



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 251 OF 2017

UNI GLOBE NORTHLINE TRAVEL LTD.....APPLICANT

- V E R S U S -

AGNES KAGURE KARIUKI..... 1ST RESPONDENT

ICON AUCITONEERS 2ND RESPONDENT

RULING

1. The subject matter of this ruling is the motion dated 9th November 2018 taken out by Uniglobe Northline Travel Ltd, the applicant herein, in which it sought for the following orders:

- 1. THAT this application be certified as urgent and the same be heard ex-parte in the first instance for purpose of prayer (2) and (3) below.***
- 2. THAT the application herein be set down for hearing inter-partes as a matter of urgency.***
- 3. THAT there be a temporary stay of further proceedings and execution of the ruling made on 2nd November 2018 herein by the honourable Justice Sergon pending the hearing and final determination of this application inter-partes.***
- 4. THAT costs of this application do abide with the appeal.***

2. The motion is supported by the affidavit and a further affidavit of Njeri N. Mugo. When served, Agnes Kagure Kariuki and Icon Auctioneers the 1st and 2nd respondents respectively filed the replying affidavit of Jeremiah Kiarie Muchendu to oppose the motion. Learned counsels appearing in this matter made oral submissions when the motion came up for interpartes hearing.

I have considered the grounds stated on the face of the motion dated 9.11.2018 and the facts deponed in the affidavits filed in support and against the motion. I have further considered the rival oral submissions of learned counsels.

3. The applicant has beseeched this court to issue the order sought arguing that the application for stay was timely filed. It is further argued that the applicant has filed a notice of appeal and that the intended appeal is arguable and has merit. The applicant also stated that it is ready and willing to comply with the directions of the court. The applicant further argued that it will suffer substantial harm if the prayers sought are not granted and that loss is real in view of the admission by the 2nd respondent that the applicant's goods which had been proclaimed have been sold. The applicant attached to the further affidavit of Njeri N. Mugo a copy of SWIFT confirmation on RTGS payment having been sent to its advocate the equivalent of the decretal sum.

4. The 1st respondent opposed the motion arguing that the 2nd respondent had been given instructions to execute the decree by attachment. It was shown that the 2nd respondent went ahead to proclaim and thereafter advertised and sold by public auction the applicant's goods in which a sum of ksh.155,900/= was netted. The 2nd respondent further stated that there still outstanding decretal amount of ksh.2,103,101 which remains unsettled. This court was informed that the decree is partly executed and that in the circumstances the motion is overtaken by events and is intended to cause further delay.

5. It is not in dispute that this court gave exparte orders for stay of execution on 14.9.2018 to last for 21 days pursuant to the motion of the same date. The motion was heard and eventually dismissed on 2/11/2018. The applicant filed a notice of appeal seeking to have the decision of this court of 2/11/2018 impugned. The applicant has now taken out the motion, the subject matter of this ruling and it is seeking for stay of further proceedings and execution of the ruling pending the interpartes hearing of the motion. It is clear on the face of the motion that the orders sought will obviously lapse at the delivery of this ruling. The applicant's advocate committed the same mistake it did while drawing the application dated 14.9.2018.

6. The court pointed out the defect in its ruling which delivered on 2/11/2018. Courts grant orders sought for and cannot grant orders gratuitously or by inference. Even assuming that the applicant had sought for an order for stay of execution pending appeal, I do not think the motion would succeed on its merits.

7. The principles to be considered determining such applications are three fold. **First**, an applicant must show the substantial loss it would suffer if the order for stay is denied. In this case the applicant has stated that it will lose its goods if they are attached and sold. I do not think this can amount to a substantial loss. The process of executing a decree involves *inter alia* the attachment and sale of the judgment debtor's property or goods. It is a lawful process which a party must suffer for failing to settle the decretal sum. That loss cannot be said to be a substantial loss.

8. The **second** principle is that the application for stay must be filed timeously. In this regard, I am convinced that the application was filed without unreasonable delay.

9. The third principle is that the court should consider the provision of security for the due performance of the decree. This principle is dependent on whether or not the applicant has shown the substantial loss it would suffer if the order for stay is denied which the applicant in his case has failed to show.

10. In the end, I find no merit in the motion. The same is dismissed with costs to the 1st respondent.

Dated, Signed and Delivered in open court this 14th day of December, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondents