



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. E012 OF 2019

NIC BANK LIMITED.....PLAINTIFF

-VERSUS-

BALUME LAURENT MBOTAZ.....DEFENDANT

RULING

1. **NIC Bank Limited** the Appellant, has filed this appeal against the Judgment of *Senior Resident Magistrate Hon. D. W. Mburu, in Chief Magistrate's Court Milimani Civil Suit No. 2442 of 2017* delivered on 18th April 2019. By that Judgment the trial Court ordered the Appellant to release to **Balume Laurent Mbotaz**, the Respondent, motor vehicle registration number KAC 854Z/ZE 8341; and further the Appellant was ordered to pay the Respondent damages of Kshs. 10,800,000. The Respondent in turn was ordered to pay to the Appellant Kshs. 4,752,683.89 being the amount due in the account.

BACKGROUND

2. The Appellant and the Respondent entered into a hire purchase agreement to enable the Respondent to purchase motor vehicle KAC 854Z. Additionally, the Respondent obtained from the Appellant a credit facility to enable him purchase motor vehicle ZE 8341, through the Chattels Mortgage Agreement.

3. The Appellant's contention before the trial Court was that the Respondent defaulted in his repayment of the loans advance by the Appellant. Consequently the Appellant exercised its right to repossess and sell the vehicle.

4. The Respondent's case before the trial Court was that the Appellant's repossession of the motor vehicle was illegal and the Respondent claimed he had lost the use of it.

NOTICE OF MOTION

5. The Appellant has filed a Notice of Motion application dated 17th May 2019. The Appellant, by that application, seeks stay of execution of the trial Court's Judgment pending this appeal.

6. By the affidavit of Ibrahim Mbogo Ngatia, the Appellant's Legal Officer, the Appellant contends that the Appellant was raised in this appeal serious issues of law and fact and which have a high chance of success. It also contends that it is a reputable financial institution and has ability to satisfy the Judgment and is willing to provide security.

7. The application was opposed by the Respondent. In the Respondent's view the Appellant's application is meant to deny him the fruits of his Judgment. The Respondent sought that the Appellant be ordered to deposit the amount awarded in damages in a joint interest earning account.

ANALYSIS

8. It is important to state that the trial Court by its Judgment ordered the Appellant to release the repossessed motor vehicle to the Respondent. It does seem however, as though that vehicle has not been released. The Respondent did not allude to what security he was willing to offer incase the Appellant's appeal is successful and the vehicle's is either not in good mechanical state or it is destroyed. I accept the Respondent's argument that the motor vehicle will deteriorate if the appeal takes too long to heard.

9. The trial Court did find the amount of Kshs. 4,752,683.89 as due and payable by the Respondent to the Appellant. That Court also found that the Appellant should pay the Respondent Kshs. 10,800,000 in damages.

10. Stay pending appeal applications are governed by **Order 42 Rule 6 of the Civil Procedure Rules**. Under that Rule the first prong test is whether the Court is satisfied that substantial loss may result to an Applicant, here the Appellant, if stay of execution is not granted.

11. In my view, bearing in mind the parties affidavits and written submissions I do indeed find that the Appellant will suffer substantial loss if the repossessed motor vehicle is released and its value diminished to its detriment. The likelihood of the value of the vehicle diminishing is sufficient to satisfy this prong test.

12. The Appellant did state through its Legal Officer, and this was not denied by the Respondent, that it is a sound financial institution and it would be in a position to provide a security if required to.

13. The second test is whether the application for stay of execution was filed without unreasonable delay. I can confirm that the Appellant filed its application without unreasonable delay.

14. The Rule 6 does also provides that the Court may order such security for due performance of the decree.

15. In my consideration on whether I should order for security to be provided in this case shall be determined by consideration of what were the terms of the Judgment of the trial Court. The Judgment of the trial Court ordered the release of the repossessed motor vehicle by the Appellant, the payment of damages by the Appellant and the payment of the amount due on the account by the Respondent. In other words, both parties were obligated by the trial Court's Judgment to do something. It is because of that, that I shall not order any security to be provided as condition for stay of execution pending appeal.

16. I do however appreciate the need to hear and determine this appeal expeditiously to ensure the repossessed vehicle does not deteriorate.

CONCLUSION

17. I make the following orders:

a. Stay of execution of the Judgment of 18th April 2019 in Chief Magistrate's Court Milimani Court Civil Case No. 2442 of 2017 is hereby granted pending the hearing and determination of this appeal.

b. The costs of the Notice of Motion dated 17 May 2019 shall abide with the outcome of this appeal.

c. At the reading of this Ruling directions will be given to ensure this appeal is heard expeditiously.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF NOVEMBER, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie..... COURT ASSISTANT

..... FOR THE PLAINTIFF

..... FOR THE DEFENDANT