



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Appeal 577 of 2011

SAMUEL M MAGUA.....APPELLANT

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT

RULING

On 8th November 2011, the appellant herein filed a Notice of Motion dated the same day expressed to be brought under Order 42 rule 6 of the Civil Procedure Rules, Section 1 and 1A of the Civil Procedure Act and all other enabling provisions of the law seeking the following orders:

- 1. That the Application herein be certified as urgent and *ipso facto* heard *ex parte* in the first instance.**
- 2. That there be a stay of execution of the Decree issued against the Judgement Debtor in CMCC 2378 of 2007 Barclays bank of Kenys – vs – Monica Muthia pending the hearing and determination of this Application.**
- 3. That the Auctioneer be directed to return the Appellants/Applicants household items that were carried away forthwith.**
- 4. That there be a stay of execution of the Decree issued against the Judgement Debtor in CMCC 2378 of 2007 Barclays Bank of Kenya – vs – Monica Muthia pending the hearing and determination of this Appeal.**
- 5. That cost is in the cause.**

The grounds upon which the application is based are that the respondent attached the appellant's properties though the appellant was not a party to the suit in the lower court and unless the stay is granted, the appeal will be rendered nugatory.

The application is supported by an affidavit sworn by **Samuel M Magua**, the appellant on 8th November 2011. According to him, instead of the respondent attaching the judgement debtor's property, the respondent has instead attached the appellant's property and a car registration No. KAN 303 B Toyota Carina and household goods by mistake. In his written submissions, the appellant states that he had instituted objection proceedings in the lower court objecting to the attachment of his properties in

execution of a decree of the lower court to which he was not a party. Despite furnishing evidence in support of his claim the lower court went ahead and dismissed his claim hence the present appeal. According to him he has a strong appeal with probability of success and he stands to suffer irreparable damage since his house is currently without necessities. According to him it was wrong for the lower court to find that a husband's goods can be attached to settle his wife's debts without evidence that he was actually married to and staying with the judgement debtor. According to him he stands to lose his household goods for no just cause. He deposes that he had stored his household items in the judgement debtor's house all of which were attached by mistake. Instead of the judgement debtor serving the proclamation on the judgement debtor, the proclamation was instead served on the appellant. According to him the subject car was bought by him from the judgement debtor in June 2010 and he has since changed the registration. He further deposes that he has been subject of threats and extortion by the auctioneers and that unless the application is granted it will render his appeal nugatory.

In opposition to the application the respondent through its legal counsel, **Nereah Okanga**, swore an affidavit on 19th December 2011, in which she deposed that following the judgement obtained by the respondent against **Monica Nyawira Muthia** in the lower court, the respondent moved to execute the same but was confronted with objection proceedings instituted by the appellant herein. However, the said proceedings were dismissed on the ground that the appellant failed to prove his interest in the attached properties. According to the deponent, while the proceedings were going on the judgement debtor purported to have transferred the attached properties to the appellant using incomplete documents. It is further submitted that since the sale agreement, which was made in 1982 three decades ago is not stamped it is not admissible in evidence. It is further deposed that since the goods were found in the judgement debtor's house and the appellant having failed to prove that the house belonged to him, the goods belonged to the judgement debtor. It is therefore deposed that the appellant has failed to prove ownership in the goods and in any case the said goods have a value which can be compensated hence there is no imminent irreparable loss and the application ought to be dismissed.

In his written submissions, the appellant states that he had instituted objection proceedings in the lower court objecting to the attachment of his properties in execution of a decree of the lower court to which he was not a party. Despite furnishing evidence in support of his claim the lower court went ahead and dismissed its claim hence the present appeal. According to him he has a strong appeal with probability of success and he stands to lose his household goods for no just cause. The grant of the stay, according to him, will not prejudice the respondent who can still pursue the judgement debtor.

On its part the respondent filed written submissions opposing the application. According to it, when the matter came up on 10th February 2012, the stay granted was limited only to the goods that had been attached thus giving the go ahead to the respondent to proceed with the execution. Accordingly, the only issue pending is whether the auctioneers should be directed to return the attached items. After giving the brief history of the appeal as arising from objection proceedings in the lower court, it is submitted that the appellant had failed to prove its legal interest in the attached property. Relying on **Braeburn Limited vs. Captain Kungu Muigai HCCC No. 478 of 2002**, it is submitted that an objector must establish his legal or equitable interest in the whole or part of the property attached in execution of the decree and to do so must bring forth some evidence that will tilt the balance of probabilities in his favour. It is further submitted that the appellant's objection was just a smokescreen for the judgement debtor, his wife, whose intention was to hoodwink the court with a purported sale agreement which had not been presented for registration. It is further submitted that the receipts which were produced in support of the claim for household goods were prepared with the sole intention of misleading the court. Taking into consideration the totality of the evidence, it is submitted that the goods attached at the judgement debtor's home can only be the judgement debtor's and not the appellant's. With respect to the stay sought it is submitted that the conditions for grant of stay of execution as enumerated in **Mukuma vs. Abuoga Civil Application No. Nai. 195 of 1978** have not been fulfilled. It is further submitted that as no security has been offered by the appellant, he does not deserve the stay sought.

I have considered the application, the supporting affidavit as well as the submissions. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the Civil Procedure Rules under which the court is to be satisfied that

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

On the first principle, the appellant's case is that the goods attached are his household goods hence necessities and unless the stay is granted he stands to suffer irreparable loss. However, it is the appellant's case that these household goods were kept in the judgement debtor's house. Unless both of them were staying together which he seems to deny, one cannot say that he was using the said goods when they were attached. I therefore do not attach much weight to his contention that if denied the use of the said household goods he will suffer irreparable loss. With respect to the motor vehicle he has not expressly stated what irreparable loss he stands to suffer. From the evidence on record I am unable to find that the appellant has proved that substantial loss is likely to be occasioned to him. Whereas I do agree that the issue whether the properties of one spouse can be attached in settlement of another spouse's debt is an arguable issue, under Order 42 aforesaid it is a mandatory requirement that before granting a stay thereunder the court must be satisfied that substantial loss may be occasioned.

On the second condition which is also mandatory, there is absolutely no offer of security coming from the appellant in satisfaction of the said provision in absence of which no stay can be granted. It is trite law that the failure by the court to make an order for security for due performance amounts to a misdirection which entitles an appellate court to interfere with the exercise of the discretion in granting stay. However, the offer for security must come from the applicant for stay. See **Carter & Sons Ltd. vs. Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997.**

In the result the appellant has failed to satisfy me on the mandatory conditions for grant of stay pending appeal under Order 42 rule 6(2) of the Civil Procedure Rules.

Moreover, the order which the appellant intends to appeal against is an order dismissing the objection proceedings. As there is no positive order against him capable of being executed, save for costs, it is doubtful whether the court would be amenable to grant a stay of execution in such circumstances. See **Western College of Arts & Applied Sciences vs. Oranga & Others [1976] KLR 63.**

However, the appellant has sought to go round this by seeking stay of the main decree and therein lies another obstacle. The appellant has not stated that he is aggrieved by the decree itself and is not appealing against the same. His application to the extent that it seeks a stay of execution of the decree itself instead of execution against himself further renders the application incompetent. A party cannot seek to stay an order against which an appeal is not directed. See **Muhammed Yakub & another vs. Mrs Badur Nasa Civil Application No. Nai. 285 of 1999.**

In the result the application dated 8th November 2011 lacks merit and the same is dismissed with costs.

G.V. ODUNGA

JUDGE

Ruling read and delivered in court this 1st day of October 2012

E.O. OGOLA

JUDGE

In the presence of:

..... for the Appellant/Applicant

.....for the Respondent

