



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 523 OF 2019

JOHN M. MBIJIWE T/A BEALINE

KENYA AUCTIONEERS.....APPELLANT/APPLICANT

-VERSUS-

LABAN GATHOGO MWANGI.....1ST RESPONDENT

AUCTIONEERS LICENCING BOARD.....2ND RESPONDENT

RULING

1. The appellant/applicant in this instance brought the Notice of Motion dated 9th September, 2019. The Motion is supported by the grounds set out on its face and the facts deponed in the affidavit of the applicant. The orders being sought in the aforesaid Motion are *inter alia*:

i. Spent.

ii. Spent.

iii. Spent.

iv. *THAT pending the hearing and determination of the appeal, this Honourable Court be pleased to issue an order staying execution of the order/decision of the Auctioneers Licensing Board dated 30th July, 2019 and received on 30th August, 2019 in Disciplinary Cause No. 48 of 2018 (Laban Gathogo Mwangi v John M. Mbiijiwe t/a Bealine Kenya Auctioneers).*

v. *THAT this Honourable Court be pleased to make such other or further orders as it deems fit and just to grant.*

vi. *THAT the costs of the application be provided for.*

2. In reply to the Motion, *Kenneth Cheruiyot* swore the replying affidavit dated 30th September, 2019 on behalf of the 2nd respondent. On his part, the 1st respondent did not file any response to the Motion.

3. Both the applicant and the 2nd respondent through their respective counsels made brief oral submissions on the application.

4. Mr. Kirimi learned advocate for the applicant relied on the grounds set out of the face of the application and the facts deponed in the affidavit in support. It is the submission of the appellant/applicant that he was not notified of the proceedings that took place before the 2nd respondent and that he only came to learn of the same on 30th August, 2019 he received a call from an officer of the 2nd respondent.

5. On the other part, Mr. Emaka learned counsel for the 2nd respondent relied on the facts deponed in the affidavit of *Kenneth Cheruiyot* and informed this court that the 2nd respondent is not opposed to the appellant's proposal to have the matter heard afresh with the appellant's participation.

6. I have taken into account the grounds set out on the face of the Motion; the facts deponed in the affidavits in support and against the motion plus the rival oral submissions made by both counsels.

7. The brief background of the matter is that the 1st respondent being at all material times involved in the business of buying and selling motor vehicles, approached *Leakey Auctioneers* with the intention of buying a motor vehicle and was referred to the applicant, who advised

him to make a deposit payment of Kshs.50,350/ towards the purchase of motor vehicle registration number KAW 836G.

8. That subsequently, the applicant informed the 1st respondent that the wife to the owner of the aforesaid motor vehicle had gone to court to seek a stay of its sale by way of the auction, and that since then, the applicant has not refunded the deposit sum paid by the 1st respondent despite a request made to that effect.

9. The 1st respondent was prompted to complaint with the 2nd respondent, following which the 2nd respondent wrote to the applicant requesting his attendance to respond to the complaint but that the applicant neither attended the hearing of the complaint nor filed any response.

10. The 2nd respondent upon hearing the complaint, arrived at a decision against the applicant, requiring him to refund the sum of Kshs.50,300/ to the 1st respondent and further slapped him with a fine of Kshs.20,000/ and awarded the 1st respondent with costs of Kshs.20,000/.

11. When the matter came up for mention before the 2nd respondent on 16th May, 2019 it was noted that the applicant had not complied. The 2nd respondent was prompted to issue a notice to show cause against him for 18th July 2019.

12. The applicant did not appear before the 2nd respondent to answer to the notice to show cause, forcing the 2nd respondent to make orders suspending the applicant's license for six (6) months and further requiring him to comply with the order previously made.

13. The main issue raised by the applicant is whether he was informed of the complaint made against him and whether he was served with the notice to show cause. This court is alive of the fact that the issue is the subject of this appeal hence no conclusive determination can be made at this stage.

14. I have looked at the documents attached both to the supporting and replying affidavits. As concerns the complaint lodged by way of an affidavit, it would appear the same bears the date 13th August, 2018. The copy attached to the applicant's supporting affidavit does not bear any signature of receipt but the copy attached to the replying affidavit of *Kenneth Cheruiyot* indicates that the complaint was received on 30th August, 2018 and a signature appended on the received copy.

15. Annexed to the replying affidavit is a copy of the letter dated 4th October, 2018 addressed to the applicant by the 2nd respondent informing him of the complaint and further requesting him to respond to the same within 14 days from the date of the letter.

16. The 2nd respondent addressed to the applicant the letter dated 15th February, 2019 informing him of the hearing scheduled for 19th March, 2019; however, there is nothing to indicate that any of the letters were actually delivered to the applicant in view of the fact that the applicant had previously issued a notice of change of his postal address to the 2nd respondent vide the letter dated 24th April, 2019.

17. On the notice to show cause, there is nothing to show that the same was delivered to the applicant prior to the date when the suspension order was made.

18. I am therefore convinced that on the basis of the above reasons that the applicant has established arguable grounds for appeal.

19. The application, the subject matter of this ruling seeks for an order for stay of execution. Under **Order 42, Rule 6(2)** of the **Civil Procedure Rules** offers the principles to be considered before granting or refusing an order for stay of execution pending appeal stated as follows:

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.

20. On the first condition, the applicant averred that he only came to learn of the order of 18th July, 2019 when he was informed of the same on 30th August, 2019 by an officer of the 2nd respondent, a fact which was not disputed by the 2nd respondent. I am therefore satisfied that there has been no unreasonable delay in bringing the application.

21. As concerns the second condition on substantial loss, the applicant has stated that as a consequence of the order being appealed against; he is unable to earn a living out of his qualifications as an auctioneer. He further stated that he has been assigned with various warrants and instructions to execute which he cannot attend to as long as the suspension order remains in place.

22. I am convinced by the explanation offered by the applicant coupled with the fact that the same has not been rebutted by either of the respondents, that the applicant has established substantial loss he would suffer if the order for stay is denied.

23. On the third condition relating to the provision of security for the due performance of the decree, none of the parties made any submissions over the issue. In the circumstances of this case I do not think it is necessary to impose any condition for the grant of order for stay.

24. In the end, the motion is allowed. Consequently, there be an unconditional order for stay of execution of the orders and or decision of the Auctioneers Licensing Board made on 30.7.2019 vide *Disciplinary Cause No. 48 of 2018 (Laban Gathogo Mwangi v John M. Mbiyiwe t/a Bealine Kenya Auctioneers)* pending appeal. The appellant to prepare, file and serve the record of appeal within 30 days. Mention on 18.11.2019 to confirm compliance.

Dated, Signed and Delivered at Nairobi this 9th day of October, 2019

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the 1st Respondent

..... for the 2nd Respondent