



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 483 OF 2013

RENSON ONGAKIAPPELLANT/APPLICANT

VERSUS

CAROLYNE WANGUI WACHIRA.....1ST RESPONDENT

ANTONY MUTHOMI MATI.....2ND RESPONDENT

RULING

The application before this Court is a Notice of Motion dated 17.3.2014 brought under Order 42 Rules 6, Order 51 Rule 1 of the Civil Procedure Rule and Sections 1A, 3A and 63(e) of the Civil Procedure Act.

The applicant seeks a stay of execution pending the hearing and determination of the appeal he also seeks a temporary injunction restraining the respondent from offering for sale, selling, disposing off and or in other way alienating the subject Motor vehicle registration number KBA 511Z, Toyota Corolla pending the hearing and determination of the appeal and urges the Court to grant orders that the said motor vehicle remain in the custody of the officer in-charge, Nairobi Area Police Station and setting aside the orders of stay granted by lower court on 19th November, 2013 and orders that the said motor vehicle Registration Number KBA 511Z be return to the applicant pending the hearing and determination of this appeal

The application is premised on the grounds that the applicant lodged its arguable appeal through a Memorandum of Appeal in on 13th September, 2013 and that the appeal would be rendered nugatory if execution of proceeds and the orders sought are not granted; that the application for stay was made without undue delay and the applicant was unable to deposit Kshs.560,000/- as security in court which was condition for grant of stay and the same was set to lapse on 3rd December, 2013; that the lower court's conditional stay was arbitrary, oppressive and tantamount to an outright refusal to grant the stay and that the applicant is not in possession of the subject motor vehicle which is being held by Kenya Police at Nairobi Area Police Station; that if the subject motor vehicle is released to the respondent, disposed off and wasted away by the respondents, who are persons of straw, they shall not be able to refund the value of the motor vehicle and or the motor vehicle itself in the event the appeal is successful; that no prejudice shall be occasioned and/or visited upon the respondents if the orders sought herein are granted.

The application is supported by the affidavits of Renson Ongaki dated 2nd December, 2013 and 18th February, 2013. He reiterates the grounds on the face of the application and gives a brief background of the matter; that the lower court suit was filed against him by the respondents and went to full hearing and judgment was delivered on 26th August, 2013 in favor of the respondents, to the effect that the respondents herein be allowed to take possession of the suit motor vehicle which during the entire Lower Court proceedings had been vested in the custody of the officer in charge, Nairobi area police station; that

being dissatisfied with the Lower Court decision he preferred an appeal by lodging his memorandum of appeal on 13th September, 2013 and applied for certified copies of proceedings and judgment which are yet to be provided to him to enable him file a record of appeal; that the Lower Court granted him conditional stay upon depositing Kshs.560,000/- in Court within fourteen (14) days from the date of ruling failure to which the stay lapses; that he had no means of raising the said amount and stay was due to lapse 3rd December 2013.

In his further affidavit he depones that at all material time during the pendency of the Lower Court proceedings, he checked on the subject motor vehicle severally up to the time after delivery of judgment and the same was in good order and condition and that the respondents' are simply employing tricks to justify their intended alienation and possession of the subject motor vehicle; that if there was any missing parts of the subject motor vehicle and which loss was caused during the retention of the motor vehicle at the police station, then the officer-in-charge of the police station is fully to blame and the motor vehicle ought not be subject of release until the missing part is replaced or returned; that the respondent never called him to witness the purported vandalism of the motor vehicle; that the respondent collected the motor vehicle without a court order to that effect ordering the release of the motor vehicle to him but that the respondent collected the motor vehicle despite the existence of a court order of this court restraining such and related action and well aware of the current application with an aim to render it nugatory and their conduct throughout the pendency of this application and appeal as against the subject motor vehicle is a clear demonstration that the respondents are inclined on not awaiting the outcome of the appeal and that they could do everything to ensure that the appeal is of no practical purpose as the substratum shall not be available in event his appeal succeeded. He maintains that the respondents were partakers and or accomplices of the theft of my subject motor vehicle and cannot be entrusted with having possession of the subject motor vehicle and unless the orders sought are granted, the determination of this appeal shall be overtaken by events as the respondents shall either dispose of the motor vehicle.

The respondents opposed the application and deponed that when the motor vehicle was in Police custody it did not receive the protection expected of the police and it would therefore be pointless, unreasonable and unwise to have the motor vehicle entrusted against into Police Custody for the period the intended appeal will remain unheard and determined; that the respondents have produced evidence to show the damages done to the motor vehicle in the Police Custody and have also paid for the repairs to damage caused; that the applicant's conduct before the motor vehicle allegedly "disappeared" from his custody left much to be desired and he has also not demonstrated that he is a man to be trusted with the custody of the motor vehicle; that the Respondents possession of the motor vehicle does not offend the Court Orders; as the Order of the Honourable Lower Court entrusted fully its custody into the Respondents and the Interim Order of this Honourable Court clearly did not disturb that aspect of the Order but only restrained the Respondents from "offering for sale, selling, disposing off and or in other way alienating the subject motor vehicle number KBA 511Z" and none of the acts of the Respondents has been shown to have inflicted any injury to the spirit of the said orders; that in view of the heavy financial investments of the Respondents in the said Motor Vehicle, they have been motivated solely in preserving the motor vehicle for the purpose for which they bought it, to produce income for their family, and the investment in its repairs does not demonstrate that they are "persons of straw," who shall not be able to refund the value of the motor vehicle" "in the likely event the appeal is successful". that the applicant was unwilling to obey the Order of the Honourable Lower Court of 19th day of November 2013 on deposit of a cash security in Court was a clear demonstration that if given custody of the motor vehicle he may not honor the Court's Order to return it to the Respondents, should he lose the appeal; that the respondents as successful litigants in the Honourable Lower Court are entitled to enjoy the fruits their judgment and stand to suffer substantially if the motor vehicle is released into Police custody again where it will be cannibalized further or to the Applicant without a substantive cash security deposited in Court.

The application came for hearing on 19th June 2014 where the parties advocates relied on the parties respective affidavits together with their written submissions. I have carefully considered the affidavits and submissions made by the parties and find that; the applicant dissatisfied with the judgment against him sought to appeal against the said decision and applied for a stay of execution. The Lower Court granted a stay on condition that the intended appellant deposited a security of Kshs. 560,000 in Court; this the applicant argues was arbitral as he is not in a position to secure the said amount. The considerations to be

taken by a court in an application for stay of execution are listed under Order 42 Rule 6 (2) of the Civil Procedure Rules, which state as follows –

No order for stay of execution shall be made under (1) unless –

that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay;

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.”

In his application the applicant further seeks a temporary injunction to prevent the sell and or disposal of the subject motor vehicle. The said motor vehicle is no longer in the custody of the police as earlier ordered by the lower Court.

The decision of the Lower Court was made on the 26th August, 2013 and the applicant filed his Memorandum of Appeal on 13th September, 2013 there was therefore no delay in filing the appeal. The application for stay was however filed on the 2nd December, 2013 and amended on the 17th March, 2014. At the hearing of this application Miss Githaiga for the applicant informed the Court that the amended Notice of motion added 2 prayers and they were seeking prayer 7 and 8 of the said Notice of Motion. In considering this application am guided by Order 42 rule 6(2) of the civil Procedure Rules. Although the appeal was filed on time the application for stay of execution was filed about 2½ months later, the delay in filing the said application has not been explained by the applicant. The applicant was given a conditional stay in the lower Court which he failed to comply with. The reasons he gives is that he had no immediate means in raising the said amounts and states that the order was arbitrary, oppressive and tantamount to an outright refusal to grant the stay. As I have perused the file I note that the applicant did not go back to the lower court to seek a review of the said order nor has he explained his lack of means in raising the said amount. The Lower Court judgment and order has not been attached to enable this Court evaluate what happened in the lower Court. To term the order as arbitral and oppressive is unwarranted. I also note that the applicant has failed to explain the substantial loss he will suffer in the event the stay order of injunction is not granted. Further he has not offered any security despite seeking a stay of execution and injunction before this Court. I therefore decline to exercise my discretion in favor of the applicant and dismiss the Notice of motion filed on the 17th March 2014 with costs to the respondents.

Orders accordingly

Dated, signed and delivered this **12th** day of **September** 2014.

R.E. OUGO

JUDGE

In the presence of:-

.....**For the Appellant/ Applicant**

.....**For the 1st & 2nd Respondents**

.....**Court Clerk**

