

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 539 OF 2019

PLAM OIL TRANSPORTERS LIMITED1ST APPELLANT

GREGORY MUEMA MUSEMBI.....2ND APPELLANT

VERSUS

GIL OIL COMPANY LIMITED.....RESPONDENT

RULING

- 1) The appellants herein took out the motion dated 26th September 2019 in which they sought for an order for stay of execution of the decree issued by the trial court pending appeal. The motion is supported by the affidavit sworn by Jackson Omwenga, learned advocate for the appellants.
- 2) When the motion came up for interpartes hearing, Mr. Mwangi, learned advocate for the respondent informed this court that the respondent would concede to the grant of the order on two conditions. **First**, that the appellants be compelled to deposit the decretal sum as security for the due performance of the decree. **Secondly**, that the appellants should pay the auctioneer’s charges.
- 3) The appellants stated that they are willing to deposit the decretal sum as security for the due performance of the decree. They however stated that they are unwilling to settle the auctioneer’s charges because the auctioneer attached their goods after the respondent’s advocate had been served with the order for stay. It is the submission of Mr. Omwenga, learned advocate for the appellants that the respondent’s advocate had on 1/10/2019 been served by email with the exparte order for stay of execution issued by Mr. Justice Mbogholi Msagha on 26th September 2019 but the auctioneer ignored the order and proceeded to proclaim the appellants’ goods on 2/10/2019; therefore the auctioneer is not entitled to be paid any charges.
- 4) Mr. Mwangi admitted that he was served by email with the exparte order of stay after the auctioneers had attached the appellants’ goods. The learned advocates appearing in this appeal did not file any affidavits to show when the order for stay was served. However, what is clear is that service of the order was effected. The question as to whether the auctioneer should be paid is an issue which can only be determined when evidence of service is availed to this court. If it is shown that the auctioneer proceeded to attach the appellants’ goods in defiance of the order for stay, then it will not be entitled to claim auctioneer charges. I think it is only fair for the issue touching on the auctioneer charges to be kept in abeyance until the auctioneer applies.
- 5) In the end, the order for stay of execution pending appeal is granted on condition that the appellants deposit the decretal sum of kshs.3,419,000/= in an interest earning account in the joint names of the firms of advocates appearing in this appeal within 30 days from the date hereof . In default execution to issue. The auctioneer is directed to forthwith release to the appellants the attached goods.
- 6) Costs of the motion to abide the outcome of the appeal.

Dated, Signed and Delivered at Nairobi this 7th day of November, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... **for the Appellant**

..... **for the Respondent**