



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 695 OF 2017**

**MWANANCHI CREDIT LIMITED.....APPLICANT**

**VERSUS**

**GIDEON ODOYO OCHIEL.....RESPONDENT**

**RULING**

1. In the Notice of Motion dated 11<sup>th</sup> January 2018, the appellant/applicant *Mwananchi Credit Limited* principally seeks an order of stay of execution of the orders issued on 7<sup>th</sup> June 2017 in Milimani Chief Magistrate's Civil Case No. 48 of 2017 and any other subsequent proceedings.
2. The application is premised on grounds stated on its face and the depositions made on 11<sup>th</sup> January 2018 in an affidavit sworn by *Dennis Mwangeka Mombo*, one of the applicant's directors.
3. In the grounds anchoring the motion and in the supporting affidavit, the applicant contends that it is aggrieved by the decision of the learned trial magistrate *Hon. D.O. Mbeja* (SRM) rendered in a ruling delivered on 7<sup>th</sup> June 2017 which is the subject of the appeal filed herein. The ruling was in respect of an interlocutory application dated 10<sup>th</sup> January 2017 in which the respondent (then the plaintiff) sought orders of both prohibitory and mandatory injunction against the applicant (then the defendant) pending the hearing and determination of the suit filed in the lower court.
4. In the impugned ruling which is annexed to the supporting affidavit, the learned trial magistrate allowed the application and restrained the applicant either by itself, agent, servant or auctioneer from selling, disposing or offering for sale motor vehicle registration number KBF 135R Subaru Legacy pending hearing and determination of the suit. He also directed the applicant to unconditionally release the vehicle to the respondent pending determination of the suit.
5. The background to the application filed in the lower court as far as can be ascertained from the material placed before the court is that the applicant, a money lending entity had advanced a loan of KShs.155,000 to the respondent on the security of the aforesaid motor vehicle; the respondent defaulted in making payments towards servicing the loan as agreed by the parties whereupon the applicant repossessed the vehicle and sold it to recover the debt.
6. It is the applicant's case that the vehicle was sold on 6<sup>th</sup> February 2017. In the affidavit supporting the motion, the applicant alludes to the fact that the sale of the vehicle was brought to the trial court's attention through a replying affidavit sworn in opposition to the application dated 10<sup>th</sup> January 2017 and that therefore, the learned trial magistrate was aware of this fact before he delivered his ruling on 7<sup>th</sup> June 2017; that if the orders are not stayed, the applicant will suffer irreparable loss and damage since it is unable to comply with the 2<sup>nd</sup> limb of the order as the vehicle is now under the control of a 3<sup>rd</sup> party; that refusing to grant stay will expose the applicant to contempt of court proceedings and that its appeal which has high chances of success will be rendered nugatory.
7. The application is opposed. The respondent swore a replying affidavit on 11<sup>th</sup> April 2018 to which he annexed copies of the applications filed in the lower court and the affidavits filed in support and opposition thereof.
8. It is the respondent's contention that the instant application lacks merit as in his view, the applicant has not demonstrated that it will suffer substantial loss if the orders sought are not granted and it has also failed to offer any security to cushion the respondent if it is unsuccessful in its appeal. The respondent denied the applicant's covert claim that it had disclosed to the trial court that it had sold his vehicle during the pendency of the application and averred that the current application is not made in good faith and is solely meant to circumvent the course of justice.
9. The application was by consent of the parties disposed of by way of written submissions. The applicant filed its submissions on 5<sup>th</sup> July 2018 while those of the respondent were filed on 24<sup>th</sup> July 2018. I have carefully considered the said submissions, the application and the

affidavits on record. Having done so, I find that the main issue for my determination in this application is whether or not the applicant has demonstrated that it is deserving of the orders sought.

10. I wish to state from the outset that unlike in the Court of Appeal where the chances of success of the intended appeal is a factor for consideration in applications for stay pending appeal, the parameters within which the High Court exercises its discretion in deciding whether or not to grant orders of stay pending appeal are set out in *Order 42 rule 6* of the *Civil Procedure Rules*. An applicant must demonstrate that if stay is not granted, he is likely to suffer substantial loss; that he is willing to give such security for the due performance of the decree as the court may ultimately order and that the application was filed without unreasonable delay. See: **Housing Finance Company Of Kenya V Sharok Kher Mohamed Ali Hirji & Another, [2015] eKLR.**

11. Starting with the last requirement, I note that the ruling appealed against was delivered on 7<sup>th</sup> June 2017. An application seeking to have those orders reviewed was dismissed on 14<sup>th</sup> November 2017. The memorandum of appeal was filed on 11<sup>th</sup> December 2017. The instant application was filed on 11<sup>th</sup> January 2018 about one month later. I am thus satisfied that the application was filed without unreasonable delay.

12. Regarding the requirement for offer of security, I agree with the respondent that the applicant has not offered any security for the due performance of any order that the court may ultimately issue. As noted earlier, this is one of the prerequisites for grant of stay orders pending appeal. The applicant has therefore failed to satisfy this particular requirement.

13. On substantial loss, the applicant has claimed that it will suffer substantial loss if stay is not granted since it will be exposed to contempt of court proceedings given that it is unable to comply with the order requiring it to release the vehicle to the respondent as the vehicle is now in the possession of a 3<sup>rd</sup> party.

The applicant through its director has deponed in the supporting affidavit that in its replying affidavit to the application filed in the lower court dated 10<sup>th</sup> January 2017, it had disclosed all pertinent facts regarding all the matters in issue in the application. In paragraph 8 of the affidavit supporting the instant application, the applicant avers that it sold the respondent's vehicle on 6<sup>th</sup> February 2017 to recover the debt owed to it. Given that the sale of the vehicle was a fact known to the applicant by the time the replying affidavit was sworn on its behalf on 23<sup>rd</sup> August 2017 and the vehicle in question was the subject matter of the suit and the application before the trial court, the sale of the vehicle ought to have formed part of the pertinent matters that the applicant claims it had disclosed to the trial court in its replying affidavit.

14. I have combed through the said replying affidavit and I have not come across any averment to the effect that the vehicle had been sold in a public auction on 6<sup>th</sup> February 2017. There is therefore no truth in the inference that the learned trial magistrate was aware of all the facts pertinent to the application by the time he rendered his ruling on 7<sup>th</sup> June 2018.

15. It is thus apparent that the applicant was less than candid with both the trial court and this court. If the applicant had made full disclosure of all material facts in its possession including the sale of the subject motor vehicle, the trial court may perhaps have reached a different decision. But having failed to discharge that duty and the court having made a decision on the material placed before it, the applicant cannot now turn around and claim that the execution of that decision will occasion it substantial loss as it is unable to comply with some of its terms. A party who seeks to benefit from the exercise of the court's discretion must come to court with clean hands which the applicant does not appear to have done.

16. Having taken into account all the relevant factors in this matter, I have come to the conclusion that the applicant has failed to demonstrate that it is likely to suffer substantial loss if stay is not granted because even if contempt proceedings are instituted against it, it will definitely be given an opportunity to be heard and to ventilate its case before the trial court. Besides, the impugned rulings were in respect of interlocutory applications and the main suit is yet to be heard.

17. In view of the foregoing, I am satisfied that the applicant is not deserving of the exercise of this court's discretion in its favour. It is consequently my finding that the Notice of Motion dated 11<sup>th</sup> January 2018 is devoid of merit and it is hereby dismissed with costs to the respondent.

It is so ordered.

**DATED, DELIVERED and SIGNED at NAIROBI this 11<sup>th</sup> day of October, 2018.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Ms Awuor holding brief for Mr. Kuloba for the applicant

Mr. Mukasa holding brief for Mr. Omino for the respondent

Mr. Fidel: Court Assistant