



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 111 OF 2019**

**JOHN NJOROGE GITANGU.....APPELLANT/APPLICANT**

**VERSUS**

**FANTASY AUCTIONEERS.....1<sup>ST</sup> RESPONDENT**

**LULU COURT MANAGEMENT TRUSTEES.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Notice of Motion dated 28<sup>th</sup> February, 2019 has been brought by the appellant/applicant. The same stands supported by the grounds set out on its face and the facts deponed to in the affidavit sworn by the applicant. The main prayer sought is an order for stay of execution pending an intended appeal against the ruling delivered by Honourable Gesora, learned Chief Magistrate delivered on 12<sup>th</sup> February, 2019 vide CMCC NO. 5598 OF 2018.
2. The applicant in his supporting affidavit deponed inter alia that he had previously lodged an application seeking for a stay of execution and a setting aside of the judgment entered in CMCC NO. 5598 OF 2018 but that the same was dismissed.
3. The applicant also deponed that he soon thereafter filed an application seeking a permanent injunctive order against the respondents and which application was similarly dismissed vide the ruling of 12<sup>th</sup> February, 2019.
4. The 1<sup>st</sup> respondent did not file any documents in opposition to the application. Nonetheless, *Mohamed Jeneby*, the Head of Operations of the 2<sup>nd</sup> respondent, swore a replying affidavit on behalf of the 2<sup>nd</sup> respondent.
5. In their respective oral arguments, *K'owade* counsel for the applicant and *Itemere* counsel for the 2<sup>nd</sup> respondent opted to rely on their respective averments and documents filed.
6. I have considered the grounds set out on the face of the Motion and the facts deponed in the supporting and opposing affidavits.
7. In determining whether or not to grant a stay of execution, I am guided by the principles stated under *Order 42, Rule 6 (2)* of the *Civil Procedure Rules* as hereunder:
  - a) *The application must be brought without unreasonable delay;***
  - b) *The applicant must demonstrate that substantial loss may result; and***
  - c) *Provision should be made for security.***
8. As concerns the first principle, I have noted that the application for stay was barely one (1) day after the delivery of the ruling. It is therefore apparent that the application has been timeously filed.
9. On the second principle the applicant communicated his apprehension arguing that unless a stay is granted, the respondents will proceed to attach and dispose of his goods, thus rendering the appeal nugatory.
10. The applicant also stated that the execution has already begun and will continue if the order sought is not granted.
11. It is the 2<sup>nd</sup> respondent's argument that by virtue of the impugned ruling, the 1<sup>st</sup> respondent was permitted to recover the monies owing from the applicant.

12. In *Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR* the Court of Appeal stated in part as follows:

***“Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.”***

13. In the present instance, no sufficient reasons have been presented by the applicant in persuading this court to grant the order for stay. In the premises, I have no basis on which to find that the applicant will suffer substantial loss if any.

14. Having failed to establish the substantial loss he would suffer if he is denied the order, then the order cannot be granted.

15. The third principle is dependent on the outcome of the decision on the second principle. The applicant having failed to show the substantial loss he would suffer, I feel not obliged to consider the third principle.

16. In the end, the Motion is found to be lacking in merit, it is hereby dismissed with costs to the respondents.

**Dated, Signed and Delivered at Nairobi this 2<sup>nd</sup> day of May, 2019.**

.....

**J.K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant/Applicant

..... for the 1<sup>st</sup> Respondent

..... for the 2<sup>nd</sup> Respondent