



REPUBLIC OF KENYA



KENYA LAW
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**Murunga v Barasa (Civil Appeal E069 of 2022)
[2024] KEHC 676 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 676 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E069 OF 2022**

DK KEMEL, J

JANUARY 31, 2024

BETWEEN

SULEIMAN KASITI MURUNGA APPELLANT

AND

DIDMUS WEKESA BARASA RESPONDENT

RULING

1. Before this court is the Appellant's notice of motion application dated 8th day of August, 2022 brought under certificate of urgency seeking an order of stay of execution of the decree by public auction of the Appellant's attached motor vehicle registration number KBX 005L Toyota land cruiser prado already advertised for public auction on 12.8.2022. Apparently. The Appellant had filed a similar application the same day but on realizing that the subject vehicle had been advertised for sale by public auction opted to proceed with the present application so as to beat against time and save his vehicle from going under the hammer.
2. The application is supported by the affidavit of the Appellant sworn on even date. The applicant's gravamen is inter alia; that the Respondent's agents have attached the Appellant's motor vehicle registration number KBX 005L Toyota prado valued at Kshs 7, 000,000/ and has now purported to put it up for sale by public auction; that if the same is sold then he will suffer great loss and prejudice as he has paid some substantial amount of the taxed costs; that unless the Respondent is restrained from executing the decree by public auction of the attached motor vehicle already advertised on 12.8.2022, the appeal herein will be rendered academic and nugatory hence immense loss and prejudice will result to the Applicant.
3. The Respondent filed a replying affidavit dated 17th day of August, 2022 sworn by Frank Ochieng Walukwe an advocate of the high court of Kenya on behalf of the Respondent/ Decree holder herein Didmus Wekesa Barasa who averred inter alia; that he is aware that there exist warrants of arrests dated 6th July, 2022 issued against the Appellant herein for contempt of court with regard to the very



same vehicle (KBX 005L) the subject of this proceedings; that the Appellant herein by conduct has in defiance and cynical disregard of the authority of this court, refused and/or failed to purge the contempt yet he is seeking an equitable relief from the same court; that the contemnor is underserving the orders sought and ought to be denied audience before this court until he purges the contempt; that in any event, the decision sought to be appealed against are orders issued in Bungoma High Court Election Petition No. 2 of 2017, Suleiman Kasuti Murunga - vs- IEBC & Another and as such, the said orders cannot be appealed against to the same court save for reference on issues of costs and/or a review on the orders made; that he is equally aware that the issue of the decretal sum having been fully and/or substantially paid has already been settled by this Honourable court when the Appellant failed to provide any proof of this payment as is the case with the application herein; that on the issue of forged documents , the same as attached are in the court file and it remains as easy as the court confirming its own orders; that without prejudice to the foregoing , the application dated 8th August, 2022 has been overtaken by events as the subject vehicle registration No. KBX 005L Toyota Prado was sold by way of public auction on 12th of August, 2022 as per annexed copy of the certificate of sale and Auctioneer's report; that the deponent herein showed that he was served with the said application and order from court on 11th August,2022 when the advocates chambers were closed for purposes of the General Elections which took place on the 9th of August 2022 as per the annexed excerpt of an automated out of office response to a few emails sent to the office during the said period; that on account of counsel's involvement in the general elections, the said email went unnoticed until the 15th of August , 2022 when normal operations resumed as advised in the automated response attached herein; that in good faith, the deponent herein has not released any funds to the Respondent pending whatever directions will be issued by this Honourable court; that in this regard, the prayers raised in the application have been overtaken by events and thus are no longer tenable anymore; that nevertheless, the persistent pattern of disregard of court orders exhibited by the Appellant is clear indication that even if the orders sought are granted, the contempt will not be purged.

4. The applications were canvassed by way of written submissions. Both parties duly complied.
5. Learned counsel for the Appellant/applicant vide submissions dated 2.11.2023 submitted that the Appellant had already made substantial payment of Kshs 2,500,000/ towards the taxed costs and that there was no need to seek to sell the Appellant's vehicle. It was also submitted that the Appellant obtained stay orders before Kakamega High court but which was defied by the Respondent and sold the vehicle and which later culminated in contempt proceedings before this court. It was finally submitted that the proceeds of the sale of vehicle be deposited in court pending determination of the appeal.
6. The Respondent filed submissions dated 22nd November, 2023 in opposition to the Appellant's application dated 8th August, 2022. Learned counsel reiterated the averments in his replying affidavit. It was his submission that the Respondent was issued with a certificate of costs on 17th, 2021 which taxed the costs at Kshs. 3,635,440 /- against the Appellant/applicant herein in Bungoma Election Petition No. 2 of 2017; Suleiman Kasuti Murunga -vs- Didmus Wekesa Barasa. That following non-payment, warrants of attachment were requested by the Respondent herein over the Appellant's motor vehicle which was later sold by public auction. Learned counsel raised three issues for determination namely; whether the conditions for stay of execution have been met; whether the Appellant has audience before the court; whether there is an arguable appeal.
7. As regards the first issue, it was submitted that the Appellant has not met the conditions provided by Order 42 Rule 6(2) of the Civil Procedure Rules. On the condition of substantial loss, it was submitted that the application has been overtaken by events as the subject vehicle No. KBX 005L Toyota prado was sold by way of public auction on 12.8.2022 and that the evidence of sale has been annexed in the



affidavit of the Respondent sworn on 17.8.2022 and that the Appellant is aware since he later filed an application for contempt of court which was determined by this court on 26.1.2023. It was submitted that the order sought would be of no effect and an academic exercise in vain. As regards the issue of delay, it was submitted that the Appellant is guilty of laches as he has delayed in prosecuting the present application. On the condition of provision of security, it was submitted that the Appellant has failed to show his willingness to furnish security for the due performance of the decree.

8. As regards the issue of whether the applicant has a right of audience before the court, it was submitted that there has been a warrant of arrest in force against the Appellant who has refused to purge his contempt yet he is seeking an equitable relief from this court. It was submitted that he should not be granted the equitable relief sought.
9. As regards whether there is an arguable appeal, it was submitted that the subject matter of the stay application having been sold then the appeal has been overtaken by events. It was submitted that the appeal relates to a ruling dated 5.8.2022 by the Deputy Registrar and hence the appeal is now moot and that orders issued thereafter will be in vain.
10. Learned counsel for the Respondent urged this court to dismiss the application with costs.
11. I have given due consideration to the rival affidavits and submissions presented. It is not in dispute that this matter arose as a post judgement activity after the election court had determined the matter and thus it is on the issue of costs as taxed by the Taxing officer. It is not in dispute that the Appellant's application before the Deputy Registrar was dismissed on 5.8.2022 wherein he lodged this appeal and the present application dated 8.8.2022. It is not in dispute that the Appellant obtained orders of stay at Kakamega High court prior to the sale of the Appellant's vehicle registration number KBX 005L Toyota Landcruiser prado. It is also not in dispute that the said vehicle was subsequently sold culminating in an application dated 23.8.2022 for contempt of court leading to the court's ruling dated 26.1.2023 in which the court found that the Respondent was not guilty of contempt of court. It is not in dispute that there are other proceedings pending before the Court of Appeal at Kisumu over the said motor vehicle registration number KBX 005L. It is not in dispute that upon the decision of the taxing master, the appellant if aggrieved over the same ought to have lodged a reference and not an appeal as herein since this court had already determined the election petition dispute and that aggrieved parties were to approach the Court of Appeal for redress. That being the position, I find the issue for determination is whether the application has merit.
12. As the Appellant's application seeks for stay pending an appeal, the application provision of the law is Order 42 Rule 6(2) of the *Civil Procedure Rules* which provides as follows:
 - No order for stay of execution shall be made under sub rule (1) unless-
 - a. The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - b. Such security as the court orders for the due performance of the such decree or order as may ultimately be binding on him has been given by the applicant."
13. As to whether the Appellant stands to suffer substantial loss if the stay of execution is not granted, it is noted that the Appellant has averred that he will suffer great loss and prejudice. It is instructive that at the time of canvassing the application a lot of water had passed under the bridge in that the subject matter of the stay namely motor vehicle registration number KBX 005L had already been sold by public auction. It is also instructive that the Appellant had filed an application dated 23.8.2022



- seeking to commit the Respondent to civil jail for being in contempt of the court orders issued on 12.8.2022 and which was determined by this court on 26.1.2023 wherein the court dismissed the same and held that the proceeds from the sale of the vehicle being ascertainable then the Appellant could still access the same in the event of success of the appeal. That being the position, it is my considered view that the order sought had already been overtaken by events and that any order of stay would be of no effect and only an academic exercise. Hence, it is my finding that the Appellant has not satisfied the condition on substantial loss. The prayer for stay and preservation of the motor vehicle registration number KBX 005 L pending the hearing and determination of the appeal has been overtaken by events and thus such an order cannot be issued in vain.
14. As to whether the application has been filed timeously, it is noted that the impugned ruling by the Deputy Registrar was delivered on 5.8.2022. The present application was lodged on 8.8.2022 and hence the same was filed without unreasonable delay. The Appellant satisfied this condition.
 15. As to whether the Appellant offered security for the due performance of the decree, it is noted that the Appellant's affidavit in support of the application is silent on the same. It is mandatory for an applicant seeking for orders of stay of execution pending appeal since the Respondent who is the successful party is also entitled to the fruits of the judgement and that if he/she is to be dislodged from the seat of judgement or kept away from the fruits of the judgement, the Appellant ought to demonstrate willingness to provide security. As this was not demonstrated, then there is lack of commitment on his part to warrant an order for stay being granted in his favour. I am therefore satisfied that the Appellant has not satisfied this condition.
 16. It is trite that all the three conditions under Order 42 Rule 6(2) of the *Civil Procedure Rules* must be fulfilled by an applicant seeking for an order of stay of execution of a decree pending an appeal. Even though the Appellant met two of the conditions, he still has not succeeded in convincing this court to grant the order sought due to the reason that the subject matter of the stay namely motor vehicle registration number KBX 005 L has already been overtaken by events as the same had already been sold prior to the hearing of the application.
 17. There is need to delve into the appellant's appeal. It is noted that the appeal is in regard to the order of the Deputy Registrar dated 5.8.2022 in which he declined to grant the Appellant an order for stay of sale and release of the appellant's motor vehicle. As matters stand, the said vehicle has since been sold and thus it is clear that the appeal has been overtaken by events. It is thus highly likely that the Appellant's appeal is already moot and might likely lead to an academic exercise. It is noted that there is a pending appeal at the Court of Appeal at Kisumu (CA No. E191 of 2023) relating to a dispute on ownership of motor vehicle registration number KBX 005 L. The appeal thus seems to have been caught up with the mootness doctrine as the same has been overtaken by events
 18. Finally, the Appellant's counsel has urged me to order the Respondent to deposit the decretal sum received from the sale of the vehicle in court pending determination of the appeal on the grounds that it is unfair for the Respondent to sell the car and keep the proceeds. That is a new prayer that has been brought up in submissions since the prayer that had been sought by the Appellant is an order for stay of execution pending appeal. The Appellant has not amended his application for an order on the decretal sums. The request is being made from the bar. This is improper. In any event, the person who had the obligation to furnish security is the Appellant and not the Respondent. The Appellant was required to satisfy the conditions imposed by the *Civil Procedure Rules* (Order 42 Rule 6(2)) and therefore he cannot turn the tables and impose a condition upon the Respondent. The parties could as well enter into a consent on that issue but there was none. Further, the appeal is in regard to the denial by the Deputy Registrar to grant the Appellant certain orders and not about the decretal sums. Consequently, I decline the request by counsel for the Appellant.



19. In view of the foregoing observations, it is my finding that the Appellant's application dated 8.8.2022 lacks merit. The same is dismissed with costs.

DATED AND DELIVERED AT BUNGOMA THIS 31ST DAY OF JANUARY 2024

D.KEMEI

JUDGE

In the presence of :

Olonyi for Sichngi for Appellant/Applicant

Mbugua for Walukhwe for Respondent

Kizito Court Assistant

