REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO.23 OF 2016

JACOB WANDERA .....APPELLANT/APPLICANT

VERSUS

ALI KADIMA YUNUS .....RESPONDENT

RULING

1. On 16th March, 2016 the trial court at Mumias (**Hon Sitati RM**) allowed an application she was considering in SPM CC No.23 of 2016 and granted custody of motor vehicles **KCE 992P NISSAN VANNETTE** and **KCD 134N TOYOTA AXIO** to **Ali Kadima Yunus** the respondent herein who was the applicant in that court. Aggrieved by that order, Jacob Wandera, the applicant lodged an appeal against that decision to this Court, on 21st March, 2016.

2. Simultaneous with the memorandum of appeal, the applicant took out a motion on notice premised under sections 1, 1A, 3, 18 and 63(e) of the Civil Procedure Act, Cap 21 Laws of Kenya., **Order 42 rule 6** of the Civil Procedure Rules, 2010 and **Article 159(d)** of the Constitution, seeking a stay of execution of that order pending the hearing and determination of the present appeal.

3. The application is based on the grounds on the face of the motion and the affidavit in support sworn by the applicant on 21st March 2016. The applicant has deponed that he is jointly registered as proprietor of Motor Vehicles **KCE 992P** and **KCD 134N** with **Family Bank Ltd** and **Diamond Trust Bank Kenya Ltd** respectively who financed the purchase of the motor vehicles. The applicant further deponed that the order in Mumias Senior Principle Magistrate's Court deprived him of possession of the motor vehicles which are still on loans yet to be serviced; that the act of placing the motor vehicles in the hands of the respondent has exposed the applicant to hardship or irreparable loss of those vehicles were they to be repossessed by the banks at a later date and disposed of, and that generally the applicant has been exposed to risks and liabilities, in the event the motor vehicles are involved in an accident;. According to the applicant, it is in the interest of both parties if the motor vehicles are placed under the custody of Mumias Police Station pending the hearing and determination of this appeal.

4. The application came by way of certificate of urgency and it was so certified and set for hearing interpartes on 30th March, 2016. On that day there was no representation on the part of the respondent and after the court was satisfied that service had been effected on counsel for the respondent, allowed the hearing of the application to proceed.

5. **Mr Luchivya**, learned counsel for the applicant, submitted that the applicant is the registered proprietor of the two motor vehicles and reiterated the fears of the applicant contained in the supporting

affidavit. Counsel submitted from the bar that there was a verbal agreement between the applicant and the respondent that the respondent would service the loans taken from the banks but that the respondent had defaulted in loan repayments. Counsel therefore urged that the motor vehicles be kept at Mumias Police Station pending the hearing and determination of this appeal.

6. I have considered the application, affidavit and submissions by counsel for the applicant. I have also perused the record. This being an application for stay of execution pending appeal, the starting point is **Order 42 rule 6** of the Civil Procedure Rules, 2010 which provides as follows:-

> **"O.42 r 6(2) – No order for stay of execution shall be made under sub rule 1 unless -**
>
> **a) the court is satisfied that substantial loss may result to the applicant unless the order is made and the application has been made without unreasonable delay; and**
>
> **b) 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."**

7. From the reading of **Order 42 rule 6(2**) there are three requirements to be satisfied before the court can grant a stay pending appeal, namely; the applicant must show that he stands to suffer substantial loss if stay is not granted, that the application for stay has been made without delay and that the applicant has offered security for due performance of the decree or order should he be found to be liable. I will first deal with the requirement that an application for stay be filed without unreasonable delay.

8. The impugned order of the learned magistrate was made on 16th March, 2016 and the appeal herein filed on 21st March 2016 within a period of five days. The application for stay of execution was filed on the same day. I am therefore satisfied that the applicant complied with the requirement by filing the application timeously.

9. The applicant is also required to show that he will suffer substantial loss if an order of stay is not granted. Substantial loss to be incurred should be demonstrated by clear evidence whereby the applicant places before the court evidence or material to show that indeed he stands to suffer substantial loss if stay is not granted.

10. In the case of **Machira t/a Machira & Co Advocates v East African Standard (No.2)** [2002] 2 KLR 63, the court stated:-

> "**If the applicant cites as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an award, decree or order, before disposal of the applicant's business (e.g. appeal or intended appeal.)"**

11. An applicant who comes to court seeking a stay of execution saying that he stands to suffer substantial loss must be candid and clear and place before court sufficient material to enable the court apply its mind on the issue. This is so because, at that point the respondent has a judgment, decree or order in his favour and the court must be satisfied that on the material before it, intervention is necessary.

12. In the case of **Kenya Shell Limited v Kibiru & another** [1986] KLR 410 **Platt JA** said at page 416:-

> **"It is usually a good rule to see if order XLI rule 4 (now order 42 rule 6) of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. *Substantial loss in its various forms, is the corner stone of both jurisdictions to grant a stay.* That is what has to be prevented. Therefore without this evidence it is difficult to see**

why the respondents should be kept out of their money."

13. Further in the case of **Andrew Kuria Njuguna v Rose Kuria (Nairobi Civil Case No.224 of 2001, unreported)** it was stated as follows:-

> **"Coming to the substantial loss likely to be suffered by the applicant if the stay order is not granted, she was bound to place before the court *such material and information* that should lead this court to conclude that surely she stood a risk of suffering substantial loss money wise or other, and therefore grant stay."**

14. The applicant before me seeks a discretionary remedy of stay of execution and prays that the subject motor vehicles be preserved at Mumias Police Station pending the hearing and determination of his appeal. In his entire affidavit, the applicant does not state the relationship between him and the respondent. There are also no materials from the lower court to enlighten this court what the respondents' claim was before the lower court. The responses that were filed by the applicant before that court are also not before this court.

15. During the hearing of the application, at the prodding of the court, learned counsel for the applicant stated from the bar that there was a verbal agreement between the applicant and the respondent, but was not sure of the terms and conditions of the said agreement is any. He however said that the respondent was supposed to service the loans that had been taken by the applicant in purchasing the motor vehicle but the respondent has defaulted in so doing. I note however that in his affidavit the applicant does not allude to any agreement or default loan repayment by the respondent which he could say the respondent had an obligation to service. The applicant has also not attached any demand letters from the banks complaining of any default. The applicant simply says at paragraph 10 of his affidavit in support of the application that there is no longer good will and trust between him and the respondent without expounding on it. What relationship if at all was there between the two parties and was it based on any undertakings by either party?

As the court held in the case of **Machira** (supra):-

> **"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. *That is strite knowledge, This is one of the fundamental procedural values which is acknowledged and normally must be put in effect by the way we handle applications for stay of further proceedings or execution pending appeal.* Ofcourse, in the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in the courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court." (emphasis)**

16. The applicant was under duty to disclose to the court what his relationship with the respondent was and how it came into being and if there were any obligations on either party. Although he says that he has been deprived of the motor vehicles by the impugned order, he has not shown how that will cause him substantial loss. It is the substantial loss that the applicant would suffer that this court should be addressing at this stage and nothing else and it can only do so when the applicant is candid and puts forward sufficient material to assist the court address the issue. That is why **Gachuhi JA** stated in the case of **Kenya Shell** (supra) at page 417:-

> **"In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that *status quo* should remain as it were before judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment."**

17. The issue of substantial loss to be suffered by the applicant if stay is not granted is central but has not been sufficiently addressed. The applicant's fear that the motor vehicles may be involved in an accident and is therefore a risk to him is farfetched. The motor vehicles were given to the respondent through a

court decision and obviously since the applicant would not be operating the motor vehicles, there would be no vicarious liability on him because the drivers of those vehicles would not be his authorised drivers. That again cannot amount to substantial loss.

18. I also note that the applicant prays that the motor vehicles be kept at a police station which would still mean that they will not be operating hence loan repayment would still not be possible. There is the second aspect of the likelihood of those vehicles being wasted which again is not a solution to the issue herein.

19. On the issue of security, although the applicant says he is willing to abide by the order of this court, that does not amount to security. As said earlier there are insufficient material before the court to enable the court address issues including security. I do not know what the respondent's claim against the applicant's and for that matter I would have no basis to order provision of security otherwise the court would be acting on abstract.

20. In the present application, the applicant has not given to court sufficient materials to enable it to exercise its discretion in granting the order of stay sought. The applicant seeks a discretionary remedy and should have satisfied the court that he deserves its exercise in his favours. I agree with **Gikonyo J's** statement in the case of **Antoine Ndiaye v African Virtual University** [2015] eKLR when he rendered himself thus:-

> **"The relief (of stay of execution pending appeal) is discretionary although as it has been said often, the discretion must be exercised judicially that is to say judiciously and upon defined principles of law, not capriciously or whimsically."**

The discretion of the court to grant or refuse stay was perhaps well put by **Madan JA** (as he then was) in the case of **Butt v Rent Restriction Tribunal** [1982] KLR 417 at 419 when he said:-

> **"It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution."**

21. The court in exercising this unfettered discretion has to consider all the circumstances of the case as presented by the applicant bearing in mind that it is the applicant's duty to satisfy the court that indeed the circumstances favour the grant of stay. In every situation the court must remain alive to the fact that there is a pending appeal and that such an appeal should not be rendered nugatory if the appeal were to succeed, thereby balancing the two interests. And as **Madan JA** said in the case of **Butt** (supra), **the Court as a general rule, ought to exercise its best discretion in away so as not to prevent the appeal, if successful from being nugatory.**

22. While that is the noble course to take, it is upon an applicant to place before court sufficient material and evidence to show that he will indeed suffer substantial loss or otherwise put, the appeal would be rendered nugatory if stay was not granted.

23. On the whole, having carefully considered the application before me, I come to the conclusion that the applicant has fallen short of the standard required for granting a stay of execution under **Order 42 rule 6** of the Civil Procedure Rules. Materials and evidence that would have enabled the court weigh the chances in the appeal succeeding and the likely consequences or loss to be suffered were the appeal to succeed yet stay was denied, were insufficient, to say the least.

24. Guided by the principles of law and authorities above the result is that the application dated 21st March, 2016 is declined and dismissed. No order as to costs.

Dated and delivered at Kakamega this 12th day of April, 2016.

E.C. MWITA

JUDGE