



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appli 155 of 2006

TARGET CARRIERS LIMITED (IN RECEIVERSHIP)APPLICANT

AND

LYNDON D'SOUZA t/a ROAD RUNNER CARRIERSRESPONDENT

(Application for stay of execution pending the lodging, hearing and determination of an intended appeal from the decision of the High Court at Nairobi Milimani Commercial Courts (Waweru J.) dated 26th May 2006

in

H.C.MISC. C. NO.207 OF 2005

RULING OF THE COURT

Target Carriers Limited (*In Receivership*), the applicant, has applied under **rule 5(2)(b)** of the **Court of Appeal Rules (the Rules)** that pending the lodging, hearing and determination of an intended appeal there be a stay of execution of the order of the superior court dated 26th May 2006, in **Milimani Commercial Court High Court Misc, Cause No.207 of 2005**. In that matter the superior court ordered that motor vehicle registration number KPA 247Y, Trailer ZB 5665 and Steel Tow Bar, be restored to the respondent in this application. We were informed from the bar that the Tow Bar is no longer the subject matter of this litigation and so we will not deal with it.

In an application under **rule 5 (2)(b)** above, the Court, in exercise of its jurisdiction is guided by two well settled broad principles. Firstly, that the applicant must show that its appeal or intended appeal is arguable. Secondly, that unless it is granted a stay or injunction as the case may be, its appeal or intended appeal, if successful, will be rendered nugatory. The power of the Court is discretionary and like all judicial discretion, it must be exercised on the basis of facts and the law.

The facts upon which the application is based are short and generally not in dispute. The applicant executed a fixed and floating debenture, on 18th April 2002 in favour of Akiba Bank Limited. Under the debenture there was a fixed charge over trailer ZB 5665. Later the applicant was placed under receivership by the said bank in exercise of its powers under the debenture. The bank appointed Panangipalli Ramana Rao as one of the Receivers and Managers of the applicant. The receivers however, could not find any significant assets within the company's premises. A search led them to the respondent from whom they took possession of motor vehicles KAP 247Y and trailer, ZB 5665, acting on an order obtained from court for that purpose under **Nairobi High Court Misc. Cause No.207 of 2005**.

Lyndon D'Souza, the respondent, trading as **Road Runner Carriers**, did not think the seizure of the vehicles was proper. So he moved the same court in the same suit by motion seeking orders that the motor vehicles seized from him be restored to him. His case was that the order for the seizure of the said vehicles was obtained through deception and that he was the lawful owner thereof. In his affidavit in support of that application he deposed that he bought motor vehicle KAP 247Y and trailer ZB 5665 from the applicant in May 2003, without notice of any fraud, that before he bought the same he conducted an official search in the Registry of Motor Vehicles, that there was no indication there that any other party save the applicant had an interest in the vehicles, and the transfer of ownership was effected without any problems, in or about April 2004. He further deposed that his firm had no connection with the applicant other than the fact that the applicant sold the said vehicles to his firm. He was using the vehicles openly for his business and had had them for over two years before they were seized. It is that application which gave rise to the order against which an appeal is intended.

Waweru J. heard the application. He found as fact that there was no fixed charge over motor vehicle KAP 247Y, and that there could only have been a floating charge over that motor vehicle in favour of Akiba Bank Ltd which would only crystallize on 18th August 2004, the date the Receivers were appointed. By that date, he held, the motor vehicle along with trailer ZB 5665 had been transferred to the respondent. There was nothing, he said, to stop such transfer as the interest of Akiba Bank Limited was not noted in the registration books of the said vehicles. Consequently, he said, the respondent was an innocent purchaser for value of the vehicles without any notice to him of the interest of Akiba Bank Limited in them. He could not find any evidence or suggestion of collusion between the applicant and the respondent regarding the alleged fraudulent sale of the said vehicles. He then reviewed the order of seizure and ordered the two vehicles to be restored to the respondent.

The applicant was aggrieved and intends to appeal against that order. It filed a notice of appeal in terms of **rule 74** of the **Rules** and thereafter brought this motion. Miss Malik for the applicant submitted before us that the registration book for the vehicles being only prima facie evidence of ownership the respondent was obliged to but failed to adduce evidence of purchase. She further submitted that Waweru J. erred when he held that the respondent had no notice of the bank's interest when in fact the debenture over the vehicles had been duly registered and thus due notice was given to the whole world. In her view the respondent had constructive if not express notice of the bank's interest over the said vehicles.

Mr. Taibjee while conceding that the registration of the debenture gave constructive notice of the interest of the bank over the two motor vehicles, submitted that the same debenture required that there be a joint registration of the applicant and the bank in the motor vehicle registration book, which was not done. He referred to a transfer form the applicant was relying on, which is part of the record of this application. There is no evidence the form was ever presented to the Registry of Motor Vehicles. If it was, he said, there had been a lapse of two years before any action was taken on it, and no explanation was offered to explain the delay in taking such action.

Clause 14:2 of the Debenture provides as follows:

“14.2 Deposit of Log Books

Deposit with the Bank all the Log Books of each Vehicle (which should be in the joint names of the Bank and the Borrower) together with blank transfer forms in respect of each vehicle.”

There is clear evidence that the applicant signed blank transfer forms and handed the same over to the Bank with the log books in compliance with the above clause.

As to why the log books were not in the joint names of the Bank and the borrower is a matter peculiarly within the knowledge of the Bank and the applicant. As the facts stand, the log books remained with the applicant which used the same to effect transfers of the vehicles to the respondent.

In such circumstances, can it be said that the applicant has shown that any arguable point exists to entitle it to the orders it seeks from this Court? We answer the question in the negative, with the result

that we do not consider it necessary to consider the issue whether if we deny the applicant an order of stay and it were later to succeed in its intended appeal such success will be rendered nugatory. The applicant was required to satisfy us on both tests and it has failed to do so.

In the result we dismiss the notice of motion dated 7th June, 2006 with costs to the respondent.

Dated and delivered at Nairobi this 14th day of July, 2006

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O.O'KUBASU

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR