



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kiarie v Cidermarc Properties Limited (Environment and Land Appeal
E009 of 2023) [2023] KEELC 16830 (KLR) (12 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16830 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E009 OF 2023**

BM EBOSO, J

APRIL 12, 2023

BETWEEN

JOSEPH THUO KIARIE APPLICANT

AND

CIDERMARC PROPERTIES LIMITED RESPONDENT

(High Court [Kasango J])

RULING

1. From the materials presented to this court, it does emerge that Joseph Thuo Kiarie [the appellant] charged land parcel number Kiambu Municipality Block 5 (Kiamumbi)/1390 [the suit property] to Kenya Women Micro-Finance [the Bank] to secure a financial facility that was to be advanced to Eunice Nduta Thuo and James Kiogora Muturi [the borrowers]. The facility was not serviced. Consequently, the Bank exercised its statutory power of sale through a public auction. M/s Cidermarc Properties Limited [the respondent] successfully bid for the suit property and purchased it. The suit property was subsequently transferred to the respondent by the Bank in May 2021.
2. It does also emerge that subsequent to the sale and transfer of the suit property to the respondent, the appellant amended the plaint in Kiambu High Court Civil Suit No E007 of 2020 and joined the respondent as a 2nd defendant in the said suit. The auctioneer who had carried out the auction was joined as an interested party in the suit. The appellant sought an additional order annulling the sale. Subsequent to that, the appellant prosecuted, in the said suit, a notice of motion dated 19/5/2021, in which he sought an interlocutory injunction restraining the defendants in the suit against evicting him from the suit property. The High Court [Kasango J] considered the application and rendered a ruling on it, dated December 16, 2021, in which it found the application unmerited. The High Court dismissed the application.



3. Subsequent to that, the respondent took out an originating summons dated 4/8/2022 in Kiambu Chief Magistrate Court MCE & L Case No 49 of 2022 (OS), inviting the Chief Magistrate Court to grant him possession of the suit property which at that time was still in possession of the appellant. The appellant objected to the originating summons on among other grounds, that there was a pending appeal against the ruling of the High Court [Kasango J]. The Chief Magistrate Court [Hon K Sambu, SPM] heard the originating summons and disposed it through a ruling dated 18/1/2023 in which the Chief Magistrate Court found that the respondent was entitled to possession of the suit property and granted them the prayers that were sought in the originating summons.
4. Aggrieved by the ruling and disposal orders of the Chief Magistrate Court, the appellant brought this appeal, challenging the said ruling and orders and inviting this court to, among other reliefs, set aside the ruling. The appellant contemporaneously filed a notice of motion dated 27/1/2023, seeking an order staying execution of the orders of the Chief Magistrate Court pending the hearing and determination of this appeal. The said application is the subject of this ruling.
5. The application is premised on the grounds outlined in the motion and is supported by the appellant's affidavit sworn on 27/1/2023. On 8/3/2023, this court directed the appellant to file and serve written submissions on the application within seven (7) days. On 22/3/2023, Mr Kurauka, counsel for the appellant, informed the court that the appellant had elected not to file written submissions and would instead rely on the supporting affidavit.
6. The case of the appellant/applicant is that he has an arguable appeal and that if a stay order is not issued, he will be evicted while this appeal is pending and the appeal will be overtaken by events and rendered nugatory. He adds that the Chief Magistrate Court erred in granting the respondent possession of the suit property.
7. The respondent opposes the application through a replying affidavit sworn on 1/3/2023 by David Kanja and written submissions dated 6/3/2023 filed by M/s Mwaniki Gachoka & Co Advocates. The case of the respondent is that the application is unmerited, misconceived, vexatious, frivolous and an abuse of the legal process. They contend that the applicant has failed to satisfy the criteria for granting an order of stay of execution pending an appeal. They add that as purchasers in a public auction conducted by a chargee, their title is protected under Section 99 of the *Land Act* and if the appellant has any claim over the suit property, the claim can only be directed against the chargee.
8. The respondent adds that the appellant is seeking from this court what the High Court declined to grant him, contending that in the absence of an order staying proceedings in the Chief Magistrate Court, the said court properly disposed the originating summons.
9. I have considered the application, the response to the application, and the respondent's submissions. I have also considered the relevant legal frameworks and jurisprudence. The single question falling for determination in the application is whether the appellant has met the criteria upon which a first appellate court exercises jurisdiction to grant an order of stay of execution pending the hearing and determination of an appeal. By electing not to present submissions on the application, the applicant chose to say nothing by way of submissions on the above question.
10. The criteria upon which this court exercises jurisdiction to grant an order of stay of execution pending the hearing and determination of an appeal is set out in Order 42 rule 6(2) of the *Civil Procedure Rules* which provides as follows:-

“(2) No order for stay of execution shall be made under subrule (1) unless—



- (a) the court is satisfied that substantial loss may result to the Applicants 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 Applicants.”

11. The Court of Appeal of East Africa outlined the general principle that guides our courts when exercising this jurisdiction in *Butt v Rent Restriction Tribunal* [1979] as follows:-

- “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
- 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge’s discretion.
- 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
- 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements.....
- 5. The court in exercising its powers can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

12. The court emphasized in *M/s Port Reitz Maternity v James Karanga Kabia*, CA No 63 of 1997 that the applicant’s right of appeal should be carefully balanced against the appellant’s right to enjoy the fruits of his judgment.

13. In the present application, the respondent is the registered proprietor of the suit property. They acquired the suit property through public auction by a chargee in early 2021. They were registered as proprietor of the suit property in May 2021. The applicant’s preceding application to the High Court seeking to restrain the defendants [the Bank and the respondent] in Kiambu High Court Civil Suit No E007 of 2020 against evicting him from the suit property was found unmerited and dismissed by the High Court. Against the above background, the respondent took out an originating summons in the subordinate court seeking possession of the suit property through the assistance of the Police. The Chief Magistrate Court found the originating summons merited and granted it.

14. Upon presenting the present application, the applicant elected to say nothing by way of submissions on the requirements of Order 42 rule 6(2). What emerges from the evidence and submissions of the respondent in this application is that a stay order would prejudice them as purchasers in a public auction conducted by a chargee and as registered proprietors of the suit property. Weighing the probable loss which the appellant may be exposed to vis-à-vis the prejudice which the respondent is exposed to by the appellant’s continued illegal occupation of the suit property, this court comes to the conclusion that substantial loss has not been demonstrated by the applicant as against the respondent.



15. Order 42 rule 6(2) required the applicant to demonstrate his willingness and readiness to provide security for the due performance of the ultimate decree of the court. Nothing was said by the applicant in relation to the above requirement.
16. In the above circumstances, the court is not satisfied that the applicant has met the criteria for grant of an order of stay of execution pending the hearing and determination of an appeal. The result is that the application dated 27/1/20223 is dismissed for lack of merit. The appellant/applicant shall bear costs of the application. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 12TH DAY OF APRIL 2023

B M EBOSO

JUDGE

Mr Nyaga for the Appellant/Applicant

Mr Muchiri for the Respondents

Court Assistant: Hinga

