



REPUBLIC OF KENYA



**Ladopharma Company Ltd & 2 others v National Bank of Kenya (Civil Suit 101 of 2001)  
[2022] KEHC 116 (KLR) (Commercial and Tax) (18 February 2022) (Ruling)**

Neutral citation: [2022] KEHC 116 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 101 OF 2001  
A MABEYA, J  
FEBRUARY 18, 2022**

**BETWEEN**

**LADOPHARMA COMPANY LTD ..... 1<sup>ST</sup> PLAINTIFF  
LADISLAUS ADUWO ..... 2<sup>ND</sup> PLAINTIFF  
SILFANUS ADUWO MIYAGA ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**NATIONAL BANK OF KENYA ..... DEFENDANT**

**RULING**

1. Before Court is the plaintiffs' Notice of Motion dated 20/8/2021 brought inter alia under Order 40 Rule 1 (a), 4 (1), (2) and (3) of the Civil Procedure Rules, Section 10 of the Judicature Act Cap 8, Section 10 of High Court (Organization and Administration) Act No. 27 of 2015 and Rule 17 of the High Court (Organization and Administration) Rules 2016.
2. The plaintiffs sought an injunction to restraining the defendants from selling by way of public auction or private treaty the properties known as SUNA WEST/WASWETA II/1453-1487, SUNA EAST/WASWETA 1/7193, SUNA EAST/WASWETA 1/4251 and KAMAGAMBO/KANYAWANGA/457 and L.R No. 8534/155 (IR NO.5396) ('the suit premises') pending appeal.
3. The grounds for the application were that judgment in this suit was delivered on 23/9/2019 and the plaintiffs lodged an appeal against it. That the applicant is likely to suffer irreparable harm if the orders sought are not granted as the properties are unique in character. That the appeal has a high chance of success as the said appeal establishes a prima facie case with a high probability of success.



4. It was contended that the defendant will not be prejudiced by the grant of the orders. That the signature appearing on the charge document dated 12/4/1999 which forms the basis of the auction, did not belong to any of the plaintiffs or their duly authorised agents and was a forgery.
5. The defendant opposed the application vide a replying affidavit sworn on 15/9/2021 by Samuel Mundia, its director of Legal Services. He averred that the application was fatally defective as this Court has no jurisdiction to stay the execution or grant conservatory orders as sought in the application.
6. That in the judgment of 23/9/2019, the court found that the defendant was entitled to exercise its statutory power of sale as there was a legitimate debit balance. All that the defendant was directed to do was to provide a fresh statement of account in order to arrive at the correct outstanding balances.
7. The defendant contended that, pursuant to the judgment, it forwarded to the plaintiff a certified statement of account vide a letter dated 3/12/2019. However, there was no substantive response whereby, the defendant commenced exercising its statutory right of sale after issuing the relevant notices to the plaintiffs.
8. That the plaintiffs only responded to the said letter on the eve of filing the present application, an inordinate delay which was not explained.
9. The plaintiff filed a supplementary affidavit dated 21/9/2021 in response to the defendants replying affidavit. It was contended that the defendant failed to respond to the factual statements brought up specifically on the allegation that the offer letter dated 12/4/1999 was not signed by the plaintiffs and that the signatures therein were forged as established by the criminal investigations department. That that no funds were released to the 1st plaintiff pursuant to the charging of the properties to the defendant.
10. That there cannot be a crystallization of a statutory right of sale which is founded on forged documents and that the substantive appeal has been filed and registered and only awaits directions from the Court of Appeal on the hearing of the same.
11. The Court has considered the entire record and the submissions of Counsel. The first issue for determination is whether this court has the jurisdiction to hear this matter.
12. The application was brought under order 40, rule 1 of the Civil Procedure Rules. It sought an order for injunction pending appeal to the court of appeal. The provisions of the law under which the Motion was brought provides: -

“Where in any suit it is proved by affidavit or otherwise—

- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit; the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”



13. It is clear from the foregoing that this Court’s jurisdiction extends as far as issuing an interim injunction in order to preserve property pending the determination of a suit or further orders.
14. In this case, a final judgment was made on 23/9/2019 whereby the plaintiffs’ suit was dismissed. Dissatisfied with the decision, the plaintiffs lodged an appeal in the Court of Appeal raising various grounds of appeal in their memorandum of appeal dated 8/9/2021.
15. In this regard, this Court completed its duty with regard to this matter upon delivery of the judgment. For all intents and purposes, the Court is functus officio and ought to down its tools. Obviously, Order 40 cannot be invoked at this stage before this Court. The plaintiffs should have approached the Court of Appeal for appropriate orders and not this Court.
16. In *Teresa Chebichii Ruto v Talalei Kiptenai* [2017] eKLR, it was held: -

“ Appeals Are Not Suits Envisaged by The *Civil Procedure Act* and Rules but are based on Order 42 of the Civil Procedure Rules and the Court of Appeal Rules and therefore an injunction does not lie under Order 40 Of the Civil Procedure Rules where the court has already made judgment and the matter is on appeal. The proper court to file this application is the court of appeal. This court can only grant a temporary injunction under Order 42 rule 6 of the civil procedure rules in respect of an appeal from the subordinate court but not an appeal from this court to the Court of Appeal. An injunction in an appeal from this court to Court of Appeal lies in the Court of Appeal whilst an application for injunction from the Lower Court to this court lies in this court. In other words, this court is functus officio.”
17. The Court fully concurs with the above finding and reiterates the same here. In this regard, the Court need not delve into the arguments advanced in this matter.
18. Accordingly, I find the application to be without merit and I dismiss the same with costs.

**DATED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**A. MABEYA, FCIArb**

**JUDGE**

