



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISCELLANEOUS CIVIL APPLICATION NO 90 OF 2006

A.G RIUNGU & COMPANY ADVOCATES.....APPLICANT

Versus

MICHIMINKURU TEA GROWERS SACCO.....RESPONDENT

KENYA COMMERCIAL BANK LIMITED.....INTRESTED PARTY

RULING

[1] Before me is a Notice of Motion Application brought pursuant to Section 1A and 1B, 3A,75,78,79 of the Civil Procedure Act, 2010 and Order 51 Rule (1) and 42 Rule (1) of the Civil Procedure Rules 2010 and all other enabling provisions of the Law. The significant orders sought in the application are:

- 1. Stay of execution of the orders issued on 15th November 2016 in Tigania PMCC NO. 36 of 2015 pending the hearing and determination of the intended appeal against the said orders.**
- 2. An order for costs; and**
- 3. Any other order that meets the ends of justice.**

[2] The gist of the Application is inter alia that the Learned Magistrate denied the Applicant a chance to be heard before delivering the ruling dismissing the Applicant's Application dated 19th September 2016. Second, that if a stay of execution was not granted substantial loss may result to the Applicant for the following reasons;

- (a) The Respondent closed shop and has no other attachable assets; therefore, if the motor vehicle in question is sold by the interested party, the Applicant would not recover his decretal sum amounting to over Kshs 600,000.
- (b) The intended appeal has reasonable chances of success and if the interested party was allowed to sell the proclaimed motor vehicle the appeal will be rendered nugatory.

[3] The Applicant further contended that there was no delay in bringing this application and that he would abide by any conditions and terms that the court may deem fit to impose.

Application was opposed

[4] The Application was opposed via two Replying Affidavits sworn by Charles Kiara the Branch Manager of the Interested Party and Mercy Kaume on behalf of the Respondent. It was deposed inter alia that the Application was an Appeal in disguise against the orders of Hon Sangomo and had the Applicant been dissatisfied with the said orders, he should have moved the court and filed a substantive appeal under the provisions of Order 42 Rule 6 of the Civil Procedure Rules in which he should have sought a stay.

[5] It was further deposed for the Interested Party that in the absence of a challenge of the Hon Sangomo's orders of 15th November 2016, the Application had no legs on which it could stand and could not lie. In addition, she averred that miscellaneous application by its very nature is a special purpose vehicle which could not be used to stay or attack substantive orders of the trial court. In any event, she stated that the subject motor vehicle was sold before the present stay orders were issued; thus, the application has been overtaken by events. It was also submitted that the Respondent Sacco did not exist in the eyes of the law at the time the dismissal order was done. The foregoing were the arguments by the Respondents and the interested party. They sought dismissal of the application herein.

DETERMINATION

[6] I have carefully considered the application and the affidavits filed as well the rival contentions by the parties. The Applicant is seeking a stay of execution of orders issued on 15th November 2016 in Tigania PMCC NO. 36 of 2015 pending inter alia the hearing and determination of the intended appeal against the said orders. So far, neither appeal nor at least a draft memorandum of appeal has been filed. But, that notwithstanding, has the threshold for stay of execution pending appeal under order 42 rule 6 of the Civil Procedure rules been satisfied? Of course the application was filed without unreasonable delay; it passes the first hurdle. Now, the main consideration and cornerstone of the jurisdiction of court under order 42 Rule 6 of the Civil Procedure Rules is whether substantial loss would occur unless stay of execution is ordered. Substantial loss as was described in *Sewan kambo Dickson Vs. Ziwa Abby HCT-00-CC MA 0178 of 2005*, was stated (The High Court of Uganda at Kampala) is:-

“...a qualitative concept. It refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal”. The court further held that “...

Consequently, in this case it is about preserving the subject of the appeal which is motor vehicle registration number KAW 182V. At this juncture, it is useful to discuss the submissions and averments by the Respondent and the interested party to the effect that this application has been overtaken by events since the motor vehicle in question had already been sold and therefore there was nothing to stay. Despite giving the Applicant ample time to file a supplementary affidavit on these allegations, he did not do so. Accordingly, these averments by the Respondent's and the interested party may be true. But, there is more than meets the eye.

[7] There are circumlocutions and ominous flags surrounding sale of the vehicle herein, if at all. First, the allegation that the vehicle in issue was under proclamation in execution of a decree is a substantial question of law and a matter of administration of justice. In fact it is a matter that hinges on court process about which the court should intensely interrogate under its supervisory jurisdiction in article 165(6) & (7) of the Constitution to ensure fair administration of justice. Again, allegations such as; (1) that no notice of objection was ever filed by KCB to intimate their interest in the vehicle; (2) claim by KCB that at the material time the vehicle was under lien by them and under the custody of CMC MOTORS GROUP LIMITED, Meru Branch; and (3) that Mr. Riungu visited CMC on the pretext that he intended to buy the vehicle only to serve an order of stay on the Interested party; are all matters which touch on propriety of the transactions relating to this vehicle. That is not all; after consideration of some of the allegations by Mr. Riungu I called for the trial court file to be availed and be part of these proceedings. I have perused that file and I note with concern that the trial court did not record what the parties said on 1st November, 2016; it simply gave a date for ruling and ordered that status quo be maintained. Those proceedings are obscure; their propriety and legality is in doubt. Such kind of proceeding is a candidate for setting aside *ex debito justitiae*- not as a matter of exercise of discretion but as a matter of judicial

duty in order to uphold the integrity of the judicial process itself and record. Accordingly, in exercise of my powers under article 165(6) & (7) of the Constitution I hereby set aside the proceedings for 1st November 2016 by Hon. Sogomo. I do not however find any bias on his part as was alleged by Mr. Riungu. This was just a careless and fatal lapse on the part of the trial court but not evidence of any bias; but sufficient cure has been administered as I have set it aside. I also order that the application dated 19th September 2016 be heard inter partes and expeditiously. In addition, the trial court shall inquire into the allegations that and establish whether or not the vehicle herein; (1) has been sold and when; and (2) it was subject of proclamation at the time of sale. And then make its decision on the matters as by law. Accordingly, the trial court's file shall be remitted forthwith back to the relevant station for hearing in accordance with the order and directions herein. By these orders and directions, the application dated 15th November 2016 is spent. Given the circumlocutions I have alluded to above which touch on all the parties, I order that each party shall bear own costs of the application. It is so ordered.

Dated, signed and delivered in open court at Meru this 16th day of February 2017

F. GIKONYO

JUDGE

In the presence:

Mr. Carl Peters advocate holding brief for Mrs.Kaume for respondent

Mr. CarlPeters advocate holding brief for Mr. Kiautha advocate

for interested party.

F. GIKONYO

JUDGE