



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 90 OF 2019

(CORAM: F. GIKONYO J.)

EXECUTIVE SUPER RIDES LIMITED.....APPELLANT

VERSUS

RAPHAEL P. MUGAMBI KIAMBI.....RESPONDENT

RULING

1. By an application dated 13th August 2019 expressed to be brought under Order 22 Rule 22 and Order 42 Rule 6 of the Civil Procedure Rules 2010, the applicant is seeking a stay of proceedings in **Meru Cmcc No. 228 of 2018** pending the hearing and determination of this Appeal.

2. The application was supported by the sworn affidavit of **Antony Wambugu** the general manager of applicant. He averred that they entered into a sale agreement with the Respondent for the sale and purchase of motor vehicle for Kshs 2,650,000/= . That the respondent breached the agreement and upon the applicant demanding the settlement it precipitated the suit. The appellant filed a notice of preliminary objection on the jurisdiction of the court to hear and determine the matter as it does not reside in Meru and being a corporation the suit ought to be instituted where it is based. The applicant's preliminary objection challenging the jurisdiction of the Court was dismissed vide the trial court's Ruling dated 16th July 2019.

3. The appellant avers that the trial court erred in failing to appreciate that the cause against the appellant violated the provisions of **Section 11 and 15 of the Civil Procedure Act**. That in the meantime unless a stay of the proceedings is granted, there is all likelihood that the Respondent will proceed to hear the suit at the subordinate court rendering the appeal nugatory.

4. The Respondent opposed the application vide Replying affidavit dated 24th September 2019. It was his averment that the application is untenable since the Ruling was delivered on 16/7/2019 and the memorandum of appeal was filed on 26/7/2019 after lapse of 30 days right of appeal. That the affidavit sworn by **Antony Wambugu** is scandalous, irregular and ought to be struck out as the appellant has not filed an authority as required by the law.

Submissions

5. On 7/11/2019 the court directed the parties to canvass the appeal through written submissions. The applicant submitted that considering where the transaction took place and where the applicant is located

the suit ought to have been instituted in Nairobi. That if a court lacks jurisdiction it cannot proceed to hear it. In this regard he cited the case of **Owners of the Motor Vessel Lillian “S” versus Caltex Oil Limited [1989] 1KLR 1 Kanti & Company Limited versus South British Insurance Co. Limited [1981] KLR 1, Director of Public Prosecutions versus Ahmed & Others [2016] 1 EA, Njagi versus Judges & Magistrate Vetting Board and another [2017] 3EA**. That in the circumstances of the case the appellant has demonstrated arguable points of appeal which would warrant grant the orders sought. He cited **Hashmukhal Virchand Shah & 2 others versus Investment 7 Mortgages Bank Limited [2014] eKLR**.

6. The Respondent submitted that the applicant has not shown the steps he has taken to bring the appeal. That it was using the application as a delay tactic to delay justice. That it has also not raised a prima facie case hence does not warrant orders for stay of proceedings. He cited the case of **Global Tours & Travels Limited: Hc Winding up cause No. 43 of 2000**.

ANALYSIS AND DETERMINATION

7. I have carefully considered the application before me as well as the rival submissions by the parties. This is essentially an application for stay of proceedings in **Meru Cmcc No. 228 of 2018** pending the hearing and determination of this appeal.

8. In **Kenya Wildlife Service v James Mutembei [2019] eKLR** I espoused stay of proceedings as opposed to stay of execution when I held as follows;

“Stay of proceeding should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore the test for stay of proceeding is high and stringent...”

9. Ringera J in the case of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** persuasively stated thus;

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously” (emphasis added)

10. The suit seeks for;

a. An order of permanent injunction restraining the defendant whether by its agents employees and/or any other person working under its instructions from repossessing, attaching and selling by public auction the plaintiffs motor vehicle registration Number KBG 553 Y TOYOTA HIACE

b. A Declaration that the defendants financial accommodation extended to the plaintiff vide agreement dated 2/5/2016 had been fully settled.

c. Cost and interest of the suit.

11. Without evaluating the potency or otherwise of the appeal, it is worth noting that, in disallowing the

preliminary objection, the trial court citing section 12 of the CPA found that

“...the subject chattel herein the motor vehicle KCG 553Y TOYOTA HIACE is movable and from the pleadings herein appears to ordinarily operate in Meru and under an imminent attachment by the defendant....”

12. I am aware that place of suing is determined by varied factors stated in the CPA including place where the defendant resides or works for gain or carries out business or where property is situated etc. Notably, the suit involves the protection of the movable chattel as well as the settlement of the outstanding consideration on sale of a motor vehicle. See sections 11 to 15 of the CPA. The two prayers are distinct and may ascribe to different territorial jurisdictions. In light of the matters disclosed, it will be ruthless act to stay proceedings on account of this interlocutory appeal.

13. In the upshot, the application dated 13th August 2019 fails in so far as it seeks to stay proceedings in the trial court for such act would only serve to prejudice the Respondent. The request for stay of proceedings is denied.

14. Costs of the application shall be borne by the applicant.

Signed at Meru this 30th day of September, 2020

F. GIKONYO

JUDGE

Dated signed and delivered at Meru this 1st Day of October, 2020

A. MABEYA

JUDGE