



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL APPEAL NO. 51 OF 2018**

**BIN JUMA OMAR (Suing as personal representative**

**of the estate of ISMAEL MSHAMBA SHOLO).....APPLICANT**

**VERSUS**

**TAHMEED COACH LIMITED.....1<sup>ST</sup> RESPONDENT**

**NASORO HAMDU AHMAD.....2<sup>ND</sup> RESPONDENT**

**TAHMEED EXPRESS LIMITED.....3<sup>RD</sup> RESPONDENT**

**RULING**

**(APPLICANT'S NOTICE OF MOTION DATED 12<sup>TH</sup> NOVEMBER, 2018)**

1. The prayer that remains to be determined in the Applicant's application dated 12<sup>th</sup> November, 2018 is the one seeking stay of the orders issued by Mariakani Senior Resident Magistrate's Court on 7<sup>th</sup> November, 2018 sustaining the objection to the attachment of the 3<sup>rd</sup> Respondent's two buses by an auctioneer acting on the instructions of the Applicant.
2. The facts of this case disclose that the Applicant, Bin Juma Omar (suing as the personal representative of the estate of Ismael M. Sholo) sued the 1<sup>st</sup> Respondent, Tahmeed Coach Limited and the 2<sup>nd</sup> Respondent, Nasoro Hamdu Ahmad in Mariakani SRM's Court Civil Case No. 28 of 2015 and obtained judgement. The Applicant instructed an auctioneer to attach the 1<sup>st</sup> and 2<sup>nd</sup> respondents' property in execution of the decree. Acting on the said instructions the auctioneer attached motor vehicles registration numbers KBT 452T and KBT 536U. These are the registration numbers of the vehicles according to the impugned ruling dated 7<sup>th</sup> November, 2017.
3. Upon the attachment of the said vehicles, the 3<sup>rd</sup> Respondent, Tahmeed Express Limited took out objection proceedings but the Applicant opted to proceed with the attachment. After hearing the 3<sup>rd</sup> Respondent's objection, the trial court in a ruling delivered on 7<sup>th</sup> November, 2018 held that the 3<sup>rd</sup> Respondent was the legal and equitable owner of the attached motor vehicles. The attachment was lifted followed by an order directing the release of the attached motor vehicles to the 3<sup>rd</sup> Respondent. This is the decision the Applicant intends to appeal. In the meantime she seeks stay of the orders of the trial court pending the hearing and determination of the appeal.
4. The application is based on the grounds that the Applicant is aggrieved by the ruling; that the attached motor vehicles belong to the 1<sup>st</sup> and 2<sup>nd</sup> respondents; that the orders issued disregarded the facts of the case and the submissions of the Applicant; and that the appeal raises substantial issues of facts and law.
5. Through the supporting affidavit, the Applicant avers that she filed her claim against the 1<sup>st</sup> and 2<sup>nd</sup> respondents on 4<sup>th</sup> February, 2015. The matter was heard and judgement delivered on 31<sup>st</sup> January, 2018. Upon delivery of the judgement the 1<sup>st</sup> and 2<sup>nd</sup> respondents requested for 30 days to pay the decretal amount. However, they instead filed an appeal but withdrew the same upon being ordered to provide security.
6. The Applicant further averred that the auctioneer duly proclaimed and attached the 1<sup>st</sup> Respondent's motor vehicles. According to the Applicant, during the attachment the 1<sup>st</sup> Respondent used the 3<sup>rd</sup> Respondent to remove the motor vehicles from her reach by transferring the same to the 3<sup>rd</sup> Respondent. It is the Applicant's averment that the trial court allowed the 3<sup>rd</sup> Respondent's objection despite the obvious conspiracy. The Applicant avers that the respondents are known for changing their names and ownership of their motor vehicles.

7. Additionally, the Applicant states that her appeal has overwhelming chances of success and the release of the motor vehicles will render the appeal nugatory. The Applicant has also pointed out that the lower court declined to grant stay hence the necessity of the instant application.

8. In opposition to the application the 3<sup>rd</sup> Respondent filed an affidavit sworn on 16<sup>th</sup> November, 2018 by its Operations Manager, Abdulkarim Juma Abdalla. It is averred that the application is misleading in relation to the aforementioned motor vehicles as the 3<sup>rd</sup> Respondent is a separate legal entity from the 1<sup>st</sup> and 2<sup>nd</sup> respondents. It is the 3<sup>rd</sup> Respondent's position that the decree was in relation to the 1<sup>st</sup> and 2<sup>nd</sup> respondents hence the attachment ought to have been restricted to their properties. Further, that the Applicant has not produced any evidence of any collusion. The application is said by the 3<sup>rd</sup> Respondent to be frivolous, vexatious and an abuse of the court process and ought to be dismissed with costs.

9. It is further averred that at the time of the attachment the 3<sup>rd</sup> Respondent was the legal and equitable owner of the said motor vehicles. It is disclosed that the 3<sup>rd</sup> Respondent had filed contempt of court proceedings against the auctioneer after failing to release the motor vehicles as ordered. It is further averred that the 3<sup>rd</sup> Respondent was never served with proclamation and attachment documentation before the vehicles were attached.

10. It is also averred on behalf of the 3<sup>rd</sup> Respondent that the Applicant has not demonstrated the loss she will suffer if the motor vehicles are released. The 3<sup>rd</sup> Respondent, will, on the other hand, incur loss as the motor vehicles are for commercial purposes and fetch income of about Kshs. 178,000.00 per return trip and the Applicant has not disclosed any known means of income that can be used to indemnify the 3<sup>rd</sup> Respondent for the financial loss likely to be occasioned during the protracted appeal process.

11. The 3<sup>rd</sup> Respondent in the alternative concedes to the stay orders on condition that the Applicant provides security to the tune of Kshs. 129,940,000.00 being the loss of revenue likely to be occasioned by the continued attachment of its motor vehicles.

12. The parties ventilated the application by way of written submissions which they later highlighted. The Applicant submitted that a search conducted prior to the attachment revealed that the vehicles belonged to the 1<sup>st</sup> Respondent. It is urged that the purpose of stay pending appeal is to preserve the subject matter thereby safeguarding the right of appeal by ensuring the appeal is not rendered nugatory. According to the Applicant, substantial loss is assessed by looking at the totality of the consequences an applicant is likely to suffer if stay is not granted. In support of these submissions, reference is made to the decisions in **Selestica Ltd v Goldrock Development Ltd, Nairobi HCCC No. 48 of 2015** and **Priscot Company Limited v Monica Hebo, Nairobi Civil Appeal No. 482 of 2014**.

13. It is further urged that the requirement for security should not arise as the Applicant is the judgement-creditor and no appeal lies against her hence it is confirmed that money is owing to her. It is also submitted that the Applicant will suffer substantial loss if stay is not granted and that the application has been made timeously.

14. In response, the 3<sup>rd</sup> Respondent submits that the Applicant has not met the threshold for grant of stay of execution pending appeal as per the requirements of Order 46 Rule 6 of the Civil Procedure Rules, 2010 (CPR). According to the 3<sup>rd</sup> Respondent, the Applicant has not averred that she would suffer substantial loss if the motor vehicles are released. In order to buttress this point, the 3<sup>rd</sup> Respondent relied on the decisions in **Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR**; **James Wangalwa & another v Agnes Cheseto [2012] eKLR**; and **Silverstein v Chesoni [2002] 1KLR 867**.

15. The 3<sup>rd</sup> Respondent asserts that it would suffer loss of Kshs. 178,000.00 per return trip and that the Applicant has not disclosed any form of livelihood that would indemnify it for the loss it will suffer were appeal to fail. It is the 3<sup>rd</sup> Respondent's assertion that the burden of proof lies on an applicant seeking stay of execution to demonstrate that if the money is paid out and the appeal succeeds then the respondent will not be in a position to refund the money. In support of this point, reliance is placed on the decisions in **Equity Bank Ltd v Taiga Adams Company Ltd [2012] eKLR**; **Corporate Insurance Company Limited v Emmy Cheptoo Letting & another [2015] eKLR**; and **Pamela Akinyi Opundo v Barclays Bank of Kenya Limited [2011] eKLR**;

16. It is further urged that the Applicant is frustrating the 3<sup>rd</sup> Respondent's peaceful enjoyment of its property and the court ought to balance the interests of the parties as was stated in the case of **J.P. Machira T/A Machira & Co. Advocates v East African Standard Ltd [2002] 2 KLR 63**.

17. It is also urged that the auctioneer deliberately held onto the vehicles so as to give the Applicant an opportunity to make this application. It is also stated that there are contempt of court proceedings against the auctioneer in that respect.

18. It is further urged that the appeal will not be rendered nugatory as the 3<sup>rd</sup> Respondent was found to be the legal and equitable owner of the attached motor vehicles. Additionally, it is asserted that for the threshold for stay of execution to be met, the Applicant has to provide security as was held in **Equity Bank Ltd** (supra) and **Focin Motorcycle Co. Limited v Ann Wambui Wangui & another [2018] eKLR**.

19. It is finally urged that as the 3<sup>rd</sup> Respondent is presently incurring a loss of Kshs. 356,000.00 daily, it is suffering irreparable loss and the application being one requiring the exercise of discretion, the court is urged to consider how each party would be affected if the application is granted or declined. It is asserted that granting stay will be more prejudicial to the 3<sup>rd</sup> Respondent.

20. The 1<sup>st</sup> and 2<sup>nd</sup> respondents did not respond to the application and neither did they file submissions.

21. The grant of stay pending appeal is not automatic. In exercising its discretion on an application for stay, the court must be satisfied that

substantial loss may result if stay is not granted; that the application has been made without unreasonable delay; and that the applicant has provided security. Where the trial court has declined to grant stay of execution, the appellate court has the mandate to consider the application for stay and make such order thereon as it may deem just. The law stated above is found in Order 42 Rule 6(1) and (2) of the CPR.

22. The facts placed before this court discloses that the Applicant is indeed the decree-holder in Mariakani SRMCC No. 28 of 2015. There is no stay against the execution of the decree. Upon attachment of the motor vehicles in question, the 3<sup>rd</sup> Respondent moved to the trial court and successfully prosecuted objection proceedings leading to the lifting of the attachment and issuance of orders for the release of the motor vehicles to the 3<sup>rd</sup> Respondent.

23. The evidence that was placed before the trial court by the 3<sup>rd</sup> Respondent is that it entered into an oral agreement with the 1<sup>st</sup> Respondent in August 2018 for the purchase of the motor vehicles and was a bona fide purchaser.

24. The Applicant did question the genuineness of the alleged transaction between the 1<sup>st</sup> Respondent and the 3<sup>rd</sup> Respondent. Whereas this is the core issue for the appeal, it is noted that the motor vehicle records attached to the 3<sup>rd</sup> Respondent's pleadings at the trial were for motor vehicles registration number KBT 451F and KBS 372D which are different from motor vehicles registration numbers KBT 452F and KBT 536U attached by Jakimu Auctioneers. The notification of sale exhibited by the 3<sup>rd</sup> Respondent was issued by Makini Auctioneers and not Jakimu Auctioneers. On her part the Applicant produced records showing that motor vehicles registration numbers KBT 452F and KBT 536U were in the names of the 1<sup>st</sup> Respondent on 24<sup>th</sup> September, 2018. The question is whether the transfer of the motor vehicles was done after the commencement of the execution process. The Applicant has therefore demonstrated that she has an arguable appeal.

25. As earlier stated, the Applicant has three hurdles to jump. She has a legit decree which she is entitled to execute. If she cannot access the properties of the judgement-debtor because the assets have been dissipated then she will surely suffer substantial loss. In this case we have a party with a valid decree and another party who may have assisted in hiding the assets of the judgement-debtor. In such a situation the decree-holder will be the greatest loser if the attachment is lifted.

26. Whereas the 3<sup>rd</sup> Respondent argues that it has capacity to make any necessary payments ordered by the court and it is actually the Applicant who has failed to demonstrate that she would be able to indemnify the 3<sup>rd</sup> Respondent were her appeal to fail, I am of the view that the substantial loss to be suffered here is inability to execute due to the likelihood of the property changing hands leaving the Applicant with a paper judgement. The Applicant has therefore successfully convinced this court that she will suffer substantial loss if the order of the trial court is not stayed

27. It is not disputed that this application has been made without undue delay. The Applicant has therefore jumped the second hurdle.

28. Finally, the 3<sup>rd</sup> Respondent has also urged that the Applicant has failed to express willingness to furnish security for costs as required by the CPR. There is indeed need to provide security where an order for stay of execution pending appeal is granted. It is the court that determines the security for the due performance of the order. The 3<sup>rd</sup> Respondent's claim that it makes Kshs. 178,000.00 per trip and is likely to suffer a revenue loss of Kshs. 129,940,000.00 is unsupported. This is a unique matter in that the Applicant is a decree-holder. She has a judgement worth Kshs. 3,530,000.00. In my view, that would be sufficient security for the 3<sup>rd</sup> Respondent in this case.

29. In short, the Applicant has met the conditions for grant of stay of execution of the ruling delivered by the trial court on 7<sup>th</sup> November, 2018. The Applicant's application succeeds so that the attachment of the two motor vehicles in question shall remain in place pending the hearing and determination of the Applicant's appeal or issuance of further court orders.

30. In light of the 3<sup>rd</sup> Respondent's concern that its commercial operations will be affected by a stay order, I direct the Applicant to file and serve the record of appeal within 45 days from today's date. The motor vehicles can be released to the 3<sup>rd</sup> Respondent if it deposits Kshs. 3,530,000.00 in this court and also pays the auctioneer's charges.

**Dated, signed and delivered at Malindi this 6<sup>th</sup> day of December, 2018.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**