



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL LNO. 26 OF 2014

SAMUEL CHEPTOO.....1ST APPELLANT/APPLICANT

BELINDA KURUI.....2ND APPELLANT/APPLICANT

VERSUS

BENSON MEMBA MBALANI.....RESPONDENT

RULING

Before me is the application dated 10/7/2014, which is brought by the appellants; Samuel Cheptoo and Belinda Kurui. They seek the following orders:-

- b. That the court do issue directions in this matter;**
- c. That this court be pleased to issue orders restraining the Registrar of Motor Vehicles from transferring motor vehicle registration number KAQ 742F Toyota Corolla to the purported bidder/buyer pending hearing and determination of this application;**
- d. That this court be pleased to issue orders that the respondent do release motor vehicle registration number KAQ 742F Toyota Corolla or refund its monetary value if the appellants succeeds in the instant appeal;**
- e. That this court be pleased to issue orders that the sum of Kshs.100,000/- deposited in court as security for stay be released to the depositor pending the hearing and determination of this appeal.**

The application is supported by grounds found in the affidavit of R.A. Omondi, counsel for the appellant and on the face of the application. He deposed that on 9/7/2014 their two applications dated 6/6/2014 seeking review of an order of 13/5/2014 and another dated 17/6/2014 were to be heard; that the respondent's counsel indicated to court that execution had proceeded and the attached vehicle sold and that without hearing the applicants, the court disqualified itself from the proceedings but issued other orders dismissing their applications dated 17/6/2014 and 6/6/2014 without proof that a sale took place. Mr. Omondi further deposed that he went to the offices of the auctioneer, asked to be taken to the yard to see the vehicle but the secretary declined to take him after she confirmed with Mr. King'ori, the auctioneer; that the secretary failed to show the certificate of sale or advertisement or valuation of the vehicle. It is the appellant's view that the respondent was working in cahoots with the auctioneer to defeat justice and it is only fair that the court grants an order restraining the transfer of the disputed motor vehicle from being transferred to another person. Counsel urged that the trial court had on 31/3/2014 granted a conditional stay of execution that the appellant's deposit Kshs.100,000/- which the applicants complied with on 11/4/2014. He annexed the deposit slip (RAO1). The appellants urged that they have demonstrated that they are keen on proceeding with the appeal; that the court directed that the auctioneers bill of costs be taxed but the auctioneer has failed to present the same despite the request (RAO3). The appellants thus seek protection from this court.

In opposing the application, Benson Memba Mbalani, the respondent herein, deponed that a consent order was entered into on 13/5/2014 but the appellants refused to comply with them but instead filed applications to defeat the said order; that the stay order was conditional and that the orders lapsed on 24/6/2014 without the appellants complying with any term as a result of which, on 4/7/2014, the subject motor vehicle was sold by public auction; that the sum of Kshs.100,000/- that was deposited into court on 11/4/2014 was security for costs and hence part of the decretal sum which should go to satisfy the decree because the sale did not realize the decretal sum. The respondent denied any malice on his part and that the vehicle was sold in accordance with paragraph (e) of the consent order.

Having perused the application and the rival arguments, the question that needs an answer is whether the appellants had complied with the terms of the consent order of 13/5/2014. The appellants have exhibited a receipt dated 11/4/2014 for deposit of Kshs.100,000/- in court. However, the consent order at paragraph (a) was clear, that the same be deposited in an interest earning account of both counsel for the applicants and respondent. There is no evidence that that had been done by the time the 30 days allowed lapsed – about 12/5/2014. At paragraph (b) of the consent, it was also agreed that Kshs.50,000/- be paid to the respondent by the appellants within 30 days. Nothing has been shown to demonstrate that the appellant had complied with that order. At paragraph (e) of the consent if any of the terms were breached the order of stay would lapse and the respondent was at liberty to proceed with execution. It seems that is what happened.

The respondent had the right to proceed with execution of the decree by dint of paragraph (e) of the consent. That is what the respondent says he did and that the vehicle has been sold by way of public auction. The respondent has, however, not endeavored to demonstrate that indeed an auction took place. The respondent should have shown to the court the certificate of sale issued by the auctioneer upon sale and filed the returns showing how the monies realized were dispersed in terms of **Section 23** of the **Auctioneers Act** and **Rule 18** of the **Rules** which provides inter alia **18(4)** it reads:-

“18(4). The auctioneer shall remit the proceeds of sale less his charges to the court or the instructing party, as the case may be, accompanied by an itemized account in the case of movable property within fifteen days of the sale and in the case of immovable property as provided under Order 21, rule 74 of Civil Procedure Rules (Cap. 12, Sub. Leg.)”

Having found that the applicant failed to comply with the consent order, this court would have no business granting the orders sought by the applicants and the application is hereby dismissed with costs to the respondent.

The respondent has filed the application dated 14/7/2014 seeking release of the decretal sum to him. The appellants opposed the said application. Ms Omwenyo in support of the release of the monies to the respondent relied on the case of **Insta Products EPR Ltd v Cobra Security Company Ltd** CA 318/2013, where J Waweru ordered release of the decretal sum which had been deposited for conditional stay. In the instant case, it was not stated whether the Kshs.100,000/- was part of the decretal sum or security for costs. Whatever the money was for, if the decree was due, there is nothing wrong with the court ordering that the same be utilized as the decretal sum because as J Waweru observed in the above cited case, differentiation whether the money was costs or the decretal sum is a mere technicality. In the instant case, though the court would have gladly released the Kshs.100,000/- to the respondent, yet the respondent has not demonstrated what was realized from the sale if at all the sale took place and whether the decree was satisfied. The respondent should have provided documentary evidence from the auctioneer on how much the sale of the vehicle realized at the auction and what the costs of the auctioneer were. For that reason, until the respondent provides evidence, the court cannot grant the respondent's prayer to release the money to him and the application dated 14/7/2014 is declined until the auctioneer files his documents with the court then the respondent will be at liberty to apply.

Since the court has found that the appellant had not complied with the terms of the consent order, the court will not grant any of the orders prayed for because if the appellant succeeds on appeal, the respondent can be ordered to refund the value of the vehicle to the appellant. Similarly, the money cannot be released till it is demonstrated that the decretal sum was not satisfied or upon succeeding on appeal.

For all the above reasons the applications are dismissed with costs abiding the appeal.

DATED and DELIVERED this 2nd day of October, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Ochang holding brief for Mr. Omondi for the appellants/applicants

N/A for the respondent

Kennedy – Court Assistant