



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 383 OF 2019

CHRISTOPHER WEBALE WALUKELA.....1ST APPLICANT

CHARITY KABURA.....2ND APPLICANT

VERSUS

JAMADASS HIRE PURCHASE LTD.....RESPONDENT

RULING

1. The application dated 19th July, 2019 seeks the following orders:

- a. This honourable court be pleased to grant stay of execution of the decree dated 13th February, 2015, pending the hearing and determination of the appeal;**
- b. This honourable court be pleased to grant an order for stay of all proceedings in the chief magistrate's court pending the hearing and determination of the appeal herein.**
- c. The Plaintiff/Respondent be restrained from arresting and committing the Applicants to civil jail and**
- d. The costs of and incidental to this application do abide the result of the appeal herein.**

2. The application is predicated on the grounds stated in its body and the supporting affidavit sworn by the 1st Applicant. The genesis of the Applicants' grievance is an *ex parte* judgment entered against them by the lower court for the sum of Ksh.394,977/=. That an application by the Applicant for stay of execution on the grounds that they had not been properly served was dismissed by the lower court. That a subsequent application seeking a review of the judgment on the account that it had been obtained fraudulently through misrepresentation and that there was discovery of new evidence was dismissed on 18th June, 2020, hence the filing of the Appeal herein.

3. The Applicants' averred that their Appeal has high chances of success but stands to be rendered nugatory if their application is not allowed. The Applicants are willing to furnish security for the due performance of the decree.

4. In a replying affidavit filed in opposition to the application, it is stated that the suit proceeded *ex parte* after the Applicants who were duly served and filed their memorandum of Appearance and statement of Defence failed to attend court on the hearing date. That the Applicants' application to have the proceedings set aside and the judgment and other consequential orders set aside was denied on 22nd September, 2017 and no appeal was preferred against the ruling. That when the Notice to Show Cause was issued, the 1st Applicant was arrested and gave an undertaking to settle the decretal sum in installments. That thereafter the 1st Applicant failed to honour the orders for payment by instalments and failed to appear in court as required hence the issuance of the warrant of arrest.

5. The Applicants filed a further affidavit. It is stated that the 1st Applicant agreed to settle the decretal sum under duress due to the arrest and fear of detention. The Applicants reiterated the contents of their affidavit in support and denied that a warrant of arrest was issued for failure to attend court.

6. I have considered the application, the response to the same and the submissions filed by the respective counsel for the parties.

7. Under 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 impugned ruling was delivered on 18th June, 2019. The instant application was filed on 19th July, 2019. There was no unreasonable delay.

9. The Applicants face the threat of being arrested and committed to civil jail. There is no doubt that substantial loss will be suffered if there is no stay. The time served in prison cannot be reversed.

10. The Applicants have offered to furnish security for the due performance of the decree. To balance the competing interests of the parties herein, the application is allowed on condition that the decretal sum is deposited in a joint interest earning bank account of the counsels for the parties or in court within 30 days.

Dated, signed and delivered at Nairobi this 6th day of May, 2020

B. THURANIRA JADEN

JUDGE