



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 524 OF 2019

JOHN M. MBIJIWE T/A

BEALINE KENYA AUCTIONEERS.....APPELLANT/APPLICANT

-VERSUS-

ALLAN GAA ODENGO.....1ST RESPONDENT

AUCTIONEERS LICENCING BOARD.....2ND RESPONDENT

RULING

1. The appellant/applicant has taken out the Notice of Motion dated 9th September, 2019 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 (Allan Gaa Odengo v John M. Mbiyiwe 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, the 1st respondent swore his replying affidavit on 16th September, 2019 whereas *Kenneth Cheruiyot* swore the replying affidavit on 30th September, 2019 on behalf of the 2nd respondent.

3. The application was canvassed through brief oral arguments

made by the respective counsels for the parties.

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

5. The brief background of the matter is that the 1st respondent was at all material times a tenant of M/S Hillside Properties, occupying Carton Court Residence No. D 8 located in Lavington, paying a monthly rent of Kshs.75,000/=. That sometimes in November, 2017 the 1st respondent defaulted in the payment of his rent, thus falling in rent arrears in the sum of Kshs.200,000/=.

6. M/S Hillside Properties instructed the applicant to levy distress for rent in a bid to recover the rent arrears and that the applicant proclaimed and attached the 1st respondent's motor vehicle registration number KBQ 972G.

7. It is averred that the 1st respondent soon thereafter managed to clear the outstanding arrears of rent but the applicant did not release the

above-mentioned motor vehicle to him and instead demanded additional charges thereby prompting him to lodge a complaint with the 2nd respondent.

8. It is further argued that upon being served with a copy of the complaint and upon being given time to respond, the applicant neither filed a response nor attended the proceedings.

9. On 19th March 2019 the 2nd respondent made an order directing the applicant to release the above-mentioned motor vehicle to the 1st respondent and further slapping him with a fine of Kshs.50,000/ and to pay the 1st respondent with costs of Kshs.30,000/.

10. The applicant did not comply hence the 2nd respondent was prompted to issue a notice to show cause against the applicant.

The applicant did not appear before the 2nd respondent to answer the notice to show cause.

11. On 18th July, 2019 the 2nd respondent issued orders suspending the applicant's license for six (6) months and further requiring him to comply with the orders previously made.

12. 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 to the fact that the issue is the subject of this appeal hence no conclusive determination can be made at this stage.

13. I have looked at the complaint dated 7th September, 2018. The copy thereof attached to the applicant's supporting affidavit does not bear any signature of receipt though the copy attached to the replying affidavit of *Kenneth Cheruiyot* indicates that the complaint was received.

14. Annexed to the replying affidavit is a copy of the letter dated 9th 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.

15. The 2nd respondent addressed to the applicant the letter dated 1st 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 vide the letter dated 24th April, 2019.

16. 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.

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

18. 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** the principles to be considered before granting or refusing an order for stay of execution pending appeal are stated inter alia 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.

19. On the first condition, the applicant averred in his affidavit that he only came to learn of the order of 18th July, 2019 when he was contacted on 30th August, 2019 to visit the 2nd respondent's offices and collect a letter to that effect. This fact was not disputed by the 2nd respondent.

20. On his part, the 1st respondent refuted the aforesaid averment, going further to state that even if that were the case, the applicant has not explained why he took nine (9) days to file this application. *Mr. Emaka* learned advocate for 2nd respondent informed this court that the 2nd respondent is not opposed to the applicant's proposal to have the matter heard afresh with the applicant's participation. I am 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 pendency of the order being appealed against, he is unable to comply with the instructions of various other clients in undertaking execution, hence denying him the opportunity to earn a living.

I am persuaded that the applicant has established substantial loss he would suffer if the order for stay is denied.

22. 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 don't think it is necessary to impose any condition for the grant of an order for stay.

23. In the end, the Motion is allowed. Consequently, there be an unconditional order for stay of execution of the orders and/or decisions of the Auctioneers Licensing Board made on 30th July, 2019 vide Disciplinary Cause No. 48 of 2018 (*Allan Gaa Odengo v John M. Mbijiwe t/a*

Bealine Kenya Auctioneers) pending appeal. The appellant to prepare, file and serve the record of appeal within 30 days. Mention on 18th November, 2019 to confirm compliance.

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

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J.K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the 1st Respondent

..... for the 2nd Respondent