



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 561 OF 2019

LUNGA LUNGA TRANSPORTERS LIMITED.....APPLICANT

VERSUS

DIONISIO NYAGAH NGARI

T/A THE VINEYARD FOOD SERVICES.....RESPONDENT

RULING

1. The application dated 30th September 2019 seeks orders **that the court be pleased to stay execution of the orders of Hon. K. I. Orege issued in CMCC No. 5305 of 2019 on 26th September, 2019 pending the hearing of the Appeal filed by the Appellant.**

2. It is stated in the grounds and the affidavit in support of the application and the supplementary affidavit that on 26th September, 2019, the lower court allowed an application by the Respondent herein dated 19th July, 2019 which sought orders that the Applicant, Lunga Lunga Transporter Ltd and/or its agent be compelled by way of a mandatory injunction to release the Respondent's goods which had been distrained for rent by Upstate Kenya Auctioneers. The Applicant is dissatisfied with the said ruling and has filed the Appeal herein. It is contended that the Respondent had admitted rent arrears and undertook to pay the same by monthly instalments.

3. It is averred that the Respondent is a man of straw and if the attached goods are released, the Applicant may not be able to recover the rent arrears in the sum of Ksh.580,000/= and an outstanding electricity bill of Ksh.66,706/= as well as the auctioneers and storage charges. That the Appeal has high chances of success and stands to be rendered nugatory. It is further stated that the Appeal was filed without unreasonable delay.

4. In the replying affidavit filed in opposition to the application, it is stated that the Applicant has not satisfied the conditions for grant of stay orders pending the hearing and determination of the Appeal. That the goods in question stand the risk of being damaged or tampered with while in the storage yard. That the goods consist of items used by the Respondent at his business of a food café and were unlawfully attached without notice. It is further deponed that the tenancy relationship had come to an end following the sale and handover of the premises to another entity.

5. It is denied that the Respondent is a man of straw. It is asserted that the Respondent runs a business, owns properties and carries out farming. The Respondent urged the court to release the distrained goods to him to enable him continue with his business. It is further stated that the Appeal is not arguable and that if stay orders are granted, the Applicant should deposit the sum of Ksh.2,000,000/= as security for the distrained goods.

6. The parties agreed to canvass the application by way of written submissions. I have considered the submissions filed by the Applicant. The Respondent did not file any.

7. 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.”

8. The ruling of the lower court was delivered on 26th September, 2019. The application at hand was filed on 4th October, 2019. The application was filed timeously.

9. As stated by the Court of Appeal in the case of **Kenya Shell Limited vs. Kibiru (1986) KLR:**

“Substantial loss in its various forms, is the cornerstone of the jurisdictions for granting a stay. That is what has to be prevented.”

10. In the instant application, the Applicant’s position is that substantial loss will be suffered if the goods in question are released to the Respondent. The Respondent on the other hand has exhibited a copy of a motor vehicle log book to demonstrate that he is not a man of straw and also stated that he runs a business and is also a farmer. However, there can be difficulties in realizing the money. The Court of Appeal in the case of **Wangethi Mwangi v Hon. Amb. Chirau Ali Mwakere CA Nbi.353/2009** observed as follows:

“...there is possibility that the appellate court may either decline or reduce the awards considerably. In the event of the former there might be a long delay in recovering from the respondent the decretal sum as there are so many imponderables in the sale of the respondent’s land which forms the bulk of his assets. It is obvious therefore that in such a likely eventuality, the applicant might be greatly inconvenienced. The balance of convenience is definitely in favour of the applicants, we would think so.”

11. On the one hand we have the claim for rent arrears while in the other hand the ruling by the lower court has made orders for the release of the distrained goods. In this courts view, a deposit of security by the Respondent will serve to safeguard the Applicant’s Appeal in the event that the same is successful.

12. In the upshot, the orders that this court commends itself to make are that the Respondent do deposit the sum of Ksh.700,000/= in court or in a joint interest earning bank account in the names of the respective counsel for the parties or deposit security in court for the sum Ksh.1,000,000/= within 30 days from the date hereof. In default the application herein stands allowed with costs in cause.

Dated, signed and delivered at Nairobi this 5th day of March, 2020

B. THURANIRA JADEN

JUDGE