



**REPUBLIC OF KENYA**

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

**[Coram: A. C. Mrima, J.]**

**CIVIL APPEAL NO. 142 OF 2019**

**PETER OMONDI GOGO.....APPLICANT/APPELLANT**

**-VERSUS-**

**SAIRAM SUPERMARKET LIMITED.....RESPONDENT**

**RULING**

1. This ruling is in respect of two applications. The first application is the Notice of Motion dated and evenly filed on 29/11/2019. It sought for a stay of execution of the orders issued in *Rongo Senior Resident Magistrates Court Civil Suit No. 260 of 2019 Sairam Supermarket Limited vs. Peter Omondi Gogo* vide the ruling delivered on 30/10/2019. The application also sought leave to file an appeal out of time. The other application is also Notice of Motion. It is dated 16/01/2020 and filed on 17/01/2020. The application sought to avail a security in support of the initial application.

2. Both applications were strenuously opposed. To that end, a Director of the Respondent swore a Replying Affidavit on 11/12/2019 which was filed on 16/12/2019.

3. The applications were consolidated and heard together by an order of this Court upon a proposal by the parties. Both parties filed their respective submissions. The Applicant appeared in person whereas the Respondent was represented by Counsel.

4. This Court did not have the advantage of perusing the record of the lower court as the file was yet to be availed. However, from the record before Court the matter seems not to have had a complex background. I will briefly reconstruct the background. In doing so, I will refer to the Notice of Motion dated and evenly filed on 29/11/2019 as '**the stay application**', the Notice of Motion dated 16/01/2020 and filed on 17/01/2020 as '**the security application**' and *Rongo Senior Resident Magistrates Court Civil Suit No. 260 of 2019 Sairam Supermarket Limited vs. Peter Omondi Gogo* to as '**the suit**'.

5. The Respondent filed the suit alongside an interlocutory application for attachment before judgment. The suit was for recovery of Kshs. 297,500/=. The court allowed the attachment application and the Applicant's goods together with the Motor Vehicle registration number KCD 019Q which carried the goods were attached. The Applicant applied to stay the attachment. A third party also filed objection proceedings. The three applications were heard together and the court rendered a ruling on 30/10/2019 where the court ordered the Applicant to deposit the sum of Kshs. 297,500/= as security pending the determination of the suit otherwise the attachment to remain *in situ*. That is the ruling which prompted this application.

6. The Applicant contended that he operated a shop which was his sole source of income and livelihood. He posited that as a result of the court order all his goods were attached and he has since then been rendered destitute. He further posited that some of the goods were perishables. The Applicant offered an alternative security for the release of the goods and the motor vehicle.

7. The Respondent vehemently opposed any attempt to substitute the security. It submitted that the Applicant ought to deposit the sums of money as ordered otherwise the attachment to remain in place. The Respondent further submitted that the Applicant did not deny indebtedness to it and that he did not demonstrate how he stood to suffer any loss. The Respondent also submitted that the security intended to be substituted for the release of the goods and the motor vehicle is owned by a third party and as such not appropriate in the circumstances of this case. The Respondent referred to several decisions in support of its submissions.

8. I have carefully considered the application and the submissions as well as the judicial decisions before me. **Order 42 Rule 6(2)** of the **Civil Procedure Rules** gives the conditions precedent to granting a stay of execution order. The conditions are that the Applicant must demonstrate that it will suffer substantial loss unless the order is made, the application is made without any unreasonable delay and the Applicant offers security for the due performance of the decree.

9. The Applicant deponed that he operated a merchandise shop which was his only source of income. He also deponed that since the

attachment he has no other source of income and his life is in jeopardy. To him, he continues to suffer substantial loss.

10. On the other hand, the Respondent's position is that the Applicant has not denied the debt. As such, there can be no loss in settling what is lawfully due.

11. The suit is yet to be heard and determined. As said, I am not possessed of the lower court record and as such not able to ascertain the nature of pleadings filed by the Applicant. I cannot therefore certainly find that the suit was admitted. Further, from the record it appears that the objection application was struck out for want of compliance with **Order 9 Rule 5** of the **Civil Procedure Rules**.

12. There is no evidence to otherwise show that the Applicant has other means of livelihood. Given that the Applicant's only source of livelihood has been curtailed then his right to life is threatened (**Article 26** of the **Constitution**). Equally, his right to inherent dignity and the right to have that dignity respected and protected is equally threatened (**Article 28** of the **Constitution**).

13. From the foregone, I find and hold that the Applicant has demonstrated that he stands to suffer substantial loss.

14. I have no difficulty in finding that there was no delay in filing the application.

15. On security, the goods and the motor vehicle are currently held as such. The fact that there are perishable goods in the motor vehicle is not denied. If so, will the said goods be of any value even if the Court eventually decrees a sale? I do not think so. A security must be able to stand in the gap between defined events. Short of that, a security may be insufficient.

16. I am aware that the objection proceedings were not determined on merit but on a technicality. That means the proceedings may be revisited within the contours pointed out by the court. Therefore, the possibility of the release of the motor vehicle to the Objector on the determination of the objection proceedings is not that remote. If that happens and coupled with the perishable nature of the goods, then one wonders whether there shall be any security in place. Of course the position would be different had the objection proceedings been fully determined in favour of the Respondent.

17. I am persuaded that this is a case where sufficient security ought to issue. At the moment, that security cannot be confirmed to be the goods and the motor vehicle. To me, the current security must be substituted in order to secure the right of the Respondent to recover its money in the event the suit succeeds.

18. The Respondent has expressed its unwillingness to the proposed security. The Applicant proposes to substitute the current security with a parcel of land known as **Kamagambo/Kongudi/2966**. The land has been valued at Kshs. 1,436,000/= and is registered in the name of a third party. I do not find any harm in allowing the land to be used as security as long as the owner creates a legal charge over it in favour of the Respondent.

19. As to whether the Applicant ought to be granted leave to appeal out of time, I do not find any impediment to that. Indeed, the Respondent did not oppose the grant of such leave.

20. Having considered the applications, I hereby make the following orders: -

**(a) The Applicant is hereby granted leave to file and serve a Memorandum of Appeal within 14 days of this ruling.**

**(b) There be a stay of execution of the ruling dated 30/10/2019 and the resultant orders in Rongo SRMCC No. 260 of 2019 pending the filing, hearing and determination of the intended appeal on condition that the Applicant files and serves the Memorandum of Appeal in (a) above and further that a legal charge in favour of the Respondent herein over the parcel of land known as Kamagambo/Kongudi/2966 is created and registered.**

**(c) Costs to the Respondent.**

21. Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 18<sup>th</sup> day of February, 2020.**

**A. C. MRIMA**

**JUDGE**

**Ruling delivered in open court and in the presence of: -**

**Peter Omondi Gogo** the Applicant in person.

**Mr. Mainga**, Counsel instructed by the firm of Messrs. Samuel N Mainga & Company Advocates for the Respondent.

**Evelyne Nyauke** – Court Assistant