



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, GITHINJI & NYAMU, J.J.A)

CIVIL APPLICATION NO. NAI. 81 OF 2010 (UR. 58/2010)

BETWEEN

PERIS WAKIURU GAITA .....APPLICANT

AND

GRACE WANJIRU MBUGUA .....RESPONDENT

*(An Application for stay of execution of a ruling of the High Court of Kenya at Nairobi (Sitati, J.) dated 9<sup>th</sup> October, 2009*

in

H.C.C.C. NO. 1108 OF 2005)

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RULING OF BOSIRE, JA

Before us is a motion expressed to be brought under **rules 5 (2) (b)** and **42** of the Court of Appeal Rules. It is now well settled that for an applicant to succeed in an application under **rule 5 (2) (b)**, aforesaid, he must show that his appeal or intended appeal is not only arguable, but also that unless he is granted an injunction or stay as the case might be, his appeal on intended appeal if successful shall be rendered nugatory. For clarity, the applicant must satisfy both conditions.

What is the applicant's case? The applicant is **Peris Wakiuru Gaita**. She was the objector in Nairobi High Court Civil Case No. 1108 of 2005 in which **Grace Wanjiru Mbugua** had successfully sued **Phillip Karumi Matu** for the recovery of Kshs.4,320,000/= with costs and interest. Decree issued and execution followed. An auctioneer proceeded to house No. DB3 located at plot No.L.R 13425/8 and attached a wall unit, Sony colour T.V set, sofa set, Sony VCD, music system with its speakers, cooker, fridge and carpet in execution of the decree. The applicant has deponed in the affidavit in support of her motion that all those items belong to her and not to **Phillip Karumi Matu**, the judgment debtor in the aforesaid suit.

Following the attachment the applicant commenced objection proceedings by a chamber summons dated 31<sup>st</sup> December, 2008. In an affidavit in support of that application the applicant deponed, *inter alia*, that

although the judgment debtor is her husband, they have been separated for quite a while, he had no interest in the attached goods which had been purchased solely by her, he was not residing in the house where the attachment took place, and the applicant was unaware of his place of abode, and that she had not incurred the debt which gave rise to the suit nor did she have any business or other dealings with the judgment debtor. She was the sole tenant of the house in which the items attached were in. She annexed a tenancy agreement in support thereof. She denied an allegation made by the respondent that the judgment debtor's car Reg. No. KAR 866 G was at her residence. The said vehicle is one of the items which were attached in execution of decree and appears on the proclamation. The goods were seized and proclaimed on 29<sup>th</sup> November, 2008 in the presence of one "Mama Njeri". The applicant exhibited copies of receipts from Sanyo Armco (Kenya) Ltd, Zoom Electronics, and Stang Communication Centre to show she bought a juice extractor, Sony radio system, cassette deck, tuner, amplifier and compact disc, Sony T.V, LG video, and Sony amplifier. Other than the T.V, the other items are not on the proclamation.

Sitati J, heard the application and was not satisfied sufficient material had been placed before her to warrant granting the objector the orders she sought. She did not believe the applicant that she was estranged from her husband, and held that the applicant withheld a lot of relevant information from the court, for instance where she works, whether she has children, the receipts she exhibited showed huge single purchases when her sources of income were not disclosed. She dismissed the objection proceedings and thus provoked the application before us.

A dismissal is a negative order. Mr. Gaturu for the respondent, Grace Wanjiru Mbugua, submitted that a stay order may not be practicable for such an order. I agree. The superior court did not order the doing of any act, nor did it order the respondent, to abstain from doing a particular thing respecting which a stay order may issue.

I am aware that the applicant was not a party in the suit before the superior court before decree was passed. She became a party as an objector during execution proceedings. She has appealed against the dismissal of her objection proceedings and might argue that she needs to be given an opportunity to ventilate her claim in her appeal to redeem her property. However, the jurisdiction of this Court under **rule 5 (2) (b)** is limited to granting an injunction or stay. The applicant is represented by a counsel. Neither a stay of execution of decree nor an injunction was prayed for. A stay can only issue where practicable. On the facts and circumstances of this case an order of stay is not grantable. Perhaps, had the applicant applied for stay of execution of decree, this Court would have possibly, in exercise of its powers under **section 3A and 3B** of the **Appellate Jurisdiction Act** which deal with the overriding objective principle in civil litigation, considered whether a stay of execution of decree should be granted to enable her pursue her claim. However, the way the motion is worded, the applicant has applied for an order of stay of the order dismissing her objection to attachment. A party is bound by the prayers of her motion and the court cannot properly grant any other order without being seen as having descended into the arena of litigation.

In the circumstances I would dismiss the application dated 13<sup>th</sup> April, 2010 and filed in this Court on 14<sup>th</sup> April, 2010, with costs to the respondent. As Githinji J.A also agrees it is so ordered.

***Dated and delivered at Nairobi this 28<sup>th</sup> day of May 2010.***

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

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RULING OF GITHINJI, J.A.

I have had the advantage of reading the ruling of Bosire, J.A. in draft. I agree with it entirely and I have nothing useful to add.

**Dated and delivered at Nairobi this 28<sup>th</sup> day of May, 2010.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

I certify that this is a  
true copy of the original.

**DEPUTY REGISTRAR**

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, GITHINJI & NYAMU, JJ.A.)

CIVIL APPLICATION NO. NAI 81 OF 2010 (UR58/2010)

**BETWEEN**

**PERIS WAKIURU GAITA .....APPLICANT**

**AND**

**GRACE WANJIRU MBUGUA ..... RESPONDENT**

*(An application for stay of execution of the ruling and order of the High Court of Kenya at Nairobi  
(Sitati, J.) dated 9<sup>th</sup> October, 2009*

*in*

**H.C.C.C.NO.1108 OF 2005)**

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**RULING OF NYAMU, J.A.**

This is an application brought under **Rule 5(2)(b)** and **42** of this Court's Rules. It seeks two prayers namely:-

1. ***THAT this Honourable Court be pleased to grant a temporary stay of execution of the order and ruling of the Honourable Lady Justice R.N. Sitati dismissing the applicant's objection proceedings at the superior court and allowing the respondent to proceed with attachment of the applicant's proclaimed household goods given on 9<sup>th</sup> October 2009 at the High Court of Kenya at Nairobi in High Court Civil Case No. 1108 of 2005 pending the hearing interpartes of this application.***
2. ***THAT this Honourable Court be pleased to grant a temporary stay of execution of the order and ruling of the Honourable Lady Justice R.N. Sitati dismissing the applicant's objection proceedings at the superior court and allowing the respondent to proceed with attachment of the applicant's proclaimed household goods given on 9<sup>th</sup> October, 2009 at the High Court of Kenya at Nairobi in High Court Civil Case No. 1108 of 2005 pending the hearing and determination of Civil Appeal No.316 of 2009 lodged in this Honourable Court by the applicant herein.***

The story behind the application is that the applicant **Peris Wakiuru Gaita** cohabited with one **Philip Karumi Matu** but at the material time the two had separated according to the averments of the applicant. **In High Court Civil Case No. 1108 of 2005, Grace Wanjiru Mbugua**, who was the plaintiff, obtained a judgment against Philip Karumi Matu, the defendant in the suit. In the process of executing the judgment against the judgment debtor, the auctioneers **M/s Nyalgunga traders** attached household goods belonging to the applicant whose value is estimated to be Kshs.300,000 whereas the judgment debt is in the sum of Kshs.7,225,386. The goods were attached from a rental residential house at Kahawa Sukari leased to the applicant. Following the attachment and proclamation of the goods, the applicant filed a notice of objection pursuant to the procedure outlined in Order 21 of the Civil Procedure Rules and on 9<sup>th</sup> October 2009, Sitati, J. dismissed the applicant's objection proceedings and allowed the judgment creditor, **Grace Wanjiru Mbugua** to attach and sell the objectors properties as proclaimed.

On 22<sup>nd</sup> October, 2009 the applicant filed a Notice of Appeal in this Court and thereafter filed **Civil Appeal No. 316 of 2005** against the order and ruling of Sitati, J. dismissing the applicant's objection proceedings.

At the hearing, the applicant was represented by *Miss Odembo* advocate and the respondent was represented by *E.T. Gaturu* advocate.

In her submissions Miss Odembo drew the attention of the Court to the grounds in the Memorandum of Appeal and stated that all the grounds were arguable in that the ownership of the goods is at the heart of the filed appeal. She added that, at the relevant time, the applicant was not cohabiting with the judgment debtor and that she was a stranger to the proceedings in which the judgment against the judgment debtor was given. She lamented that as the judgment debt was over 7 million (Kshs) if a stay was not granted, her appeal would be rendered nugatory whereas at the other end of the scale, the value of her goods would not make much difference in terms of reducing the indebtedness of the judgment debtor although it would cause grave hardship to her as an objector and further that, the judgment debtor was outside the jurisdiction of the court having acquired a green card which entitled him to residential status in U.S..

*Mr. Gaturu* for the respondent contred his arguments on the strength of a line of this Court's decisions to the effect that a stay order cannot be granted against a negative order. He further added that the value of the attached goods was in the region of Kshs.174,000 and that his client would be in a position to refund the amount should the applicant's appeal succeed. Concerning arguability, Mr. Gaturu said that the ruling of the superior court speaks for itself and that the appeal was not arguable.

Having considered the affidavit in support of the application and the submissions of counsel, it is clear to me that the facts before the Court are novel in that the applicant was not a party to the proceedings which gave rise to the judgment and she is an objector who says she owns the attached goods.

It is clear to me that ownership of the attached goods is the heart of the intended appeal, but I cannot at this stage delve into the merits. Although the respondent's counsel has said that the respondent would be able to refund the sale proceeds sufficient to cover the value of the goods, the respondent has neither filed any affidavit in reply nor demonstrated her means. In the circumstances in my view, pending the hearing of the appeal, the applicant bears the greatest burden although she is not the judgment debtor. On the other hand, the value of the goods attached is not proportionate to the colossal judgment debt and therefore would not have much impact in terms of reducing the judgment debtor's indebtedness. It is like a drop of water in the ocean.

On arguability of the appeal, the grounds raised which interalia touch on the ownership of the goods attached are not in my view frivolous.

On the claims of the appeal being rendered nugatory, the circumstances of the case before us shows that should the appeal succeed, perhaps in a few years time, the goods shall be released to her but she will in the meantime be without furniture to which she could be sentimentally attached or be compelled to buy new ones or hire new ones until the appeal is determined. The objection rules under order 21 are not explicit on the issue of refund and the respondent has not demonstrated ability to refund. If the appeal fails, the goods will be sold in execution of the decree. The other factor to consider is that the applicant is just an objector and not a judgment debtor and this application represents the only source of interim relief pending appeal. At the other end of the swinging pendulum is the respondent judgment creditor who is owed over Kshs.7 million, but this is not owed by the objector.

Novel situations in my view call for novel ideas. Justice of the matter before the court in my view demands that I give sufficient weight to the fact that the applicant is not a debtor and also take into account the above factors. In my view, the applicant is likely to suffer a greater hardship than the respondent if the court failed to grant a stay. In this regard, I am conscious of the fact that in a situation such as the one before the court it is clear that the value of the attached goods is such that the sale price would not significantly reduce the judgment debt. It is also fairly evident that the judgment debt is manifestly out proportion with the value of the goods. In the circumstances, it would be just in my view to preserve the goods than to have them sold with the accompanying hardship to the applicant. All in all, pursuant to the overriding objective – **section 3A(1)** of the Appellant Jurisdiction Act I am conscious of

the Court's duty under the section to appreciate that the powers conferred on the Court under **rule 5(2)(b)** exist only for the purpose of enabling the court to give effect to the overriding objective (O<sub>2</sub> principle) and for no other purpose. Thus, the pertinent provision reads:-

***“The Court shall, in the exercise of its powers under this Act, or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).”***

The overriding objective which is the objective of the entire Appellate Jurisdiction Act provides:-

***“The overriding objective of the Act and the rules made hereunder is to facilitate the just,, expeditious, proportionate and affordable resolution of the appeals governed by the Act.”***

With the above O<sub>2</sub> principle in view, the duty of this Court is to act justly in the special circumstances of each case. In the circumstances of this case and after taking into account the factor that the applicant objector is a stranger to the proceedings until the issue of ownership of the goods is determined on merit in the intended appeal, justice demands that I grant a stay. I have also considered the applicant/objectors hardship pending the hearing of the appeal. At the same time, I have also considered the special position of the respondent judgment creditor. On the whole, I have placed their respective position on the scales. I have equally considered the need to treat both claims proportionately. In my view, all I need to satisfy myself on is that, I have as far as is practicable given effect to the O<sub>2</sub> principle in the course of the exercise of the power under the **rule 5(2)(b)**. This is a duty and not a discretion. In the result, I would hold that it would in the circumstances be unjust not to grant a stay of the order dismissing the objection proceedings. I do not consider the order as negative in the circumstances, since a stay would still prevent the sale taking place and since under **section 3A**, I would still be entitled to design an order on special terms to stop the sale. The O<sub>2</sub> principle as held severally now, gives the Court both substantive and procedural powers to attain justice and fairness with regard to every case or appeal.

I do not consider that a past decision would in the circumstances prevent me from giving effect to the O<sub>2</sub> principle.

In the circumstances, I would Order that no sale of the contested goods should take place pending the determination of the appeal. In the circumstances, I would make no order as to costs.

It is so ordered.

***DATED and delivered at Nairobi this 28<sup>th</sup> day of May, 2010.***

**J.G. NYAMU**

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**JUDGE OF APPEAL**

I certify that this is a true  
copy of the original.

**DEPUTY REGISTRAR**