



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL APPEAL NO. 41 OF 2019

TAHMEED EXPRESS LIMITED.....APPELLANT/APPLICANT

-VERSUS-

JOSEPHINE NDANU (*Suing as the Legal*

Representative of the estate of JULIAS MUOKI).....**1ST RESPONDENT**

RANDA COACH LTD.....**2ND RESPONDENT**

RULING

1. The application for determination is dated 17/05/2019 and was filed under certificate of urgency. It is brought under sections 1A, 1B & 3A of the Civil Procedure Act, Order 42 Rule 6(1), Order 50 Rule 4 of the Civil Procedure Rules 2010 and all other enabling provisions of the law. It seeks.

a) **That** the Honorable court be pleased to grant an extension of the interim stay orders granted in the ruling delivered before Hon. Mayamba C.A (P.M) on the 18th of April 2019 in Kilungu SRMCC No.12 of 2016 pending the hearing and determination of this application inter-parties until its final conclusion.

b) **That** and /or in the alternative, the Honorable court be pleased to maintain the *status quo* pending the hearing and determination of this application inter-parties.

c) **That** the Honorable court be pleased to grant an extension of the interim stay orders granted in the ruling issued by Hon. Mayamba C.A (PM) on the 18th of April in Kilungu SRMCC No.12 of 2016 pending the hearing and determination of the substantive appeal filed herein.

d) **That** costs be borne by the 1st Respondent.

2. The application is supported by the grounds on its face and the supporting affidavit of Nassoro Khalfan Said a director of the Appellant/Applicant sworn on 17th May, 2019

3. The principal ground is that objection proceedings before the trial court were struck out for being *sub judice* after the decree holder's counsel misdirected the trial court that there was a similar application before this court. He deposed that the substantive issue of whether the objectors' assets were wrongfully proclaimed and/or attached was not addressed at all.

4. The application is opposed through a replying affidavit sworn on 21/05/2019 by the 1st Respondent. The gist of the opposition is that the application is *sub judice* because there is a similar application in this court to *wit* Misc Suit No 48 of 2019 in which stay orders were issued.

5. The application was canvassed by way of written submissions.

6. The Applicant submits that the court should consider the evidence on record in determining whether the application is merited. It cites **Nairobi HCCC No. 969 of 1990; Precast Portal Structures –vs- Kenya Pencil Company Ltd & 2 others (1993) eKLR** where it was stated that;

“The burden is on the objector to prove and establish his right to have the attached property released from the attachment.

On the evidential material before the court, a release from attachment may be made if the court is satisfied.

(1) **That** the property was not, when attached, held by the judgment-debtor for himself, or by some other person in trust for the judgment-debtor; or

(2) **That** the objector holds that property on his own account”

7. The Applicant submits that the certificates of incorporation of the two companies show that they are distinct and separate entities and the copies of CR12 show that the directorship is not the same. Further, it submits that from the various log books attached, there is no proof of transfer of ownership from the judgment debtor to the objector and that at all material time relevant to the suit; the respective buses belonged to the objector. It relies *inter alia* on **Civil Appeal No. 73 of 2002; Securicor Kenya Ltd –vs- Kyumba Holdings** where the Court of Appeal held that;

“Our holding finds support in the decision of *Osapil –vs- Kaddy (2000) EALA 187* in which it was held by the Court of Appeal of Uganda that a registration card or logbook was only *prima facie* evidence of title to a motor vehicle and the person whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise. The Appellant had indeed proved otherwise.”

8. It also submits that for temporary orders pending appeal to be granted, an Applicant must satisfy the following conditions laid out in **Giella –vs- Cassman Brown & Co. (1973) EA 358**;

- a) Prima facie case with high chances of success.
- b) That he stands to suffer irreparable damage.
- c) If the court is in doubt, it will determine the matter on a balance of convenience.

9. The Applicant submits that the case has overwhelming chances of success and will suffer irreparable loss as an objector if the appeal succeeds and the interim orders are not granted because a recovery suit will have to be initiated.

10. In opposing the application, the Respondent cites section 6 of the Civil Procedure Act, and submits that the application is *sub judice* as it is similar to Makeni High Court Misc Suit No. 48 of 2019. It relies on **Republic –vs –Registrar of Societies-Kenya & 2 others ex parte Moses Kirima & 2 others (2017) eKLR** where the Court held that;

“Therefore for the principle to apply, certain conditions precedent must be shown to exist; First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit. Proceedings must be between the same parties or between parties under whom they or any of them claim, litigating under the same title and such suit proceeding must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed...”

11. The Respondent submits that the parties in the two suits are similar, that the subject matter is the same and relief being sought is also the same; She has also cited *inter alia* the case of **Thika Min Hydro Co. Ltd –vs- Josphat Karu Ndwiga (2013) eKLR** where the Court opined that;

“It is not the form in which the suit is framed that determines whether it is *sub judice*. Rather, it is the substance of the suit and looking at the pleading in both cases.”

12. She submits that the Applicant is shopping and hopping between different courts until it gets the redress it desires and the only remedy to quench this habit is to strike out this application.

13. She also submits that she will suffer prejudice if the application is allowed as she has a young family and the deceased was their sole breadwinner. She contends that beneficiaries of the deceased should be left to enjoy the fruits of the judgment and that justice demands that litigation must come to an end.

Analysis and determination

14. Having considered the application, replying affidavit, annexures and rival submissions, it is my considered view that the only issue for determination is whether the orders sought are merited. I will however first highlight the chronology of this matter.

15. The Respondent’s husband perished in a road traffic accident in 2014 and she successfully sued for damages in Kilungu SRMCC No. 12 of 2016 (*primary suit*). After the judgment and decree, she commenced execution but it was interrupted by objection proceedings. The objector’s prayers in the application were as follows;

a) **That** the application be certified as urgent and service in the first instance be dispensed with.

b) **That** the Honourable court do grant stay of execution of the judgment and decree pending the hearing and determination of the application *inter-parties*.

c) **That** the warrants of attachment and proclamation levied against motor vehicle registration numbers KBN 399F, KBP 928E, KBP 927E, KBN 399F and KCE 969X respectively be hereby raised and lifted.

d) **That** costs of this application be borne by the plaintiff.

16. The objector did not get stay orders from the duty Magistrate pending the hearing and determination of the objection proceedings and that prompted it to move this court through Misc Application No. 48 of 2019 (*the misc application*) where the prayers sought were;

a) **That** the Honorable court do hereby grant an interim stay of execution of the judgment and decree in Kilungu SRMCC No. 12 of 2016; Josephine Ndanu –vs- Randa Coach pending the hearing and determination of the objection proceedings filed and dated 6th February 2019 until its final determination.

b) **That** costs be borne by the plaintiff/decree holder.

17. The misc application was dismissed on 07/06/2019 for want of procedure and this court observed as follows;

“11. Up to this point, it is not clear as to what happened in the Kilungu SRM’s case on 21st February 2019 when the application dated 16/02/2019 was to come for hearing. The orders of temporary stay issued herein did not stay the objection proceedings. (emphasis mine)

12. Be it as it may, I find the Applicant’s conduct to be an abuse of the due process. The proceedings in the subject matter are before the Kilungu SRM’s court and the objection was rightfully filed before the said court. If the Applicant was dissatisfied with the denial of an interim stay order by the learned trial Magistrate, the proper step would be to challenge the refusal by way of review or appeal but not filing a fresh and similar application before this court.”

18. The objection proceedings were also dismissed and the learned trial Magistrate held that the application was similar to the misc application filed in this court hence *sub judice*. The ruling is undated (*Exh NKS-6*) but from the prayers in the current application, it was delivered on 18/04/2019. The specific orders were as follows;

a) *The application is struck out on account of being sub-judice.*

b) *The Applicant is granted a stay of sale of the proclaimed buses for a period of 30 days to allow him to put in order the application in the High court.*

c) *The stay is not open to any extension in this court upon expiry.*

d) *Costs of the application shall be met by the Applicant.*

19. At that juncture, there were no objection proceedings in place and contrary to the Respondent’s submissions, the stay orders issued in the misc application had been extinguished after its dismissal. Further, the stay order issued in the trial court’s ruling of 18/04/2019 was quickly fading with no prospects of extension. On 17/05/2019, just before the lapse of the 30 days period, the objector filed this appeal together with the application now under consideration.

20. In the memorandum of appeal, the objector is challenging the trial court’s decision to strike out the objection proceedings on the basis of being *sub judice*. This court has now been called upon to determine whether the prayers sought in the current application are merited.

21. Despite all the circus that has been created by the Appellant/Applicant in this matter, it has all through vehemently opposed the warrants of attachment and proclamation levied against motor vehicles registration numbers KBN 399F, KBP 928E, KBP 927E, KBN 399F and KCE 969X.

22. As to whether the current application is *sub judice*, the misc application was dismissed for want of procedure and is therefore no longer pending before this court. Further, the Applicant had sought stay orders in the misc application but in the current one, it seeks extension of stay orders which were already in place at the time of filing the application. It is therefore, my considered view that the application is not *sub judice*.

23. After considering the totality of the material on record and without prejudice to the pending appeal, it is evident that the substantive issue, of whether the proclamation and attachment were proper, has never been addressed. Accordingly, I find that the interest of justice tilts in favour of maintaining the *status quo* until the appeal is heard and determined.

24. I therefore allow the application and order for maintenance of the status quo pending the hearing and determination of this appeal.

25. I further direct that this appeal be fast tracked to avoid further delays in the matter before the trial court.

26. Costs in the cause.

Delivered, signed & dated this 13th day of February 2020, in open court at Makueni.

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H. I. Ong'udi

Judge