



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NUMBER 163 OF 2013

AUTO SELECTION (K) KTD.....APPLICANT

VERSUS

ANN C. CHERUIYOT.....1ST RESPONDENT

STEPHEN AMURO MESA.....2ND RESPONDENT

BENARD PARSOI.....3RD RESPONDENT

(Being an appeal from the ruling and decree of the Honourable S. Mungai dated the 21st August 2013 in Nakuru CMCC No. 863 of 2010)

RULING

1. The applicant and appellant in this appeal by its application dated 19th November 2014 sought the following orders:

1. spent

2. spent

3. that this Honourable Court be pleased to review its ruling of the 13th November 2014 to the extent that it dismissed the appellants application.

4. That provisions be made as to the costs of this application.

The application is brought under **Order 45 Rule 1(1)(b), Order 22 Rule 22 and 25 of the Civil Procedure Rules:**

The grounds upon which the application is premised is that there is an apparent error on the face of the record, that no determination was made on whether the Respondent can refund the decretal sum that the appellant stands to suffer irreparable loss and damage, that the ruling violates the concept of justice and finally that the court did not logically consider the principles of stay pending appeal at the appellate stage. It is further supported by an affidavit sworn by one Shukadin Kassam the Chief Executive Officer of the appellant company sworn on the appellant company sworn on the 19th November 2014.

The application is opposed by Replying affidavit sworn by the first Respondent, and filed on the 2nd December 2014.

At the onstart of the hearing of the application, parties agreed to file written submissions on the application.

2. **The applicant's case and submissions.**

The Ruling dated 13th November 2014 dismissed the appellant's application dated 5th May 2014 that sought orders for stay of execution pending hearing and determination of the hereof on the grounds that the said application had not been made without unreasonable delay, that the applicant did not demonstrate any likelihood of suffering irreparable loss on account of the first Respondents inability to repay the decretal sum should the appeal be successful and finally that no reasonable offer was made on security for due performance of the decretal.

3. In its supporting affidavit the applicant deponed that it was never the owner of the motor vehicle in question and that the matter proceeded in the trial court without its participation and the appeal is against the trial court's refusal to set aside the *exparte* judgment and reiterated the grounds stated above.

4. In its written submissions, the applicant submits that the trial court dismissed its application for stay pending appeal without giving directions on security, and states that the security offered by way of log book, evaluation report and the pleadings refer to one and the same entity, that is Auto **Selection Ltd, Auto Selection(K) Ltd and Autosol (K) Ltd**. It is further submitted that the onus of proving the fact of whether or not the first Respondent is able to refund the decretal sum if paid to her rests with her, and not the appellant and relied on **Section 112 of the Evidence Act**, and that the court made a mistake by dismissing the application as a lot of money is involved and there is no evidence that the first Respondent can refund the same as no disclosure was made on how and by what means she can do so. It is further submitted that unless the court orders a stay of execution pending the appeal the applicant stands to suffer substantial loss and relied on the cases **Orero -vs- Sello (1984) KLR 238 and Shah -vs- Dharamshi (1981) 560**.

5. In highlighting the submissions, the appellants advocate, Mr. Matiri advocate referred the court to **Order 45 Rule (1)(1)** that adds any sufficient reason as a good ground for an application for review. He further reiterated that the first Respondent did not show how she would refund the decretal sum of Kshs.3.5 Million should the appeal be successful. It was his submission that the appellant offered to give a Bank guarantee or deposit a log book which the court rejected but were willing and ready to offer sufficient security for the entire amount. He urged the court to consider just and proportionate dispensation of Justice by reviewing the court order issued on the 13th November 2014.

6. **On the Respondents part**, it was urged in the written and oral submissions that the appellant has been filing multiple applications, four in number, that the court have since dismissed and as such this court is *functus* official.

In her Replying affidavit, the first Respondent states that there is no material placed before the court to warrant a review of its earlier orders nor is there any error apparent on the face of the record.

As to the ownership of the subject motor vehicle, it is submitted that its ownership was a matter of evidence and that the applicant ignored to tender such evidence during the trial and not therefore a matter for this courts determination on application for Review. It is further submitted that the applicant never offered sufficient security and all applications in respect thereof were dismissed.

7. Mr. Orege Advocate for the Respondent in his oral submissions urged the court that the security offered was not in the appellant's name and that the conditions set out under **Order 45 of the Civil Procedure Rules** were not met, that once an appeal is filed, the right to Review is waived under **Order 45 Rule 1 of Civil Procedure Rules**. It is further submitted that the order sought to be reviewed was not annexed, which is a preliquisite to the application. On this, the case of **Mea Ltd -vs- Gititu Coffee Growers Ltd (2006) KLR** came to play. It was urged that the application is defective and ought to be dismissed.

8. The court has considered the application, affidavit evidence and submissions by counsel.

An application for Review of a court order, judgment or ruling is premised on provisions of **Order 45 of the Civil Procedure Rules. Rule (1)(1)** states:

“Any person considering himself aggrieved and who from the discovery of the new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the Judgment to the court which passed the decree or made the order without unreasonable delay.”

The order sought to be reviewed was issued by the court on the the 13th November 2014.

I note that this order is not subject of an appeal. What is on appeal is the trial court's ruling and decree dated 21st August 2013 dismissing the appellants application dated 12th April 2013.

9. I have also considered the first Respondents submission that four similar applications have since been heard and dismissed by various courts. It is true that the appellant has filed four applications against each of the three Respondents before the trial court seeking similar orders of stay of execution of the same decree pending hearing and determination of the appeal.

As expressed by Honourable Justice H. Omondi in her ruling under attack dated 13th November 2014 the applicant has been frustrating the first Respondent/Decree holder by filing unmerited applications in conjunction with the third Respondents and which all have been dismissed. This is but another such application, in my view, made to further the frustrations to the first Respondents by the applicant.

That as it may, I have interrogated the ruling under attack. I have not seen any error apparent on the face of the record as the main ground upon which the application is premised. All arguments urged before this court are the same ones urged before Hon. Omondi, Judge. I have tried to find any important matter or evidence that was not within the knowledge or could not have been produced before, even at the trial court, and I have found none. I too have not seen any apparent mistake.

10. In the first instance, the order sought to be reviewed has not been annexed to the application. In the case **Mea Ltd (Supra)** the court held that it is trite that the applicant ought to have extracted the order and appended it to his application for review and failure to do so the application is rendered defective . The applicant did not attempt to explain its failure to extract and annex the order. That in my view makes the application defective, among other reasons.

11. The issue of security was argued at length. I have noted that the same security offered in the earlier application dated 5th May 2014 and in the four applications before the trial court is the same – a motor vehicle log book in different names as stated earlier. The submission by the applicant that all the three different owners, alleged to be one and the same entity is not a sound legal submission. I agree with Hon. Omondi, Judge that there is a possibility that the three could be different entities. To this end, I have looked at the deponent of the supporting affidavit hereof. He is Shujadin Kassam Salyani and describes himself as the Chief Executive Officer of the appellant company. It was sworn on the 19th November 2014. In the application dated 5th May 2014 whose ruling is the subject of this application, the deponent of the supporting affidavit is named as Boniface Shikomele Wanyonyi and described as the Chief Executive Officer of the appellant company. It was sworn on the 5th May 2014. Further in the Notice of motion dated 18th October 2013, the said Bernard Wanyonyi, the deponent of the supporting affidavit describes himself as the **Nairobi Branch Manager of Auto Selection(Kenya) Limited**.

12. There is no doubt that the applicant/Appellant is taking this court for a ride, hoping that the court will not peruse all the documents filed to find the mischief. That mischief is apparent and will not sway the court in its adheavour to administer justice.

The court finds that all the applications filed by the appellant are tainted with mischief and are made to frustrate the first Respondent from enjoying fruits of her judgment. The said motor vehicle cannot be owned and/or registered in three different names, and the three entities cannot be one and the same. I have seen a copy of the log book. The motor vehicle Registration **Number KBM 301Y** is registered in the name of **Autosol K. Limited**. By stretch of all imagination, the said **Autosol Kenya Limited** cannot be one and the same as **Auto Selection (K) Ltd**.

13. The applicant argued that it is ready to offer any other security, and faults the earlier court that it did not request the applicant to provide other security. This on its own connotes a ground of appeal, not a Review order. Having made a finding that conditions for Review had not been met, the court cannot entertain the request as all along the applicant ought to have provided sufficient security for due performance of the decree, and this point is embodied in the grounds of appeal in the appeal filed herewith. There can be no appeal as well as a review of an order or decree where an appeal has been preferred as in this matter, on the same grounds. Provisions of **Order 45 of Civil Procedure Rules** forbids such move. It reads:

45(1) (a) Any person considering himself aggrieved by a decree or order from which an appeal is allowed, but from which no appeal has been preferred, or

(b) by a decree or order from which no appeal is hereby allowed.”

14. For the above reasons, the court finds that the application dated 19th November 2014 is defective, without merit, frivolous an abuse of the court process. It is dismissed with costs to the first Respondent.

The interim orders of stay of execution granted to the applicant on the 21st November 2014 are hereby vacated and discharged.

Dated, signed and delivered in open court this 4th day of February 2016

JANET MULWA

JUDGE