



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 165 OF 2018

WOOD VENTURE (K) LIMITED.....APPELLANT

VERSUS

JAMES GITAU MUIGAI.....1ST RESPONDENT

ALI JAMAL ABDULNASIR2ND RESPONDENT

RULING

1. By a Notice of Motion dated 29th March 2018, the applicant *Wood Venture (K) Limited*, moved this court principally seeking orders to grant it leave to appeal against part of the ruling and order made on 15th March 2018 by *Hon. Obura (SPM)* in Milimani CMCC No. 8403 of 2017 and to stay execution of the said order pending the hearing and determination of the intended appeal.

2. The application is anchored on grounds stated on its face which are largely replicated in the depositions made in the supporting affidavit sworn on 29th March 2018 by *Mr. Fredrick Muriithi*, the applicant's Nairobi branch manager.

In a nutshell, the applicant's case is that it is aggrieved by part of the ruling of the lower court which directed it to settle the auctioneer's charges incurred in the course of execution of the judgment entered in the respondent's favour on 27th November 2017. It is the applicant's case that if stay of execution of the said order is not issued, the auctioneer will move to execute for his costs and that if the costs are paid, it might be impossible to recover the money in future if the appeal is successful; that it has a good appeal with chances of success which will be rendered nugatory if stay is not granted.

3. The application is opposed by the 1st respondent through the replying affidavit sworn by his learned counsel *Mr. David Karanja Thuo* on 22nd May 2018. The 2nd respondent did not file a response to the application. When the application was scheduled for hearing, the court was informed that the 2nd respondent did not also participate in the proceedings in the lower court.

4. In his replying affidavit, *Mr. Thuo* deponed that the application ought to be dismissed as in his view, it was frivolous, vexatious and an abuse of the court process; that the impugned orders were made in the exercise of the lower court's discretion and that discretion cannot be challenged unless it is demonstrated that it was not exercised judiciously; that the trial court ordered the applicant to meet costs of the application which included the auctioneer's charges and that in any case, costs follow the event.

5. The application was canvassed by way of written submissions. Those of the applicant were filed on 28th June 2018 while those of the 1st respondent were filed on 24th July 2018.

6. I have considered the application, the affidavits on record and the parties' rival written submissions as well as the court record.

Having done so, I fail to understand why the applicant sought this court's leave to appeal against part of the ruling of the trial court considering that on the day the application was filed, the applicant also filed a memorandum of appeal contesting the trial court's decision. The appeal was filed within the time prescribed by the law. The applicant in its submissions did not make any reference to this prayer. Since there is an appeal already on record and it is not clear what leave the applicant was seeking in the application, I will not spend any time belabouring the prayer for leave.

7. The only prayer then left for determination by this court is whether the applicant deserves an order of stay of execution of the orders directing it to settle the auctioneer's costs pending the hearing and determination of the appeal.

8. The legal parameters that guide the court in the exercise of its discretion in determining whether or not to grant 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 timeously. See *Housing Finance Company Of Kenya V Sharok Kher Mohamed Ali Hirji & Another, [2015] eKLR.*

9. The applicant has argued that it will suffer substantial loss if stay is not granted as the auctioneer's means are unknown and it is unlikely to recover costs paid to the auctioneer in future if its appeal succeeds. It is important to point out at this juncture that the said auctioneer is not a party to this application and the appeal. He did not therefore have an opportunity to respond to the application. The ruling of the lower court was not availed to this court but from the copy of proclamation of moveable property annexed to the supporting affidavit, it is apparent that the auctioneer's charges amount to a round figure of about KShs.89,997.

10. The applicant has not expressly averred that the auctioneer is impecunious and is not capable of refunding such sums if the appeal is successful. The applicant has only vaguely claimed that the auctioneer's means are unknown which is not the same thing as saying that the auctioneer is not possessed of means to refund the costs if paid if the applicant's appeal is successful.

11. In view of the foregoing, even though I am satisfied that the application was filed timeously, I am not convinced that the applicant has demonstrated that it will suffer substantial loss if the orders of stay pending appeal are not granted as prayed. In the premises, I find that the application dated 29th March 2018 is not merited and it is hereby dismissed with costs to the 1st respondent.

It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI this 11th day of October, 2018.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Mukasa for the appellant/applicant

No appearance for the respondents

Mr. Fidel: Court Assistant