



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**CIVIL APPEAL NO 224 OF 2018**

**HARRISON WANGORO MWANGLI.....APPELLANT**

**VERSUS**

**FAMILY BANK LIMITED.....RESPONDENT**

**(Being an appeal from the Ruling of Hon M. Murage (Ms), Resident Magistrate (RM) at the Chief Magistrate's Court at Milimani in Civil Case No 9447 of 2017 delivered on 26<sup>th</sup> April 2018)**

**RULING**

**INTRODUCTION**

1. The Plaintiff's Notice of Motion application dated and filed on 21<sup>st</sup> May 2018 was filed under the provisions of Order 42 Rule 6 (6) of the Civil Procedure Rules 2010. It sought the following orders:-

**1. Spent.**

**2. Spent.**

**3. THAT pending the hearing and final determination of the Appeal herein, the Respondent either by itself its servants, agents, servants, officials, nominees or howsoever be restrained from repossessing alienating, attaching or in any way dealing with the Appellant's Motor Vehicle registration number KCB 245E.**

**4. THAT the costs of this application be provided for.**

2. The Appellant's Written Submissions were dated and filed on 24<sup>th</sup> August 2018. The Appellant's Supplementary Written Submissions, Case Digest and List of Authorities were dated and filed on 18<sup>th</sup> September 2018. The Respondents Written Submissions were dated 5<sup>th</sup> September 2018 and filed on 10<sup>th</sup> September 2018.

3. When the matter came up on 26<sup>th</sup> September 2018, the parties requested the court to deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

**THE APPELLANT'S CASE**

4. The Respondent advanced the Appellant financial accommodation in the sum of Kshs 1,500,000/= and secured the same with his Motor Vehicle Registration KCB 245E (hereinafter referred to as "subject Motor Vehicle") as the security for the said loan.

5. Subsequently, the Appellant fell into arrears whereupon he sought to have M/S Ngao Credit, a financial institution (hereinafter referred to as "the financial institution") take over the loan from the Respondent. However, the Respondent refused to accept an undertaking by the financial institution or to release his documents to it and instead instructed an auctioneer to repossess the subject Motor Vehicle.

6. It was his case that the Respondent had fettered or clogged his right of redemption and thus urged this court to allow his application as prayed.

**THE RESPONDENT'S CASE**

7. In response to the said application, Anthony Ouma, the Respondent's Legal Officer, swore a Replying Affidavit on 3<sup>rd</sup> July 2018. The same was filed on 9<sup>th</sup> July 2018.

8. The Respondent contended that the Appellant had several loans owed to it but he had refused to service the same, thus breaching his contractual obligations. It stated that it had no objection in discharging the Appellant together with his company if all the combined loans arrears together with the legal costs and any costs that had been incurred in realising the loan amount were paid.

9. It added that if the Appellant wanted to take over his loan obligations, then the financial institution had to first clear the entire loan by the Appellant and his company because it could discharge him from his obligations.

10. It pointed out that it would not be possible to discharge the Motor Vehicle even if the amount of the loan in the Appellant's name was taken over by the financial institution since all the securities had been consolidated.

11. Further, it averred that the Appellant had not demonstrated that he would suffer any irreparable harm, that he had an arguable appeal, that his appeal would be rendered nugatory if the orders he had sought were not granted, that there was any threat of execution or that he had met all the conditions that had been set out in Order 42 Rule 6 of Civil Procedure Rules.

12. It therefore urged this court to dismiss the Appellant's application with costs to it.

### **LEGAL ANALYSIS**

13. The Respondent was categorical that the Appellant did not demonstrate that he would suffer substantial loss if the order for a stay of execution was not granted, that he had not provided any security and that there had been a delay in filing the present application.

14. It relied on several cases amongst them **Equity Bank Ltd vs Taiga Adams Company Ltd [2006]eKLR**, **Masisi Mwita vs Damaris Wanjiku Njeri [2016 eKLR]** and **Jaber Mohsen Ali & Another vs Priscillah Boit vs Another [2014] eKLR** in support of its arguments that the Appellant had not demonstrated any of the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules.

15. It also relied on the case of **Machira t/a Machira & Co Advocates vs East African Standard [2002] eKLR** where it was held that the ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage.

16. On the other hand, the Appellant submitted that in an application for stay pending appeal or an injunction, all that an applicant was required to demonstrate was whether or not he had an arguable appeal and whether such appeal would be rendered nugatory if the stay was not granted.

17. He pointed out that one of the loans the Respondent wanted to consolidate was where the borrower was a limited liability company and the guarantor was the County Government of Muranga by way of invoice discounting. It was his contention that such a loan could not be consolidated.

18. He added that the Respondent could also not consolidate a loan for a limited liability company with an individual loan account particularly where the company had other directors. He was emphatic that the company was not a guarantor to his personal loan and neither was there a Board Resolution to that effect.

19. He argued that this was an arguable point of law and pointed out that the Respondent's action was obstructing his right to redeem his Motor Vehicle and was therefore a clog of his equitable right of redemption.

20. The Appellant argued that he would undergo hardship of instituting proceedings to recover his subject Motor Vehicle which would then render his appeal nugatory. He placed reliance on the case of **Mt View Maternity & Nursing Home vs Miriam Maalim [2018] eKLR** where this very court held that costs in instituting legal proceedings constituted substantial loss because substantial loss need not be loss of a lot of money.

21. He was emphatic that he filed his application without any delay as the decision he was appealing against was made on 26<sup>th</sup> April 2018 and he filed the present application on 21<sup>st</sup> May 2018 which was less than a month.

22. He pointed out that the Subject Motor Vehicle was still registered in the joint names of his name and that of the Respondent and consequently he could not dispose of the same.

23. He also placed reliance on the cases of **Molo Group Shuttle Ltd vs Sub County Administration Naivasha & Another [2015] eKLR** and **Reuben & 9 Others vs Nderitu & Another [1989] KLR 490** to buttress his arguments.

24. Order 46 Rule 6 (2) of the Civil Procedure Rules, 2010 provides that an applicant who is seeking a stay of execution pending appeal must demonstrate the following:-

- 1. Substantial loss may result to the applicant unless the order was made;**
- 2. The application was made without unreasonable delay; and**

**3. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.**

25. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “and”. It connotes that all three (3) conditions must be met simultaneously.

26. At this juncture the court would only be interested in ascertaining whether or not the Appellant had satisfied all the three (3) prerequisites under Order 42 Rule 6(2) of Civil Procedure Rules, 2010.

27. However, under Order 42 Rule 6 (6) of Civil Procedure Rules, 2010, it is provided as follows:-

**“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with”.**

28. It is important to differentiate the aforesaid provisions for the grant of orders pending appeal. Under Order 42 Rule 6 (2) of Civil Procedure Rules, 2010, an applicant must demonstrate that he had satisfied the ingredient set out in Paragraph 24 hereinabove. Under Order 42 Rule 6 (6) of Civil Procedure Rule, the court can grant a temporary injunction provided that the procedure for instituting an appeal had been complied with.

29. The decision the Appellant sought to be appealed from was granted on 26<sup>th</sup> April 2018. He lodged his Memorandum of Appeal dated 4<sup>th</sup> May 2018 on 3<sup>rd</sup> May 2018 (**sic**). For all purposes and intent the Appellant had satisfied the first condition set out in Order 42 Rule 6 (6) of Civil Procedure Rules, 2010. In other words, he had complied with the procedure of instituting an appeal.

30. Going further, the said decision was a negative order as that the Learned Trial Magistrate, Hon M W Murage (Ms) dismissed his application for injunction. He could only then had approached this court under Order 42 Rule 6 (6) of the Civil Procedure Rules. The power of court to grant an injunction pending appeal was also addressed in the case of **Erinford Properties Ltd vs Cheshire County Council [1974] 2 All ER** where the Court of Appeal held that a court could grant a *status quo* order pending the hearing and determination of an appeal.

31. In this regard, it was the considered opinion of this court that before granting a temporary injunction, the High Court had to be satisfied that the appellant had met the criteria that had been set out in the case of **Giella vs Cassman Brown [1975] EA**.

32. The Appellant had raised several questions as shown in Paragraphs 17 and 18 hereinabove. These were not questions that could be answered by way of affidavit evidence. They were arguable issues for appeal. It was evident to this court that the Appellant herein had established a *prima facie* case.

33. Although the Respondent was a financial institution which as the Learned Trial Magistrate observed was capable of compensating the Appellant, it was the considered view of this court that the balance of convenience tilted in favour of the Appellant being granted an injunction pending the hearing and determination of the appeal herein because once the subject Motor Vehicle was disposed of, it would be transferred to a third party making it difficult for the Appellant to repossess it back if he succeeded on appeal.

34. This court noted that the cases the Respondent had relied upon related to a stay of execution pending appeal under Order 42 Rule 6 (2) of the Civil Procedure Rules which were distinguishable from the stay in case of appeal under Order 42 Rule 6 (6) of the Civil Procedure Rules as had been sought by the Appellant herein.

#### **DISPOSITION**

35. For the foregoing reasons, the upshot of this court’s decision was that the Plaintiff’s Notice of Motion application dated 18<sup>th</sup> January 2018 and filed on 22<sup>nd</sup> January 2018 was merited and the same is hereby allowed on following terms:-

**1. THAT the Appellant, the Respondent and/or their agents and/or servants are hereby restrained from alienating, disposing the Motor Vehicle Registration No KCB 245E which is jointly registered in their names pending the hearing and determination of the Appeal herein.**

**2. THAT the Appellant shall file and serve his Record of Appeal within sixty (60) days from the date of this Ruling i.e by 2<sup>nd</sup> March 2019.**

**3. THAT the Deputy Registrar High Court of Kenya Civil Division do facilitate the typing of the proceedings to enable the Appellant comply with order in Paragraph 35 (2) hereinabove with a view to him prosecuting his Appeal without any delay.**

**4. Either party is at liberty to apply.**

36. It is so ordered

**DATED and DELIVERED at NAIROBI this 6<sup>th</sup> day of December 2018**

**J. KAMAU**

**JUDGE**