



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL 579 OF 2017

WILL M. OMIDO.....1ST APPELLANT/APPLICANT

JANET A. OMIDO.....2ND APPELLANT/APPLICANT

VERSUS

HUZEIFFER M. HEBATULLA.....RESPONDENT

RULING

1. This ruling is the product of the Notice of Motion dated 27th August, 2019 brought by the appellants/applicants and supported by the grounds laid out on its face and the facts deponed to in the sworn affidavit of 1st applicant. The application is seeking the substantive order for stay of execution pending the hearing and determination of the appeal lodged against the judgment delivered by Honourable I. Orengé (Mr.) (Senior Resident Magistrate) on 28th September, 2017.
2. The 1st applicant deponed that the respondent instituted CMCC NO. 3150 OF 2013 against the applicants, which suit was heard and determined in favour of the respondent on 28th September, 2017.
3. The 1st applicant also deponed that being dissatisfied with the decision, the applicants lodged an appeal against the same and sought an order for stay of execution before the trial court, further stating that the order for stay of execution was granted on 6th June, 2018 but on terms that were too stiff for the applicants to comply with.
4. It was the 1st applicant's assertion that soon thereafter, the respondent through ICON Auctioneers proclaimed various goods belonging to the applicants and purportedly sold them, yet the respondent has not communicated the amount realized from such proclamation.
5. The Motion is opposed by way of the replying affidavit sworn by the respondent. Therein, he stated that the applicants' previous application seeking an order for stay of execution before the trial court was dismissed based on their failure to provide security.
6. The respondent further confirmed that certain goods belonging to the applicants were proclaimed, advertised and sold by public auction, hence the sum of Kshs.1,373,097/ was realized, leaving the outstanding balance of Kshs.2,288,278.89/ out of the decretal amount.
7. Consequently, the respondent averred that the application does not meet the threshold for granting the order being sought but should this court be inclined to grant the order for stay of execution, then the applicants be ordered to deposit the decretal amount of Kshs.2,428,657.06/ in a joint interest earning account. The respondent was keen to add that he is a man of means, hence capable of reimbursing the decretal amount should the appeal prove successful eventually.
8. The 1st applicant filed a further affidavit in response thereto, challenging *inter alia*, the breakdown of the items purported to have been sold by the auctioneers acting on behalf of the respondent as being insufficient and not commensurate to the quality of goods sold.
9. The parties through their advocates made oral arguments on the Motion. *Mr. Olele* learned counsel for the applicants began by submitting *inter alia*, that at the time the proclamation of the goods was undertaken, there was in place an order staying the execution process, adding that the items already sold should suffice as security for the due performance of the decree.
10. In reply, *Miss Kang'ethe* learned advocate representing the respondent restated the contents of the replying affidavit that following the auction of the applicants' goods, the auctioneers availed the list of goods and amount recovered, which amount did not cater for the entire decretal sum. The counsel also contended that the applicants have not demonstrated that they stand to suffer substantial loss or inferred that the respondent is not in a position to refund the decretal sum, adding that there has been a delay in bringing the present application and without explanation.

11. *Mr. Olele* rejoined by maintaining that the application has been timeously filed.
12. I have considered the grounds on the face of the Motion, the facts contained in the affidavits supporting and opposing it as well as the rival oral arguments.
13. I noted that the parties raised issues pertaining to the proclamation of the goods and whether the same was properly done and what goods did and did not form part of the proclamation. It is imperative that the parties recognize that since the application now before me concerns itself with an order for stay of execution, I must therefore restrict myself to that subject; if the applicants are in doubt as to the validity or otherwise of the execution process, they are at liberty to move the court appropriately.
14. The conditions pertaining to the granting of an order for stay of execution are governed by **Order 42, Rule 6(2)** of the **Civil Procedure Rules** and are three (3) in kind.
15. The *first* condition has to do with whether the application has been brought without unreasonable delay. It has already been established that the impugned judgment was delivered on 28th September, 2017. Going by the lower court record, the applicants thereafter filed the application dated 27th November, 2017 seeking an order for stay of execution pending appeal and which application was dismissed by the trial court on 18th May, 2018. The current application was filed more than one (1) year later on 27th August, 2019.
16. The courts have previously offered the argument that there is no accurate way of measuring inordinate delay but that such delay will depend on the circumstances of the matter at hand. In the present instance, the applicants' counsel brought forth the argument that since the proclamation notice was issued on 26th September, 2019 the application was filed in good time. I find no weight in this argument since the applicants were all along aware of the judgment and consequently, the likelihood of execution being commenced against them at any time. In the circumstances and in the absence of sufficient explanation, I am satisfied that there has been inordinate delay in bringing the Motion.
17. The *second* condition relates to substantial loss. The courts have maintained that this condition, forming the cornerstone of an application seeking an order for stay of execution, must be satisfied by the applying party. Such was the case in **Antoine Ndiaye v African Virtual University [2015] eKLR** cited by the respondent's advocate, *Miss Kang'ethe* where the court with reference to a variety of authorities, articulated that:

“So the Applicant must show he will be totally ruined in relation to the appeal if he pays over the decretal sum to the Respondent, in other words he will be reduced to a mere explorer in the judicial process if he does what the decree commands him to do without any prospects of recovering his money should the appeal succeed.”
18. The applicants here made no attempt to demonstrate the manner in which they stand to suffer substantial loss. It therefore follows that there is no need for me to dwell on this condition, since it has not been met.
19. The third and final condition touches on the provision of security. The principal decretal amount indicated in the decree is Kshs.2,300,000/ and the said amount is set to accrue interest. The respondent intimated that execution has been undertaken but that there is still an outstanding balance in the sum owed. The applicants did not address this condition in their Motion; however, their advocate through his oral submissions urged that the motor vehicle registration number KBT 555D which formed the subject matter of the suit be applied as security.
20. From the foregoing, it is evident that the applicants have not satisfied the conditions laid out under **Order 42, Rule 6(2)** (*supra*). Needless to say that the respondent has admitted to having sold a number of items belonging to the applicants by way of public auction-including the subject motor vehicle registration number KBT 555D-thereby recovering a portion of the decretal amount; what remains in dispute is the actual amount recovered therefrom and whether the same exceeds or falls short of the decretal sum.
21. For that reason only, I am convinced that it would be in the interest of justice to grant the order for stay of execution being sought.
22. Consequently, the Motion is allowed and the following orders made;
 - a) *There shall be a stay of execution pending the hearing and determination of the appeal.*
 - b) *The Value of the goods already attached and sold by the auctioneer to constitute sufficient security pending the hearing and determination of the appeal.*
 - c) *Costs of the Motion shall abide the outcome of the appeal.*

Dated, Signed and Delivered at Nairobi this 21st day of November, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellants/Applicants

..... for the Respondent