



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 638 OF 2012

GITONGA KITHINJI MURIUKI.....APPELLANT/APPLICANT

-VERSUS-

KINGS CAPITAL LIMITED.....1ST RESPONDENT

STEPHEN KITHINJI MUHAH.....2ND RESPONDENT

ROBERT WAWERU T/A

ANTIQUA AUCTIONEERS.....3RD RESPONDENT

RULING

1. This ruling is precipitated by the Notice of Motion dated 18th January, 2018 brought by the appellant/applicant herein. The Motion is supported by the grounds set out on its face and the facts deponed in the affidavit sworn by the applicant. The said appellant is seeking for an order for the release of the decretal sum of Kshs.333,480/= deposited in court on 26th November, 2018 and 13th December, 2012 respectively by himself. The applicant is also seeking for costs on his application.
2. When the application came up for hearing before this court on 16th July, 2019 *Mr. Muriuki*, learned counsel for the applicant pointed out that the aforesaid Motion only affects the 1st and 3rd respondents. *Mr. Mohamed*, advocate for the 1st and 3rd respondents sought leave of this court to file a response to the application. The prayer was vehemently opposed by Muriuki, arguing that the application was filed way back in 2018 and to date there has been no response to the same.
3. This court declined to grant the prayer for leave sought on the basis that no plausible reason was offered for the failure on the part of the 1st and 3rd respondents to file a reply in good time. Consequently, the application stood unopposed and proceeded *ex parte*.
4. I have carefully considered both the grounds set out on the face of the Motion and the facts deponed in the affidavit in support thereof.
5. A brief background of the matter is that the applicant instituted a suit against the respondents herein before the Chief Magistrate's Court, Nairobi vide Civil Case No. 6143 of 2012 seeking for a declaratory order and general damages over his motor vehicle which had been allegedly illegally and unlawfully attached by the 1st and 3rd defendants in respect of loans advanced to the 2nd respondent.
6. The applicant, while admitting to having guaranteed the first business loan advanced to the 2nd respondent by the 1st respondent in the sum of Kshs.400,000/= and further giving the particulars of his motor vehicle registration number KBN 234G (the subject motor vehicle), the 1st respondent sought to fraudulently attach the subject motor vehicle.
7. The applicant thereafter filed the application dated 12th October, 2012 seeking orders for an interlocutory injunction against the 1st and 2nd respondents, thereby compelling them to release the subject motor vehicle to him and further restraining them from disposing of the same pending the hearing and determination of the suit.
8. The trial court upon hearing the parties on the aforesaid application, declined to grant the orders sought, stating that the applicant had failed to establish a prima facie case.
9. Being aggrieved by the above decision, the applicant lodged this appeal. The said applicant equally filed an application seeking an order for stay of the ruling pending the hearing and determination of the said appeal.
10. In the end, this Court vide its ruling made on 26th November, 2012 and 13th December, 2013 respectively, granted the order for stay on

condition that the applicant deposits the sum of Kshs.170,000/= and thereafter, the sum of Kshs.163,480/= in court following which the subject motor vehicle would be released to the applicant.

11. The applicant is now before this court seeking to have the abovementioned sums totaling Kshs.333,480/= released to it. In his affidavit, the applicant asserts that the appeal was heard and allowed on 31st March, 2017 with costs.

12. The applicant went further to assert that the respondents only released the subject motor vehicle after the intervention of police officers and that the 1st respondent has since failed to give a statement of account relating to the attachment and sale of certain goods belonging to the 2nd respondent.

13. It is also the applicant's statement that the 1st respondent has no basis on which to lay claim over the money deposited in court.

14. It is not disputed that the applicant deposited the claimed sum in court on two (2) separate dates.

15. It is also not in dispute that the appeal before this court was heard and determined as alluded hereinabove. This court held *inter alia* that the applicant had established the relevant principles for granting an injunctive order and having held so, allowed the appeal with costs.

16. In the circumstances, I see no reason as to why the decretal sum should not be released to the applicant.

17. The upshot is that the Motion is found to be meritorious. The same is allowed as prayed therefore it is ordered that the decretal sum of Kshs.333,480/= be released to the applicant within the next 21 days. Each party to cater for its own costs.

Dated, Signed and Delivered at Nairobi this 18th day of July, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the 1st and 3rd Respondents

..... for the 2nd Respondent