciously and the court has to balance the interests of the applicant and those of the respondent and to ensure that the conditions provided for under **Order 42 Rule 6 (2) of the Civil Procedure Rules** are satisfied.

The judgment which the appellant seeks to appeal against was delivered on 20th September 2019 and the Applicant filed the Application for stay on 14th October 2019. This was within a span of less than one month and this court finds that there was no delay in bringing the application.

7. On whether the Applicant has proved that he will suffer substantial loss if the orders sought are not granted the Trial Magistrate determined that the Applicant paid Ksh. 100,000/- as part payment for Motor vehicle registration KCA 946 W Subaru to the 1st Respondent. He was to pay the balance of the purchase price i.e Kshs. 300,000/= within the next 2 months from 12th January 2018. The Trial Magistrate determined that the Applicant had not paid the balance of the purchase price and that the title of the vehicle had to passed to him to enable him pass the same to a 3rd party. From the agreement for the sale of Motor Vehicle it appears that having breached the contract between him and the 1st Respondent he was the one liable to pay damages to the 1st Respondent and therefore, he cannot be said to be likely to suffer substantial loss. He has not proved that he will suffer substantial loss.

8. As to whether the Applicant has provided Security as required under Order 42 Rule 6 (b) of the Civil Procedure Rules. I have perused the Affidavit sworn on 14th October 2019 by the Applicant and there is no offer for security. In the Affidavit sworn on 5th November 2019 the Applicant averred that the 1st Respondent had his Ksh. 100,000/= which can stand as security and that the Motor vehicle should remain in custody of the police. In essence, the Applicant admits that although he paid only Ksh. 100,000/- for a motor vehicle worth Ksh 400,000/=, the 1st Respondent should surrender the same so that it is given to the 2nd Respondent to whom he had sold the motor vehicle. The Applicant's terms of providing security are not acceptable to this court and therefore his application for stay fails. The Applicant received Kshs. 600,000/- from the 2nd Respondent and he cannot offer Ksh. 100,000/- which he paid to the 1st Respondent as security for stay of execution where the 2nd Respondent is the decree holder.

9. Whether the Applicant has satisfied the court that he is entitled to an order of Temporary Injunction as in prayer 3 the Applicant was required to prove that he has a *prima facie* case with probability of success, irreparable damage, and balance of convenience when court is in doubt. See ***Giella v Cassman Brown and Co Ltd [1973] E.A 360.*** The grounds upon which the appellant has relied to support his claim does not meet the required threshold for which temporary injunction can be granted. The claim herein, arose out of a contractual relationship and the loss can be quantified.

10. The Application dated 14th October 2019 is therefore dismissed with costs to the 1st Respondent.

HON A. ONG'INJO

JUDGE

RULING DELIVERED, DATED AND SIGNED IN COURT ON 6TH DAY OF FEBRUARY 2020.

In the presence of :

C/A: Kinoti :-

Appellant/Applicant:- Mr Thangicia Advocate – No appearance

1st Respondent:- Mr Riungu Advocate holding brief for Ms Kithaka for 1st Respondent .

2nd Respondent:-N/A

HON A. ONG'INJO

JUDGE