



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL CASE NO. 31 OF 2016

1. SIGHN SURGIT

2. MALKIAT SINGH

3. GIBLERT WANYONYI..... APPELLANTS

VERSUS

AUGUSTINE WESONGA OPONDO and ZAKAYO OPONDO CHESA

suing as the personal and legal representatives of the estate of the late

ELLIET HENRY ZAKAYORESPONDENTS

RULING

1. Before court are two applications by the appellants/applicants, SINGH SURGIT, MALKIAT SINGH and GIBLERT WANYONYI as against AUGUSTINE WESONGA OPONDO suing as a legal representatives of the estate of Elliot Henry Zakayo.

2. All applications were filed under certificate of urgency. The first is dated 14th November, 2016, seeking to set aside the order of the trial court in CMCC No. 859 of 2010 where the condition for setting aside the exparte judgment was payment of decretal amount of Kshs. 1,846,443/- in a joint interest earning account. The appellants were aggrieved by the said condition.

3. The applicants argue that depositing the entire amount will cripple their business.

4. The second application dated 13th December, 2016 also under certificate of urgency seeks to have a vehicle attached by the respondents auctioneers Eshikhoni Auctioneers being vehicle reg. No. KAZ 909G Mitsubishi Canter be released pending hearing and determination of the appeal. The application was brought on grounds that the vehicle was attached while interim orders were in place.

5. Both applications were objected to by the respondent.

The first application was opposed on the grounds that the appellants' failed to comply with the trial court's order for setting aside the exparte order specifically failure to pay the decretal sum into a joint account; further that this court has no jurisdiction to re-consider a trial court's discretion.

6. As for the 2nd application the respondent argues that the interim stay lapsed on the 7th of December, 2016 and the auctioneers attached thereafter. That the extension of the order was served on the respondents counsel on 10th of December, 2016 3 days after the extension and 2 days upon execution and therefore the respondent cannot be faulted.

7. I have considered both applications and submissions by the parties and authorities cited.

I will start by the 2nd application. It is clear that there was a lapse on the part of the appellants' counsel to serve the order extending the stay. The said order was served two days after extension of the same and therefore the respondents counsel cannot be faulted for acting diligently however the outcome of the first application shall inform the 2nd application's direction.

8. The first application was brought pursuant to Section 1A, 1B, 3, 3A, 63(e) of the Civil Procedure Act and Order 42 Rule 6, and 51 Rule (1) of the Civil Procedure Rules. The substantive rule being relied upon is Order 42 rule 6. The requirements of the said order are very clear in that in order for a court to grant an order of stay it must be satisfied that substantial loss may result; the application has been brought without undue delay; and the applicant must provide such security as may ultimately be binding on him.

9. The applicants as stated above are appealing against the condition imposed on them by the trial court. They argue that the condition is oppressive and they have preferred an appeal. In the meantime, the vehicle has been attached and is likely to be auctioned yet the same is their tool of trade.

10. . In his response the respondent has dealt more on the case in the trial court and the order subject of the appeal. He does not dispute that if execution takes place the appellants will suffer substantial loss. I am satisfied that the 1st application was made before court without undue delay, a stay is eminent in order that the appeal is not rendered nugatory.

11. .In the circumstances, therefore I will give the following orders;

(a). That there be stay of execution of the trial court's order pending hearing and determination of the appeal on condition that a sum of Kshs. 800,000/- be deposited in an interest earning account in the names of the advocates representing the parties within the next 15 days.

(b). This appeal be set down for hearing, the record having been filed within 30 days.

(c). The vehicle attached on the 8th of December, 2016 by Eshikhoni Auctioneers being vehicle registration No. KAZ 909G Mitsubishi Canter be released upon payment of reasonable auctioneer's fees to be agreed or taxed.

(d). Costs in the cause.

DATED and DELIVERED at BUNGOMA this 20TH OF DECEMBER 2016

ALI-ARONI

JUDGE



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