



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KERICHO

CIVIL APPEAL NO.15 OF 2014

MICAH TONU.....APPLICANT

VERSUS

WILLIAM CHERUIYOT KIRUI.....RESPONDENT

RULING

The notice of motion dated 23/07/2014 is brought pursuant to section **3A Civil Procedure Act** and Order **46 rule 6(1) and (2)**; seeking that:-

(1) Pending the hearing and disposal of the appeal, there be temporary stay of further execution of decree and also stay of sale of motor vehicle registration No.KAW 126H, Toyota Station Wagon.

(2) The motor vehicle registration KAW 126H Toyota Station Wagon, currently held by MOCO AUCTIONEERS, be released conditionally to the applicant for safe keeping to avoid storage charges.

The application is premised on grounds that:-

(a) There is an appeal pending for hearing which has high chances of success.

(b) The respondents have already received payment of Kshs.300,000/= from the sale of the applicant's other motor vehicle registration No.KBK 498V which was attached earlier.

(c) There is fear that the motor vehicle may be sold at a throw away price.

(d) MOCO AUCTIONEERS of Kisii have no geographical jurisdiction to execute warrants emanating from Bomet County.

This matter was certified urgent and heard under the vacation rules. No reply had been filed by the respondent. Mr. J.K. Rono who appeared on behalf of the applicant submitted on behalf of the applicant that the continued holding of the motor vehicle would be consumed by storage costs, and the appeal would be rendered nugatory, unless the court grants the orders sought. He urged the court to order unconditional release of the motor vehicle, saying no prejudice will be suffered by the respondent.

It was his contention that since another motor vehicle belonging to the applicant had already been sold in fulfilment of part payment of the decretal sum, at least the respondent's interests were

cushioned, and he urged the court to direct that the sum realised from that sale, be deposited as security in court.

Mr. Miruka who held brief for Mr. Gachathi explained that no response had been filed because the respondent's counsel was served very late i.e. on 28/07/2014.

I must first address the issue of service, as it will determine whether the application as it stands ought to be considered. The respondent does not deny being served on 28/07/2014, which is indeed confirmed by the affidavit of service sworn by Joseah K. Rono. This means that by the date of hearing, the respondent's counsel had at least ten (10) clean days to file a response, in a matter which had already been certified urgent by Serگون J.

Under Order 51 Rule 13(3), an applicant is required to serve the respondent in "not less than seven days before the date of hearing." In my view, the service was not late, and satisfied the provisions of the Civil Procedure Rules. The respondent's counsel had sufficient time to file a response, and having failed to file any response, he could only address the court on points of law - which he did not.

It is not in dispute that an appeal has been filed in this matter. It is also common ground that the motor vehicle is currently being held by MOCO Auctioneers in fulfilment of the execution process.

Under Order 42 Rule 6(2):-

"No order for stay of execution shall be made unless:-

(a) The court is satisfied that substantial loss may result to the applicant unless the order is made, and that the application has been made without unreasonable delay.

(b) Such security as the court orders for due performance of such decree or order as may ultimately be binding on him has been given by the applicant."

In the supporting affidavit sworn by **MONICAH TONUI**, she deposes that the motor vehicle has already been taken by the auctioneer to their yard in Kisii Town. Besides attaching the motor vehicle, the auctioneers have proclaimed her other assets, and she has already lost another motor vehicle KBK 498U Toyota Hiace, sold by way of auction which realised a sum of Kshs.300,000/=.

From the memorandum of appeal, what I can glean is that the judgment for which execution is being pursued, was entered subsequent to failure by the applicant to defend the suit. Her contention in the appeal is that such failure was occasioned by her insurer who failed to defend her.

I have perused the annexed proclamation form issued by MOCO Auctioneers; listing several other assets belonging to the applicant without disclosing how much money is being executed for. If a motor vehicle registration No.KBK 498U Toyota Hiace was sold for Kshs.300,000/= then I am not surprised that the applicant has fears that the currently attached vehicle is likely to be sold at a throw away price (unless that other motor vehicle was in such dilapidated condition that it could not fetch much. The annexed proclamation form is not very clear, but it seems to be from the faint entries that the value given for that motor vehicle is 120,000/=. If that sale by auction was to be realised, and the applicant eventually succeeds in her appeal, then she will have lost substantially. I say so because once the motor vehicle changes hands, perhaps at best she'd only get a refund of what it was sold for, and not the true value of the motor vehicle. Even if she was to attach a value, it would involve a long unwinding process of tracing the motor vehicle, whose value may have depreciated once it got a new owner, and perhaps create further litigation. (2) If another motor vehicle has already been sold, in execution of the same decree, then substantial loss referred to by the applicant is palpable. The continued retention of the motor vehicle by the auctioneer only attracts more expenses.

As regards security for due performance, I do not think the money realised from the sale of another motor vehicle - which sale the details are not clear, can be treated as security for due performance.

The applicant has satisfied this court that it is desirable to stay the execution pending hearing of the appeal, and that the motor vehicle be released to the applicant on condition that:-

- (a) He deposits half the decretal sum in court within 30 days hereof.
- (b) He deposits the motor vehicle log book in court.
- (c) The Auctioneer costs should abide the outcome of the appeal as in my view the loser in the appeal ought to bear the costs of the auctioneer.
- (d) Costs of this application shall be in cause.

Delivered and dated this 7th day of October 2014 at Nakuru.

H. A. OMONDI

JUDGE