



**REPUBLIC OF KENYA**

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

**MISC. APPLICATION NO. 48 OF 2019**

**TAHMEED EXPRESS LIMITED..... APPLICANT**

**-VERSUS-**

**JOSEPHINE NDANU (Suing as the Legal Representative of the estate of)**

**JULIAS MUOKI.....RESPONDENT**

**AND**

**RANDA COACH LTD.....JUDGMENT DEBTOR**

**RULING**

1. The application dated 07/02/2019 was filed under certificate of urgency. It is brought under Sections 3A of the Civil Procedure Act, Order 22 Rule 51&52 of the Civil Procedure Rules 2010, Article 165 (1)(a) & (e) of the Constitution of Kenya and all other enabling provisions of the law, seeking the following orders: -

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 6<sup>th</sup> February 2019 until its final determination.

b) **THAT** costs be borne by the plaintiff/decreed holder.

2. The application is supported by the grounds on the face of it and the supporting affidavit of Nassoro Khalfan Said sworn on the same date.

3. The principal ground is that the execution of the decree is intended to be levied on its assets (*motor vehicles*) yet it has never been a party in the proceedings. That the said assets have never been registered in the name of the judgment debtor. The Applicant also deposes that it had applied for stay orders in the objection proceedings before the trial court but interim stay orders were not granted.

4. The application is opposed through a replying affidavit sworn on 25/02/2019 by the Respondent. She deposes that the application is *res judicata* because a similar application dated 18/05/2018 had been filed and dismissed *vide* a ruling delivered on 23/01/2019.

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

6. The Applicant's counsel has generally submitted on why the learned trial magistrate erred by failing to grant the interim stay orders. On the other hand, the Respondent has through his counsel challenged this application saying its *subjudice* and *resjudicata*.

7. I have considered the application, grounds affidavits and submissions and I find one issue falling for determination. ***The issue is whether this application is properly before this court.*** The parties herein are parties in **Kilungu SRMCC No. 12/2016 (Josephine Ndanu v- Randa Coach)**. The Applicant herein Tahmeed Express Limited was enjoined in the proceedings by virtue of an objection it filed before the said court.

8. Having filed the said notice, it filed an application seeking stay of execution against the judgment and decree. Further that the warrants of attachment in respect of named vehicles be lifted. The application is dated 6<sup>th</sup> February, 2019. The duty magistrate certified the application as urgent and gave a hearing date for 21<sup>st</sup> February, 2019. No interim orders of stay were granted.

9. The Applicant then came and filed this application dated 7<sup>th</sup> February, 2019 before this court, seeking similar orders of stay of the judgment and decree of the Kilungu SRM's case No. 12 of 2016.

10. This court on 7<sup>th</sup> February, 2019 (exparte) granted temporary stay of execution pending issuance of directions on 13<sup>th</sup> February, 2019. Directions were then issued with the interim orders being extended.

11. Up to this point, it is not clear as to what happened in the Kilungu SRM's case on 21<sup>st</sup> 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.

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.

13. There is no review application or appeal pending before this court that would be the basis of issuance of the orders sought. The issue of *resjudicata* and *subjudice* does not even arise here. The application is a non-starter as it has no footing to stand on.

14. Reference has been made to an application **Hc. Misc. Appl. No. 57 of 2017 between Randa Coach Limited (Applicant) vs- Josephine Ndanu Matee (Respondent)**. The same was for interim stay of execution. It was heard and dismissed. I do note that the Applicant herein (Tahmeed Express Ltd) was not a party to the said application. It does not therefore have any bearing in the present matter.

15. After analyzing all the above, I find that the application dated 7<sup>th</sup> February, 2019 was not properly filed before this court. Counsel knows how one should move the court when dissatisfied with an order of a lower court. That was not done in this case.

16. I therefore find no merit in this application which I dismiss with costs.

Orders accordingly.

**DELIVERED, SIGNED AND DATED THIS 7<sup>TH</sup> DAY OF JUNE, 2019 IN OPEN COURT AT MAKUENI.**

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**H. I ONG'UDI**

**JUDGE**