



**REPUBLIC OF KENYA**

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

**COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI**

**HCC APPEAL NO.9 OF 2017**

**UCHUMI INTERNATIONAL AGENCIES LIMITED.....PLAINTIFF/APPL**

**VERSUS**

**ALIOS FINANCE KENYA LIMITED.....1<sup>ST</sup> DEFENDANT/RESP**

**JOSEPH NYUTU KAMAU.....2<sup>ND</sup> DEFENDANT/RESP**

**RULING**

This is a ruling on the Appellants application dated 24<sup>th</sup> October 2017. It seeks to restrain the Respondents from selling, disposing of, alienating and or dealing in any manner with the assets namely caterpillar Excavator Registration No. KBN 601V and Hammer/Digger pending hearing and determination of Appeal filed; that Decree dated 8<sup>th</sup> September 2017 be stayed.

Grounds On The Face Of the Application are that the Appellant owned two assets Caterpillar Excavator Registration number KBN 601V and Hammer/Digger. That the Appellant used the former to secure a loan form the 1<sup>st</sup> Respondent while the Hammer/Digger remained unencumbered.

That the 2<sup>nd</sup> Respondent attached both assets.

The Appellants contention is that the debt has been settled by the applicant save for incidental cost; that trial Court misconstrued a letter dated 4<sup>th</sup> April 2016 to mean that the was a balance of Kshs. 2.1 million owing from the applicant to the 1<sup>st</sup> Defendant

That the Court had ordered release of the asset prior to institution of this suit.

The applicants appeal is to establish whether it was entitled to mandatory order of injunction to have its two assets, damages on trespass to property, costs and interest.

The Appellant seeks conservation of the property awaiting appeal.

In response, the Respondents filed replying affidavit sworn by Christopher Njoroge Wachira the 1<sup>st</sup> Defendant's loan recovery officer. He averred that the suit was heard and dismissed with costs but the 1<sup>st</sup> Respondent was unable to execute as the Appellant has no known abode.

The 1<sup>st</sup> Respondent prays that the Appellant deposit security for costs which have been assessed at Kshs. 98,025.00; that the Appellant has not produced proof of settling the debt.

Counsel for Respondent submitted that the the application was filed on 24<sup>th</sup> October 2017 for judgment delivered on 8<sup>th</sup> September 2017; that there is delay which has not been explained.

I note that the applicant failed to cite specific provisions of the laws but it is evident that prayers sought fall under Order 42 Rule 6 of the Civil Procedure Rules. I will proceed to consider merits of the application; whether the application met the requirements provided under order 42 of the Civil Procedure Rules.

Conditions for grant of stay pending appeal are :-

**Order 46 Rule 6**

**a. The Court is satisfied that substantial loss may result to the applicant...that the application has been made without unreasonable delay**

**b. Such security as the Court orders for due performance of such Decree or order as may ultimately be binding...**

In so far as the first condition is concerned, I note that the application herein was filed one month 2 days after delivery of judgment. I do not consider the above timing to fall under category of delay.

In so far as substantial loss is concerned, the Appellant has indicated that the second asset was not charged for the loan and should not have been attached. Parties herein will converse that issue in the Appeal. It would be in the interest of justice to preserve the subject matter awaiting appeal.

On the second condition, security for performance is crucial to safeguard interest of the Respondent.

**Final Orders**

1. Decree issued on 22<sup>nd</sup> September 2017 is hereby stayed pending hearing and determination of the appeal herein.
2. The Appellant do deposit the decretal amount within 30 days from today's date.
3. Failure to comply with order 2 above, the stay orders will stand discharged.
4. Costs in the cause.

**Ruling Delivered, Dated and Signed at Nairobi this 13<sup>th</sup> day of December, 2018**

.....

**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF**

Margaret: **COURT ASSISTANT**

Mutuvi H/B for Ogwayo: **COUNSEL FOR APPELLANT**

No appearance for: **RESPONDENTS**