



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CORAM: SHAH, OWUOR & KEIWUA JJA
CIVIL APPLICATION NO. NAI. 57 OF 2000 (NAI.25/2000 UR)

BETWEEN

NGWARE-INI INVESTMENT COMPANY LTD)

JOSEPH NDIRANGU)

ALICE NDIRANGU).....APPLICANTS

AND

DIAMOND TRUST BANK OF KENYA LIMITED.....RESPONDENT

**(Appeal from the judgment of the High Court of Kenya at
Nakuru (Hon. Justice D.M. Rimita) dated 12th April,**

1999

in

H.C.C.C. NO. 117 OF 1997)

RULING OF THE COURT

We have before us an application brought under rule 5(2)(b) of the Rules of this Court seeking stay of execution of a decree issued pursuant to a judgment entered by the superior court (Rimita, J) on 12th April, 1999 whereby the present applicants were ordered to pay a sum of Shs.17,979,853/05/= to the respondent. The respondent's claim in the superior court was for special damages in sum of Shs.4,683,137/= plus interest thereon at the rate of 30% per annum plus costs and also payment for storage charges.

The applicants had entered into a hire-purchase agreement with the respondent in respect of a bus registration number KAE 456 C. The applicants were to service the hire-purchase agreement payments but did not manage to do so and opted to return the said bus to the respondent. The respondent had to employ tracers, to look for the bus which was traced to a garage in Lanet on the outskirts of Nakuru town, undergoing repairs. When the bus was put up for sale the respondent was unable to sell it as it had some vital part cannibalised. The bus had been on the road for only a year and should have been in a reasonably sound condition. The learned Judge after hearing the suit disbelieved the applicants' witness and concluded that the cannibalisation must have been done at the behest of the applicants.

The learned Judge entered judgment against the applicants for special damages as pleaded plus interest thereon. We do not have the plaint before us. So we cannot say what storage charges were claimed. The judgment entered was as prayed in the plaint. We bear in mind the fact that the claim was not in respect of

unpaid arrears of hire purchase instalments. The arrears according to Mr. Olola who appeared for the applicants amounted to a total of Shs.3,100,000/= at the time of repossession.

There is something to be said about the decretal sum. There is no date in the judgment from which the interest on special damages ought to accrue. In that event the interest on those damages would accrue from the date of the suit which we are told is 19th March, 1997. It would appear at least arguable that the decretal sum was not correctly calculated to result in the sum of Shs.17,979,852/05/=. The special damages being K.Shs.4,613,137/= simple interest thereon @ 30% per annum would be, for 3 years, K.Shs.4,151,823/= making a total of K.Shs.8,764,960/=.

On the issue of cannibalisation we do not see much scope for argument as the learned Judge has made a finding on fact based upon demeanour of witnesses as well as in respect of a letter which he found, in material part, to be a forgery by addition of the words "The above vehicle surrendered to above with all accessories and tools in good order". Such words were obviously added by the applicants' witness as the respondent's copy thereof did not have those words. The applicants have been quite dilatory about the conduct of the matters in the superior court after judgment. They did not approve the draft decree on the excuse that they did not have a copy of the judgment, although the order was for judgment as prayed in the plaint. They did not disclose the reasons why their application for stay of execution was dismissed by the superior court. They have not put on record a copy of the notice of appeal nor have they shown if they applied for copies of proceedings and judgment for the purposes of the intended appeal in the time so that they could avail themselves of the benefit of the proviso to rule 81 of the Rules of this Court. They have simply said "It is all in the court file".

The application before us, on the whole, is shoddy and half-hearted. But as pointed out earlier by us the decretal sum may be far in excess of what was awarded. To that extent only, we see an issue to be determined, on appeal.

What we have to consider next is the issue whether or not the success in the intended appeal would be rendered nugatory if stay of execution is not granted. The respondent is a reputable bank and we see no reason why it would not be able to refund the decretal sum if paid to it by the applicants. We have to secure the interest of both parties.

Considering all the circumstances of this matter, in particular, that the attached properties may not fetch proper amounts on account of a forced sale, the order that commends itself to us is to grant a conditional order of stay. In the event, we order that there be a stay of execution of the decree on condition that the applicants pay to the respondent bank a sum of Shs.6,000,000/= within 30 days from to-day's date and in default of such payment this application shall stand dismissed with costs. We also order that if the said sum is so paid the attached properties be returned to the applicants who will bear costs of execution and court brokers' charges. The costs of this application will be costs in the intended appeal.

Dated and delivered at Nairobi this 24th day of March, 2000.

A.B. SHAH

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

M. KEIWUA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.