



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E.M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, J.J.A.)

MISC. CIVIL APPLICATION NO. 61 OF 2017 (UR 41/2017)

BETWEEN

RANA AUTO SELECTION LIMITED.....APPLICANT

AND

NEMWEL MOTURI NYAMOSI.....RESPONDENT

(An application for stay of execution pending the lodging, hearing and determination of the appeal from the Judgment of the High Court of Kenya at Kisumu, (Cherere, J.) dated 16th March, 2017

H.C.C.A. NO. 123 OF 2014)

RULING OF THE COURT

[1] This is an application under **Rule 5(2) (b)** of the **Court of Appeal Rules 2010** for stay of execution of the judgment and decree of the High Court pending the hearing and determination of the intended appeal. The application is supported by the affidavit of **Sultan Ali Khan**, a director of the applicant. The respondent did not file a replying affidavit and his advocates **M/S Mose Nyambega & Co. Advocates** did not attend the hearing although served with the hearing notice on 28th November, 2017.

[2] The facts contained in the copy of the judgment of the High Court show that the dispute between the parties relates to a contract for sale of a motor vehicle.

By an agreement dated 3rd September, 2009, the applicant sold motor vehicle registration number KBJ 087S to the respondent at a consideration of Shs. 1,500,000/=. According to the agreement, the respondent was required to pay a deposit of Shs. 700,000/= and the balance of Shs. 800,000/= by 13 monthly instalments of Shs. 65,000/=. Apparently, the applicant repossessed the motor vehicle on 5th May, 2011, claiming that the respondent had breached the contract by failure to pay the monthly instalments as agreed. The respondent filed a suit in the Resident Magistrate's Court for a declaration that the sale agreement was a hire purchase agreement, that the repossession of the motor vehicle was illegal, null and void and for restitution of motor vehicle or refund of the purchase price. The respondent averred that by the time the motor vehicle was repossessed, he had paid a total of Shs. 1,218,000/=. The subordinate court dismissed the suit. On appeal to the High Court, the High Court allowed the appeal and entered judgment for the respondent for Shs. 1,108,000/= being the refund of the purchase price. The applicant filed a notice of appeal and proceeded to file the present application.

[3] Before the Court can exercise its discretion in favour of the applicant, the applicant is required to demonstrate that the intended appeal is arguable and that unless the stay is granted, the intended appeal would be rendered nugatory.

Although the applicant has not filed a draft memorandum of appeal showing the proposed grounds of appeal, the applicant states that the appeal has overwhelming chances of success as the Court erred in the evaluation of the evidence thereby arriving at a wrong and unjust decision and that the order for refund would amount to rewarding the respondent for breach of contract.

[4] We have perused the judgment of the High Court. The main issue that the High Court determined and on which its decision turned was whether or not time was of essence to the contract. The learned Judge made a finding that **clause 10** of the agreement specified that time was of the essence in connection with payment of instalments and that the respondent did not make the payments as agreed. However, the Court made a finding that from the conduct of the parties, the applicant waived its rights arising from any breach of the sale agreement. The Court

further found that the notice issued by the applicant to the respondent before repossession did not specify within which time the respondent was required to pay the outstanding sum. It is also apparent from the judgment that the order for refund of the purchase price was made notwithstanding that the respondent had used the motor vehicle for nearly one year and 8 months. We are satisfied that legal issues emerge from the determination by the High Court such as the interpretation of the contract, waiver and inferences drawn from the primary facts which are arguable.

[5] As to whether or not the intended appeal would be rendered nugatory if stay is not granted, the applicant states that the respondent is a person of unknown means and that the appeal if successful, would be an academic exercise.

The judgment of the High Court shows that the respondent had difficulties in paying the monthly instalments as they fell due.

At the hearing of the application, the applicant offered to deposit the decretal amount and a stay of execution pending this ruling was granted on that condition. That would be a just condition for grant of stay of execution pending appeal.

[6] For the foregoing reasons, the application is allowed. The execution of the decree of the High Court is stayed pending the hearing and determination of the appeal on condition that the applicant complies with the order dated 4th December, 2017 as regards the deposit of the decretal sum.

Dated and Delivered at Kisumu this 22nd day of February, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR