



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 469 OF 2019

WACHIRA MWANGI.....APPELLANT/APPLICANT

-VERSUS-

D.M. ENTERPRISES LIMITED.....1ST RESPONDENT

WACHIRA BUILDERS LIMITED.....2ND RESPONDENT

RULING

1. Wachira Mwangi, the appellant/applicant herein, took out the Notice of Motion dated 16th August, 2019 in which he sought for the following orders:

i. Spent.

ii. Spent.

iii. THAT pending the hearing and determination of the appeal this Honourable Court be pleased to issue an order for stay of execution of the decree issued in CMCC NO. 1650 OF 2012.

iv. THAT this Honourable Court be pleased to raise the proclamation and/or attachment of the motor vehicle registration number KAR 602M.

v. THAT this Honourable Court do make any such or further orders and issue any other reliefs it may deem just to grant in the interest of justice.

vi. THAT the costs of the application be in the cause.

2. The Motion is supported by the grounds laid out on its face and the facts stated in the applicant's affidavit. Therein, he deponed that he was not a party to the suit which was before the subordinate court, the same having been filed by the 1st respondent against the 2nd respondent.

3. The applicant went on to explain that following the entry of judgment in favour of the 1st respondent, sometime on or about 15th February, 2019 Icon Auctioneers attached his motor vehicle registration number KAR 602M ("the subject vehicle") prompting him to file an objection to the attachment vide the Notice of Motion dated 18th February, 2019 and that an interim order for stay of execution was issued by the subordinate court on 22nd February, 2019 pending the hearing and determination of the aforementioned application.

4. According to the applicant, the respondent filed a response to his notice of objection and also filed the application dated 7th March, 2019 seeking *inter alia*, to have the directors of the 2nd respondent; including the applicant; cross examined on oath as to the assets and means of the 2nd respondent.

5. It was the applicant's assertion that the court delivered rulings in respect to the two (2) applications. The court allowed the 1st respondent's application and ordered the directors of the 2nd respondent to satisfy the decretal sum of Kshs.1,205,789.95/-. The court also found that the applicant had rights to the subject vehicle vide its ruling delivered on 17th July, 2019 but declined to lift the proclamation order.

6. The above ruling is now the subject of the appeal. The applicant is apprehensive that unless an order for stay of execution is granted, he stands to suffer substantial loss by virtue of the fact that the subject vehicle will be sold, thereby forcing him to satisfy a decree in a matter to which he was not a party. The applicant further stated that the subject vehicle continues to waste away in the auctioneer's yard, hence the need for its release, and expressed his willingness to abide by the conditions that will be set by this court for the furnishing of security.

7. In opposing the application, the 1st respondent put in the replying affidavit sworn by its Financial Controller, *Francis K. Musamula* on 13th September, 2019 who stated that the Motion has since been overtaken by events owing to the sale of the subject vehicle on 23rd August, 2019. The deponent also asserted that the applicant had previously lodged an appeal against the decree vide HCCA NO. 502 OF 2015 which appeal was consequently dismissed in February, 2019.

8. The applicant rejoined with the further affidavit sworn by his advocate, *Chrispin Wainaina* who largely stated that at the time the subject vehicle was sold, there was an interim order for stay in place, thereby making the sale unlawful. The advocate went on to assert that following delivery of the impugned ruling on 17th July, 2019 the trial court granted the applicant 30 days' stay of execution but that the 1st respondent through its auctioneers proceeded to advertise the subject vehicle for sale by way of public auction on 30th July, 2019 and a re-advertisement was done on 16th August, 2019 in the absence of valid warrants of attachment.

9. The application was disposed of through written submissions. The applicant filed his submissions on 23rd September, 2019 reiterating that the sale of the subject vehicle was unlawful for the reasons set out hereinabove and that in any event, there is nothing to show that the subject vehicle was truly sold.

10. On the question of stay of execution, the applicant maintained that his application has been brought without unreasonable delay, citing the case of **Bubble Engineering Company Limited v Maseno University [2015] eKLR** where the court held thus:

“Unreasonable delay is delay that is inordinate or excessive. Whereas two months appears to be long I do not consider it ordinate given the circumstances pertaining in our Courts.”

11. It was equally the applicant's contention that he stands to suffer irreparable loss as elucidated in his supporting affidavit and laid out hereinabove with reliance to the holding in *inter alia*, the judicial authority of *James Wangalwa & Another v Agnes Naliaka Cheseto [2012]* that an applicant ought to establish other factors to show the irreparable loss that will follow him or her in the event that the appeal is successful.

12. On the subject of provision of security, the applicant restated his readiness and willingness to furnish reasonable security, though urging this court to keep in mind that he was only an objector in the suit and not the judgment debtor.

13. In its submissions dated 15th October, 2019 in resistance to the averments made hereinabove, the 1st respondent argued that at the time of advertising and selling the subject vehicle on 16th August, 2019 and 23rd August, 2019 the order for stay issued by the trial court had already lapsed on 15th August, 2019. On the same note, the 1st respondent brought forth the argument that since the decree has been executed, to grant the orders being sought will have the sure impact of occasioning prejudice to it, quoting **Ann Wanjiku Nduati v Fredrick Oogo Oyuoya [2019] eKLR** where this court rendered itself as follows:

“...it is fair to state that the respondent would stand to suffer a level of prejudice since he already has an ex parte judgment in place and has made attempts at executing the decree.”

14. It was also the 1st respondent's view that this court ought to consider whether the applicant has an arguable appeal in deciding whether or not to grant the application for stay of execution. In closing, the 1st respondent submitted that the application is ripe for dismissal with costs for the above reasons.

15. I have considered the grounds featuring in the Motion; the facts stated in the affidavits associated with and opposing it; and the submissions and authorities relied upon.

16. From the foregoing, it is noted that there are three (3) intertwined issues for consideration: the subject of whether the sale of the subject vehicle is lawful, the subject relating to stay of execution and finally, the subject relating to the raising and/or proclamation of the subject vehicle.

17. I will begin with the issue of the subject vehicle which will answer the question on whether the application has been overtaken by events. From my perusal of the record, I have ascertained that whereas the applicant was not a party to the suit which was before the subordinate court, he was at all material times a director of the 2nd respondent. The record also discloses that the subordinate court ordered the applicant and other directors of the 2nd respondent to settle the decretal amount; it is clear that the current appeal is against that ruling.

18. When then did the order for stay of execution issued by the subordinate court lapse? I have computed the time and established that 30 days from the 17th July, 2019 would lapse on 15th August, 2019 as the 1st respondent correctly put it. I have looked at a copy of the affidavit sworn by auctioneer Jeremiah K. Muchendu t/a Icon Auctioneers annexed as “CW 1” to the further affidavit of Chrispin Wainaina. The deponent stated that on 30th July, 2019 they advertised the subject vehicle for sale by way of public auction to be held on 7th August, 2019 and that on 16th August, 2019 they re-advertised the subject vehicle for sale through the public auction to be held on 23rd August, 2019.

19. I have perused the documents availed to me by the parties and I have not come across any evidence to show that warrants of attachment

were truly extended on 21st August, 2019 though it would appear the deponent had annexed the same to his affidavit before the subordinate court.

20. Be that as it may, I have seen a copy of the advertisement notice made on 16th August, 2019 as well as the memorandum of sale of the subject vehicle dated 23rd August, 2019. The same indicates that one Raphael Itemo Wahinya was the highest bidder at the public auction and hence the declared purchaser of the said vehicle at the consideration of Kshs.1,200,000/-. A memorandum of sale is said to constitute a sale agreement of sorts. However, the 1st respondent did not produce any evidence to indicate payment of the purchase price or a transfer of the subject vehicle to the highest bidder. This, coupled with the fact that at the time the public auction was being conducted there was in place the order made on 21st August, 2019 staying execution of the decree, nullifies the result of the public auction. Consequently, I find that the application is competently before me.

21. Turning to the second issue on stay of execution, the conditions pertaining to the granting of an order for stay of execution are encapsulated under **Order 42, Rule 6(2)** of the **Civil Procedure Rules** and are three (3) in kind.

22. The first condition relates to the question on whether the application has been filed without unreasonable delay. I note that the present application was filed one (1) month following delivery of the impugned ruling. I am therefore satisfied that there has been no inordinate delay in bringing the Motion.

23. As regards the second condition on substantial loss, the law is well settled that a party ought to clearly demonstrate the substantial loss he or she stands to suffer, as correctly asserted in the appellant's submissions with reference to **James Wangalwa & Another v Agnes Naliaka Cheseto [2012]** where the court opined that:

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail...”

24. The applicant herein expressed his apprehension that since he was not a party to the suit, selling the subject vehicle would create a state of affairs that would defeat the appeal in the event that it succeeds.

25. I have considered the foregoing and I have appreciated that the subject vehicle forms the crux of the appeal. I have equally appreciated that whereas the applicant is admittedly a director of the 2nd respondent, the law is well settled that a company and its directors are distinct persons, hence reinforcing his position that he was not a party to the suit. Looking at the circumstances of the application before me, I am convinced that the applicant has reasonably shown that he stands to suffer substantial loss.

26. The third condition to do with the provision of security was not resisted by the applicant and the 1st respondent did not address me on the same.

27. In view of the foregoing, I am persuaded to exercise my discretion in favour of the applicant.

28. The third facet of the application concerns itself with the raising of the proclamation and/or attachment of the subject vehicle. I note that this order was similarly sought before the trial court and discussed in the ruling which has now been appealed against. For that reason, I am unable to consider that aspect of the application at this stage.

29. The upshot is that the Motion succeeds in terms of prayer (iii). Consequently, I make an order that there shall be a stay of execution of the decree issued in CMCC NO. 1650 OF 2012 pending the hearing and determination of the appeal on the condition that the applicant deposits the decretal amount of Kshs.1,205,789.95/ in an interest earning account in the joint names of the parties' advocates or firm of advocates within 30 days from today, in default of which the order for stay shall lapse.

30. Costs of the application shall abide the outcome of the appeal.

Dated, Signed and Delivered at Nairobi this 5th day of December, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

.....for the Appellant/Applicant

.....for the 1st Respondent

.....for the 2nd Respondent