Sweetland Company Ltd & another v Transnational Bank Ltd & another; Kolato Auctioneers & another (Interested Party) (Civil Case 25 & 55 of 2018) [2022] KEHC 3168 (KLR) (27 June 2022) (Ruling)

Neutral citation: [2022] KEHC 3168 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL CASE 25 & 55 OF 2018

EKO OGOLA, J

JUNE 27, 2022

BETWEEN

SWEETLAND COMPANY LTD ..... 1ST APPLICANT

HILLARY KIPKOSGEI KIBOINET ..... 2ND APPLICANT

AND

TRANSNATIONAL BANK LTD ..... 1ST RESPONDENT

PURPLE ROYAL AUCTIONEERS ..... 2ND RESPONDENT

AND

KOLATO AUCTIONEERS ..... INTERESTED PARTY

MARGARET JEPKOECH KAMAR ..... INTERESTED PARTY

RULING

1. I have before me for determination two applications both filed by the Plaintiffs/Applicants. In the 1st Notice of Motion application dated October 8, 2021, the Applicants seek for an order of temporary injunction to restrain the 1St Defendant Transnational Bank And 2Nd Defendant, Purple Royal Auctioneers and their agents and/ or servants from trespassing upon and/ or subdividing and or transferring and or alienating and or selling and/ or in any way dealing with the land parcels registrations Nos. L.R Eldoret Municipality/block 9/1965 And Kiplombe/kiplombe Block 10 (GROWEL) 837.

2. In the second Notice of Motion application dated 23rd November, 2021 the Applicants are seeking an order of stay of execution in respect of the ruling of the Court dated 10th August, 2021 and delivered on September 6, 2021.

3. I will first address the first application.

The First Application

In the application dated October 8, 2021 the Applicants seek the following orders;

1) Spent

2) That pending hearing inter-partes of this application and thereafter the intended appeal and the determination thereof there be an order of temporary injunction to restrain the 1st Defendant Transnational Bank and 2nd Defendant, Purple Royal Auctioneers and their agents and/ or servants from trespassing upon and/ or subdividing and or transferring and or alienating and or selling and/ or in any way dealing with the land parcels registrations Nos. L.R Eldoret Municipality/block 9/1965 And Kiplombe/kiplombe Block 10 (GROWEL) 837.

3) That the Respondents be condemned to pay costs of this application.

5. The application is premised on grounds on the face of it and is further supported by the affidavit of Hillary Kipkosgei Kiboinet sworn on 8th October, 2021. The 2nd Applicant's case is that land parcel Nos. L.R Eldoret Municipality/block 9/1965 And Kiplombe/kiplombe Block 10 (GROWEL) 837 are registered in his name and form the subject matter of the loan in question. That on 6th September, 2021 the Court vide the Ruling of the Court delivered on the said dated dismissed his application dated 16th September, 2020 which had sought to review the Ruling of the court dated 22nd May, 2020 which ruling discharged and or vacated and or did set aside the injunction orders herein that were given on June 15, 2017 by the Environment and Land Court which orders had restrained the 1st and 2nd Defendants from advertising for sale, offering for sale, alienating or in any manner disposing off land parcel Nos. L.R Eldoret Municipality/block 9/1965 and Kiplombe/kiplombe Block 10 (GROWEL) 837 and consequently exposed the said properties for sale.

6. The 1st Applicant deposed that the 1st and 2nd Defendants/Respondents have since issued Statutory Notice of sale of the suit properties. That the said notice is dated September 22, 2021 and the sale is due on October 26, 2021.

7. The 1st Applicant further deposed that on the delivery of the ruling dated September 6, 2021 the court granted stay of execution of (30) days which stay expired on 6th October, 2021. That being aggrieved by the said the ruling, the 1st Applicant has since preferred an appeal to the Court of Appeal vide Notice of Appeal dated September 17, 2021.

8. The 1st Applicant prayed that in the intertest of justice the Court do restrain the Defendants by way of injunction from further dealings with the suit land pending the hearing and determination of this suit. The 1st Applicant maintains that unless the Respondents are restrained from selling the suit properties by way of an injunction, his intended appeal shall be rendered nugatory.

9. According to the 1st Applicant the Respondents are currently demanding a colossal sum of Kshs. 100,409,513.85 (Kenya Shillings One hundred Million Four Hundred and Nine Thousand Five Hundred and Thirteen and Eighty-Five Cents) from the Applicants which amount the 1st Respondent contends is grossly inflated, totally outrageous, obnoxious and which amount is as a result of illegal and unlawfully accrued interests. The 1st Applicant maintains that given the economic situation in the country he cannot afford to settle the said amount, and prayed that in the interest of justice the Applicants be given an opportunity to be heard by the Court of Appeal.

10. The application was opposed by the Defendants/Respondents who vide the Replying Affidavit of Paul Ndegwa sworn on October 18, 2021 deposed that he is the manager of the 1st Defendant/Respondent. The 1st Defendant's case is that the Applicants' application is fatally and incurably defective, bad in law, an abuse of Court process, misconceived and as such ought to be dismissed with costs to the Defendants.

11. The 1st Respondent denies the allegations in paragraph 7 of the 1st Applicant's supporting affidavit.

12. The 1st Respondent contends that the orders sought cannot be granted as this Court is now functus officio in light of its orders issued on 15th June, 2017 and set aside/discharged by Court May 22, 2020 which were further denied on September 16, 2020.

13. The 1st Respondent contends that this instant application does not raise new issues which have not been adjudicated upon. That the Applicants are inviting the Hon. Court to re-engage in this dispute on matters already heard and determined on merit. Further, that this Court lacks jurisdiction to entertain the application and issue injunctive orders against the Respondents pending the intended appeal. The 1st Respondent maintains that only the Court of Appeal has jurisdiction under Rule 5 of the *Court of Appeal Rules* to issue injunctive orders pending the hearing and determination of the appeal.

14. The 1st Respondent contends that the Applicants have refused and or declined to service the loan by payment of the monthly instalments rendering the loan account to be in arrears of Kshs. 100,409,513.85/= as at 20th August, 2020 being the principal amount and interest. That despite demand being made to the Plaintiff the said amount is yet to be repaid.

15. The 1st Respondent further deposed that it has since served Applicants with requisite Statutory Notices in accordance with the law.

16. The 1st Respondent is apprehensive that the loan will outstrip the value of the suit properties herein. Further the 1st Respondent contends that it has been four years since the suit was instituted by the Plaintiffs and not a single cent of the loan has been repaid or received by it. The 1st Respondent contends that the loan amount is still outstanding and the property has not been redeemed. And that the 1st Respondent right to exercises its statutory power of sale has accrued.

17. Further, the 1st Respondent contends that the Applicants having been served with Statutory notices, have had time to exercise their equity of redemption and rectify the default.

18. The 1st Respondent maintains that Applicants' application is unmerited, scandalous, frivolous, vexatious and brought in bad faith; that the balance of convenience tilts in favour of the 1st Respondent.

Determination

19. I have carefully considered the motion, the grounds thereof and the supporting affidavit, the replying affidavit, the rival submissions by the parties and the law. The only issue for determination is whether this application is res-judicata.

20. The doctrine of res-judicata is set out in the *Civil Procedure Act* at Section 7 as follows:

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

21. The *Civil Procedure Act* also provides explanations with respect to the application of the res judicata rule. Explanations 1-3 are in the following terms:

> " Explanation. (1)—The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.
>
> Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.
>
> Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other."

22. In essence therefore, the doctrine implies that for a matter to be res judicata, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a Court of competent jurisdiction. The doctrine of res-judicata is founded on public policy and is aimed at achieving two objectives namely, that there must be finality to litigation and that an individual should not be harassed twice with the same account of litigation.

23. The Court in *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR pronounced itself as follows:

> " The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably."

24. Applying the foregoing to the present case, I note the Respondents main contention is that the Applicants' application raised similar issues which had been considered and determined in the ruling dated September 6, 2021.

25. The test for determining the application of the doctrine of res-judicata in any given case is spelt out under Section 7 of the *Civil Procedure Act*. In *Independent Electoral & Boundaries Commission v MainaKiai & 5 others* [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

> " (a) The suit or issue was directly and substantially in issue in the former suit.
>
> (b) That former suit was between the same parties or parties under whom they or any of them claim.
>
> (c) Those parties were litigating under the same title.
>
> (d) The issue was heard and finally determined in the former suit.
>
> (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

26. From the record it is not in dispute that Eldoret ELC No. 28 of 2016 was instituted before this instant suit and the Plaintiffs filed an application dated October 3, 2016 for temporary injunction against the Defendants which application was heard and determined in favour of the Plaintiff's by Hon. Justice A. Obwayo on June 15, 2017. Thereafter the Respondents herein moved court vide an application dated January 20, 2020 seeking to discharge the temporary injunction orders that had been issued on 1June 5, 2017 and the court did discharge the said interim relief orders and directed the 1st Defendants to exercise it statutory power of sale over the said suit properties. That subsequently, the Applicants herein moved court vide an application dated 16th September, 2020 seeking among other reliefs temporary injunction orders which application was dismissed vide this court ruling delivered on 6th September, 2021. I have perused the Applicants application dated 16th September, 2020 and it is without doubt, that one of the orders being sought by the Applicants was temporarily injunctive order against the Defendants herein. This Court in its ruling delivered on September 6, 2021 rendered itself on the issue of the temporary injunctive orders being sought. The injunctive orders being sought in the instant application are similar to those that the Applicant sought is their application dated September 16, 2020. The Applicants are inviting this court to sit as an appellate court on an issue that it has already heard and determined.

27. Accordingly, I find that this instant application is res-judicata the issues herein having been determined by this Court's ruling delivered on September 6, 2021. Reasons wherefore it is my finding that the application dated 8th October, 2021 is lacking in merit and is consequently dismissed with costs.

The Second Application

28. The Applicants in the application dated 23rd November, 2021 primary seek the following orders;

1. Spent

2. That pending hearing and determination of the Appeal lodged in the Court of Appeal through Eldoret Registry vide Civil Appeal No. E199 Of 2021; Sweetland Company And Another v Transnational Bank And Another, there be stay of execution in respect of the ruling of the Court dated 10th August, 2021 and delivered on 6th September, 2021 which ruling essentially exposed the suit properties being land parcel Nos. L.R Eldoret Municipality/block 9/1965 and Kiplombe/kiplombe Block 10 (GROWEL) 837 for sale by the 1st and 2nd Defendants/Respondents.

3. That the Respondents be condemned to pay costs of this application.

29. The application is premised on the grounds on the face of it and is supported by the affidavit of Hillary Kipkosgei Kiboinet sworn on November 23, 2021 in which the 1st Applicant reiterated the contents and depositions contained in his application dated October 8, 2021. In addition, the 1st Applicant averred that he has since lodged an appeal in the Court of Appeal, Civil Appeal No. E199 of 2021 which raises arguable issues and overwhelming chances and will be rendered nugatory should orders of stay fail to issue.

30. The Application was opposed via a Replying Affidavit sworn by the 1st Respondent's manager, Evans Bett on 10th December 2021, in which he reiterated the contents and averments in the affidavit sworn by Paul Ndegwa sworn on October 18, 2021 which I need not to reproduce here. In addition, the 1st Respondent stated that the ruling dated 10th August, 2021 and delivered on 6th September, 2021 being a negative order is not an order capable of execution. The 1st Respondent averred that the Applicants have been indolent in filing the stay application which was filed over 3 months after the

ruling was delivered. The 1st Respondent further averred that the Applicants have failed to satisfy the (3) conditions provided in Order 42 rule 6 (2) of the C*ivil Procedure Rules.*

31. The 1st Respondent's case is that the Applicants have not demonstrated the substantial loss they are likely to suffer if orders of stay are not issued. The 1st Respondent maintains that it is a sound financial institution that can compensate the Applicants in the event the Appeal succeeds. The 1st Respondent contends that the Applicants have failed to demonstrate that the appeal would be rendered nugatory if the orders sought are not issued, that the Applicants have failed to settle the loan and that the 1st Respondent will continue to suffer substantial loss due to non-payment. Further the 1st Respondent contends that the filing of an appeal does not ipso facto guarantee stay of execution of orders of the court. The 1st Respondent further contends that the Applicants have failed to address the court on the issue of security and granting a stay of execution would outstrip the value of the loan that continues to accrue interest and charges. The 1st Respondent urged the court to dismiss the application dated 23rd November, 2021 terming it as an abuse of Court process.

Determination

32. I have carefully considered the motion, the grounds thereof and the supporting affidavit, the replying affidavit, the rival submissions by the parties and the law.

33. The issue now for determination is whether the Applicant is deserving of the orders sought.

34. The law concerning stay of execution pending Appeal under Order 42 Rule 6 of the *Civil Procedure Rules* stipulates as follows:

> No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) 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 such decree or order as may ultimately be binding on him has been given by the Applicant.

35. There are three conditions for granting of stay order pending appeal under Order 42 Rule (6) (2) of the *Civil Procedure Rule*s to which:

a. The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;

b. The application is brought without undue delay and

c. 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.

36. A cursory perusal of the record herein shows that this Court vide its Ruling dated 10th August, 2021 and delivered on 6th September, 2021 merely dismissed the Applicants' case with costs to the Respondents. The parties were not ordered to do anything or to refrain from doing anything. What was therefore issued by the High Court is in the nature of a negative order incapable of execution and as such there is nothing to stay. See *Western College of Arts and Applied Sciences v EP Oranga & 3 others* [1976] eKLR where the Learned Judges stated thus:

> " what is there to be executed under the judgment, the subject of the intended appeal" The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In Wilson v Church the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered."

37. Similarly, in *Raymond M. Omboga v Austine Pyan Maranga* Kisii HCCA No 15 of 2010, Makhandia, J (as he then was) stated thus:

> " The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise..."

38. Being guided by the foregoing, the prayer for stay of execution cannot therefore be issued. Accordingly, I hereby dismiss the application dated 23rd November, 2021 with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 27TH DAY OF JUNE 2022.

E. K. OGOLA

JUDGE