



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
MISC. APPLICATION NO. 20 OF 2015

PUBLIC TRANSPORT INVESTMENT COMPANY LTD APPELLANT

VERSUS

JOSEPH WANAMI WEPUKHULU – DECEASED SUING THROUGH

NEXT OF KIN ANNET NAFULA OKUMU.....1ST RESPONDENT

INVESTO ASSURANCE CO. LTD..... 2ND RESPONDENT

[Being an appeal from Bungoma CMCC Case No. 770 of 2011]

RULING

1. The 1st and 2nd respondents were parties in CMCC no. 770 of 2011. The 1st Respondent was successful as against the 2nd Respondent. And pursuant to a successful judgment the 1st engaged a firm of auctioneers M/S Sakame Auctioneers in execution of the decree as against the said 2nd respondent for a sum of Kshs. 795,155/=.
2. On the 4th March 2015, the current applicant Public Transport Investment Company Limited moved the Court in CMCC No. 770 of 221 under certificate of urgency pursuant to Order 22 Rule 52 and Order 57 Rule 1 of the Civil Procedure Rules. The applicant also invoked section 3A and 63 (e) of the Civil Procedure Act, seeking for stay of execution pending inter parties hearing of the application and lifting of the proclamation and attachment as goods as the said goods belonged to the applicant and not the 2nd respondent.
3. The trial court declined to certify the application urgent and gave a date 2 weeks after which prompted the applicant to move this court with a similar application the following day 5th of March 2015, where interim orders were granted. At the hearing of the application the 2nd respondent raised a preliminary objection.
4. The preliminary raised was as follows;
 - I. **That the application was filed contrary to the provisions of Order 22 Rule 51 of the Civil Procedure Rules.**
 - II. **That the application violates the provisions of section 6 of the Civil Procedure Act.**
5. On the 11th of March the applicant withdrew the application in the Chief Magistrate's Court it appears in response to ground 2 of the preliminary.
6. At the hearing of the Preliminary Objection Mr. Bw'onchiri counsel for the 2nd respondent argued that the application before the court is an abuse of the court process as a similar application was at the time of filling this application pending before the lower court and if the applicant was

aggrieved by the lower court there were ways of seeking redress. He argued also that Order 22 rule 51 makes reference to a court and the “Court” therein referred is the trial court and the appellate court.

7. In objecting Mr. Ngayma for the applicant referred to his notice of withdrawal of the application before the lower court. He also argued that the court referred to in order 22 rule 51 is not specific and his application is therefore before a proper forum. He submitted that the decline by the trial court summarily of his application under certificate necessitated the application to this court as the date issued by the trial court would have seen the applicants goods sold.
8. I have considered the facts placed before court by the rival parties. I do agree with Mr. Onchiri as regards Order 22 rule 51 of the Civil Procedure rules that the court referred to therein is the trial court and not an appellate court. I do agree also that Section 6 of the Civil Procedure Act is clear that where the issue in one case is similar to another before a competent court the latter case cannot proceed. The application in the trial court has been withdrawn and therefore there is no such application pending there. Needless to say that earlier application was proper before the trial court.
- I. However having stated as above it is fool hardy to argue that the applicant ought to have appealed or reviewed the order declining to certify the application before the trial as urgent as none of the said “remedies” would have assisted the applicant in the circumstances of the case, which leads me to invoke Section 1A, 1B & 3A of the Civil Procedure Act to ensure that the ends of justice are met in the circumstances of this case. And in that regard I therefore order as follows:
 - a. **That the applicant files fresh objection proceedings before the trial court.**
 - b. **There be a stay pending hearing and determination of the said application**
 - c. **Each party to bear own costs**

Dated at Bungoma this 5th day of May 2015.

ALI-ARONI

JUDGE.