



Rehal & another v Kenya Commercial Bank Ltd & 3 others (Commercial Case 1 of 2023) [2023] KEHC 23254 (KLR) (29 September 2023) (Ruling)

Neutral citation: [2023] KEHC 23254 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
COMMERCIAL CASE 1 OF 2023
MS SHARIFF, J
SEPTEMBER 29, 2023**

BETWEEN

KARMJIT KAUR REHAL 1ST APPLICANT

JASDEEP SINGH REHAL 2ND APPLICANT

AND

KENYA COMMERCIAL BANK LTD 1ST RESPONDENT

JAMES ONYANGO JOSIA T/A NYALUOYO AUCTIONEERS 2ND RESPONDENT

BALVINDER SINGH REHAL 3RD RESPONDENT

AMARDEEP SINGH REHAL 4TH RESPONDENT

RULING

A. Introduction

1. The appellants' notice of motion dated January 9, 2023 seeks the following orders;
 - a. Pending the hearing and determination of this application, the respondents, their employees, workers, agents and or whomsoever be restrained from advertising for sale, auctioning, selling, disposing, transferring and or interfering with the 1st appellant's property Kisumu Municipality block 7/92.
 - b. Pending the hearing and determination of this appeal, the respondents, their employees, workers, agents and or whosoever be restrained from advertising for sale, auctioning, disposing, transferring and or interfering with the 1st appellant's property Kisumu Municipality block 7/92.



c. Costs of the application.

2. The 2nd respondent swore an affidavit in support deponing inter alia that the parcel was inherited from the 1st appellant's late husband with a loan facility of 8,000,000/- from prima bank. Upon successful transmission of the property to the 1st appellant, they approached the 1st respondent to take up the loan from prima bank in the sum of Kshs 10,000,000/= and granted the 1st respondent deed of assignment to collect rent from the suit property in case of default.
3. He depones that on October 10, 2017, the 1st respondent served tenants in that property with a statutory notice to sell the property. The tenants then moved the subordinate court through CMELC 238 of 2018 to stop the sale. The said court issued a temporary injunction preventing the sale until conclusion of the suit.
4. That however, before the hearing of the suit, the respondents filed a preliminary objection contesting the subordinate court's monetary jurisdiction to deal with the subject matter which is stated to be Kshs 96,000,000/-. The court vide a ruling delivered on December 7, 2022 allowed the preliminary objection and struck out the suit. Aggrieved, they moved this court on appeal which he depones has a high chance of success. He depones that if the orders sought are not granted, they will suffer irreparable loss and render the appeal nugatory.
5. The 1st Respondent through Onesmus Muthama Nguu filed a replying affidavit deponing inter alia that the suit was dismissed purely on the issue of jurisdiction and the appellants having admitted the existence of loan arrears, they have no arguable appeal. He depones that the loan was secured by a charge over the suit property and a deed of assignment of rental income which was to be channeled through an account held at the 1st respondent.
6. It is further deponed by the 1st Respondent that the execution and registration of the deed of assignment of the rental income notwithstanding, the appellants failed to remit the same. Reminders were issued and subsequently a statutory notice was issued requiring them to regularize the default. Due to persistent default, the bank issued a notice of sale upon the tenants in the property.
7. The 1st Respondent deposes that despite the appellants enjoying interim orders since 2018, they have not made any effort to redeem the property despite having indicated their willingness to settle the matter out of court.
8. This application was canvassed by way of written submissions. Both parties complied. The said submissions have been taken into consideration.

Analysis and determination.

9. The application before me seeks orders of injunction restraining the respondents from disposing of the suit property pending the hearing and determination of the appeal already filed. The genesis of the dispute is a loan arrangement where the appellants were advanced some money by the 1st respondent and secured by a legal charge over the suit property. It is common ground that the loan fell into arrears and the 1st respondent moved in to realize the security by issuing notices of sale.
10. Consequent to the issuance of the said notices, the appellants moved the subordinate court to stop the sale. That suit was dismissed on grounds that the court lacked jurisdiction to entertain the matter. The appellants have thus preferred an appeal which they maintain has a high probability of success and they thus seek the court's intervention to protect the property until the appeal is concluded.



11. The issue that emerge for determination is whether the appellants are entitled to an order of injunction at this juncture pending the hearing and determination of the appeal. The grant of orders sought is a discretionary one governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules. The court in RWW v EKW [2019] eKLR, while considering the purpose of a stay of execution order pending appeal, stated as:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.
9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”
12. The conditions to be satisfied under Order 42 Rule 6 (2) are;
 - (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 such decree or order as may ultimately be binding on him has been given by the applicant.
13. The appellants’ contention is that if the respondents are not restrained, they may sell the property and render the appeal nugatory. Their appeal is said to be anchored on the erroneous finding by the trial magistrate that it lacked jurisdiction. They however admit the loan is in arrears though that there was in place arrangements to pay up the loan by way of deed of assignment of rental income.
14. The 1st Respondents on its part asserts that the loan being in arrears and the outright admission by the appellants of that fact supports the respondents’ position that the appeal has no chance of success.
15. The issue of what amounts to substantial loss under order 42 rule 6 was considered in Wangalwa & Another -v- Agnes Naliaka Cheseto [2012] eKLR, where the court held that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
16. In the instant application, the subject matter is a parcel of land pledged as security. The 1st Respondent no doubt still has the title to the property and will only discharge upon payment of the loan. The property as valued by the 1st Respondent shows that the property is valued at 96 million and the loan



arrears is in the region of Kenya shillings slightly less than 11 million meaning there is a huge difference between the amount claimed and the value of the property.

17. I also take cognizance of the fact that the cause of this appeal is a dismissal of the suit on a preliminary point of law. The matter had not been heard on merits and depending on the outcome of the appeal, parties may have to have the suit determined on merit.
18. As stated by Aburili J in *Nicholas Stephen Okaka & another v Alfred Waga Wesonga* [2022] eKLR, the court besides considering the conditions stipulated in Order 42 Rule 6, the overriding objectives under the *Civil Procedure Act* have to be taken into account. In that case, the learned judge stated;

Further to the above, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions.

19. I am alive however to the fact that, this being an interlocutory application, the province of determining the merit ability of the appeal lies within the appellate court which time shall come. At this stage, I only have to determine whether on the face of it, there exist grounds that may render the appeal successful.
20. Premised upon the above findings I do find that the appellants/applicants have established that they stand to suffer substantial loss if the orders sought are not granted.
21. I therefore proceed to allow the application dated January 9, 2023 in terms that the respondents are hereby restrained from advertising for sale, auctioning, selling, disposing, transferring and or interfering with the appellants /applicants property known as Kisumu Municipality block 7/92 pending the hearing and determination of the appeal herein, on condition that the appellants do deposit in a joint interest earning account of parties advocates the sum of Kshs 10,000,000 within 60 days from the date hereof.
22. The appellants are directed to file their record of appeal within 60 days of this ruling failing of which the orders above automatically shall lapse.
23. Costs of this application shall abide the outcome of the appeal.
24. Orders accordingly.

DELIVERED, DATED AND SIGNED AT KISUMU THIS 29TH DAY OF SEPTEMBER 2023.

MWANAISHA S. SHARIFF

JUDGE

