



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL CASE NO. 100 OF 2019

ZACHARY NDIRITU NDUNG’U..... APPELLANT

VERSUS

HENRY NJUGUNA GATHUA.....1ST RESPONDENT

JAMES NJENGA2ND RESPONDENT

ANDREW NGUGI MWAURA.....3RD RESPONDENT

RULING

This is an application by way of Notice of Motion under Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for an order that there be a stay of proceedings and execution in the Chief Magistrate’s Civil Case No. 4350 of 2016 pending the hearing and final determination of the objector’s appeal.

There are several grounds listed in support of that application alongside an affidavit sworn by the appellant. The application is opposed and grounds of opposition have been filed by the 1st respondent. Both parties have also filed written submissions.

Although the appellant in his submissions has alluded to Order 42 Rule 6 of the Civil Procedure Rules as the applicable law, it should be noted that the said Order has not been cited in the Notice of Motion. That notwithstanding, the application shall be considered on its merits.

The ruling sought to be appealed has not been annexed to the application. It would appear however that, the 1st respondent sued the 2nd and 3rd respondents in the lower court for damages arising from a road traffic accident in which he was awarded Kshs. 800,000/=. In execution of the decree therefrom, motor vehicle registration No. KBT 439P was proclaimed. It is the appellant’s case that he filed objection proceedings in the lower court claiming ownership of the said vehicle which application was dismissed leading to the filing of this appeal.

There is a Memorandum of Appeal dated 21st and filed on 25th February, 2019. Incidentally, there is no appeal against the main judgment in which the 1st respondent is the decree holder while the 2nd and 3rd respondents are the judgment debtors.

In the present application, the appellant has annexed a sale agreement relating to the said motor vehicle in which one Luaba Dawe Koche is indicated as the seller, while the appellant herein Zachary Ndiritu Ndungu is shown as the buyer. It is instructive that the said seller is not a party, either in the lower court proceedings or in the present application.

Further, whereas the appellant says the motor vehicle was comprehensively insured at the time of the accident, there is no indication as to who was the insured and by which insurance company. There is also no indication whether or not any insurance company has declined to meet the liability arising therefrom and if so, if any declaratory suit has been lodged in that regard. Most importantly however is that, if the appellant is proceeding under Order 42 Rule 6 he has not offered any security in the event that he loses this application and the appeal.

The issues are more complicated by the fact he is not a judgment debtor. But even if he were, an agreement of sale per se does not confer ownership of the motor vehicle.

This application was filed on 25th February, 2019. This was about six months from the date of the said sale of the motor vehicle to the appellant. That notwithstanding, there is no copy of the registration book issued by National Transport and Safety Authority (NTSA) to confirm ownership of the same motor vehicle.

It is not enough in applications of this nature to say the appeal shall be rendered nugatory, and that a party shall suffer irredeemable loss and damage as stated by the appellant. That loss must be demonstrated. The appellant has fallen short of the said requirement. In any case, the decree holder has a valid judgment in his favour which has not been challenged by the judgment debtors. He cannot continue to be denied

the fruits of his judgment.

The appellant may be anxious to lose an asset in which he says he paid Kshs. 1,200,000/=. However, from the sale agreement dated 5th September, 2018 there is condition No. 5 which provided that **“any claim or any liability with regard to the said motor vehicle before execution of this agreement shall be undertaken by the seller”**. If the seller sold the said motor vehicle registration No. KBT 439 P to the appellant with such liabilities, then any loss attributed thereto and which the appellant is likely to suffer shall be recovered from him.

For now, I find that the application by the appellant must fail and is therefore dismissed with costs to the 1st respondent.

Dated, signed and delivered at Nairobi this 17th Day of October, 2019.

A. MBOGHOLI MSAGHA

JUDGE