



**Ecobank Kenya Limited v Harvey Engineering Ltd & 2 others (Civil Suit 26 of 2015)
[2022] KEHC 11954 (KLR) (Commercial and Tax) (12 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 11954 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 26 OF 2015
A MABEYA, J
AUGUST 12, 2022**

BETWEEN

ECOBANK KENYA LIMITED PLAINTIFF

AND

HARVEY ENGINEERING LTD 1ST DEFENDANT

STANLEY NDUATI MWANGI 2ND DEFENDANT

JOSEPH MBURU MUIGAI 3RD DEFENDANT

RULING

1. Before court are 3 applications, 2 being objector proceedings against the Deputy Registrar's ruling of July 26, 2021 and one seeking leave to appeal against the ruling albeit out of time.

The First Application

2. The first is a Motion on Notice dated August 16, 2021. It was brought under order 22 rules 51 and 52 of the Civil Procedure Rules and section 3A and 63(e) of the *Civil Procedure Act*. It sought the stay of the auction scheduled for August 17, 2021 of the suit property being House No 129 erected on LR No Nairobi/Block 106/155. The application was supported by the affidavit sworn by Phyliss Wanjiku Mburu (herein 1st objector) on August 16, 2021.
3. The grounds for the application were that the objector had divorced from the 3rd respondent and the suit property was their matrimonial home, thus she had a legal interest in the suit property. That the sale was subject to a loan facility advanced to the 1st respondent, and the 2nd and 3rd respondents were only guarantors, and that the charge was never registered. It was further contended she never gave her consent for the said property to be used as security for the credit facility.



4. In answer to the application, the plaintiff filed grounds of opposition dated August 19, 2021. It was contended that after the 1st objector divorced the 3rd respondent, no order or decree was issued pursuant to proceedings under the *Matrimonial Property Act* decreeing that the attached property was matrimonial and that the 1st objector was entitled to a share of it.
5. In her supplementary affidavit sworn on 6/09/2021, the 1st objector stated that she has since instituted proceedings under the *Matrimonial Property Act* being HCFOS/E047/2021- *Phyllis Wanjiku Mburu vs Joseph Mburu Muigai* (“1st objector”) seeking to have the suit property decreed as matrimonial property and ascertain her share.
6. In its further affidavit sworn on 8/10/2021, the plaintiff admitted the filing of the said matrimonial cause and being enjoined therein but stated that the 1st objector had not enjoined the 2nd objector despite claiming that it had a charge against the suit property.
7. In a further supplementary affidavit sworn on October 29, 2021, the 1st objector indicated that she had since obtained interim orders in that Cause staying any dealings with the said property.

The Second Application

8. The second application was a Motion on Notice by Sbm Bank (kenya) Limited (herein 2nd objector) dated August 16, 2021. It sought orders staying execution of the decree issued on December 15, 2015 and the auction scheduled for August 17, 2021. It also sought orders restraining the plaintiff from disposing off the suit property and orders directing the plaintiff to release and return the suit property to the 3rd respondent.
9. The application was supported by the affidavit of Martha Kanyinge sworn on August 16, 2021. It was based on grounds that the 2nd objector took over the assets of Chase Bank (Kenya) Limited including the facilities granted by Chase Bank to the 1st respondent and any securities issued in favour of Chase Bank. That Chase Bank advanced a sum of Kshs 14,000,000/= to the 1st respondent and created a charge dated October 18, 2016 against the suit property.
10. That the 2nd objector was a secured creditor and the property could not be sold to its exclusion. In any event, it had not been served with any auctioneers notice, warrant of attachment or proclamation notice.
11. The plaintiff responded to the application vide the replying and a further affidavit sworn by Edith Wanjiku on August 18, 2021 and 8/10/2021, respectively. It contended that the charge dated October 18, 2016 was neither registered nor signed by the Land Registrar. That the charge was by Chase Bank and there was no evidence of any registered deed of assignment or transfer to the objector. That the annexed loan statement indicated the amount of Kshs 63,000,000/= was advanced to the 1st respondent on March 18, 2016. That no letter of offer was availed.
12. It was further contended that prior to the attachment of the suit property, the plaintiff carried out a search annexed as EW1 which confirmed that the property was not encumbered, and that its valuer M/s Tysons Limited also carried out an official search annexed as EW2 which similarly revealed that the property was not encumbered. In any event, the 3rd respondent had participated in all the proceedings leading to the attachment of the suit property and had never alleged that the property was charged to Chase Bank.
13. The 3rd respondent responded to both applications vide his replying affidavit Joseph Mburu Muigai of 9/09/2021. He contended that the unregistered charge created a contractual relationship between him and the 2nd objector. That the 2nd objector held the original title to the suit property thus there was



a charge by deposit of title document which created a legal interest and right of recovery against the title in the event of default. He annexed the letter of offer from chase bank dated February 16, 2016 as JMM 2 and the gazette notification on transfer of assets and assignment as JMM 3.

14. He averred that he had not instructed his previous advocates to consent to the sale of the property as the property was pledged to the 2nd objector. There was no evidence to demonstrate any conspiracy between him and the 2nd objector. That the suit property was matrimonial where he lived with his family.
15. The plaintiff filed its submissions dated August 23, 2021 in opposition to the 2nd objector's application. It submitted that prayer 4 for release and return of the suit property to the 3rd respondent was incapable of being granted as the suit property was immovable. That the 2nd objector ought to have demonstrated that the charge had crystalized and ranked in priority to the plaintiff's decree.
16. The 2nd objector filed submissions dated February 11, 2022 in support of its application. It submitted that by virtue of section 80(1) of the Land Act, a charge had effect as security only and interest over the charged property was conferred on the chargee upon default. That there having been default, the charge had crystalized and an interest conferred on the 2nd objector. That its rights ranked higher than those of the plaintiff. That the searches provided by the plaintiff were not conclusive proof of interest of proprietorship or encumbrances details.

The Third Application

17. The third application was by the 3rd respondent. It was a Motion on Notice dated August 10, 2021. It was brought under rule 3(1) and (2) of the High Court Rules, Section 10 of the Judicature Act, orders 42 rules 6, 51 rules 1 and 3, 50 rule 6 of the Civil Procedure Rules, and section 7 of the Appellate Jurisdiction Act.
18. It sought orders staying the execution of the ruling delivered by the deputy registrar and leave to appeal against the said ruling out of time.
19. It was supported by the affidavit of Wilfred Nyasimi Oroko, the 3rd respondent's Counsel, sworn on August 10, 2021. It was averred that the 3rd respondent had filed an application dated April 28, 2021 which ruling was delivered on July 23, 2021. That the plaintiff then instructed auctioneers to sell the suit property on August 17, 2021. The 3rd respondent was dissatisfied with the ruling which he only became aware of on 7/08/2021 time by which the period of filing the notice of appeal had lapsed, and that the delay was not his fault. That he was willing to furnish security and pursue the intended appeal.
20. The plaintiff raised a preliminary objection dated August 18, 2021 to that application. It was on the ground that the firm of Ndege Ogwaka Advocates had not obtained leave of court to come on record in place of M/s Njuguna Kimani Nduhiu Advocates. That the application was improperly on record, and that by virtue of order 43 Rule 1 of the Civil Procedure Rules, no leave was required to appeal from the ruling delivered by the deputy registrar.
21. The 3rd respondent filed submissions dated November 10, 2021 in support of his application.
22. The court has considered all the parties affidavits and submissions on record. The issues for determination are; whether the objection proceedings have any merit and whether leave to appeal out of time should be granted.



23. Order 22 rule 51(1) of the Civil Procedure Rules provides as follows: -

“Any person claiming to be entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all parties to the decree-holder, of his objection to the attachment of such property.”

24. In Arun C Sharma v Ashana Raikundalia T/A A Raikundalia & Co. Advocates & 4 others [2014] eKLR, it was held: -

“The objector bears the burden of proving that he is entitled to or has legal or equitable interest on the whole or part of the attached property. The key words are; entitled to or to have a legal or equitable interest in the whole or part of the property.”

25. In the present case, the 1st objector premises her objection on grounds that the suit property is matrimonial as she was married to the 3rd respondent. It was not disputed that she has since lodged a Matrimonial Cause in which she has obtained restraining orders against the said property.

26. While it may be true that she had not obtained any decree after her divorce with the 3rd respondent to the effect that the said property was matrimonial and she was entitled to share thereof, that eventuality may become a reality after the filing of the aforesaid Cause.

27. I am satisfied that, a claim under Matrimonial Causes Act is a beneficial interest which graduates into a legal interest in terms of order 22 of the Civil Procedure Rules once the trial of the Cause is concluded in favour of a claimant.

28. In the present case, not only has the 1st objector lodge a Matrimonial Cause in respect of the said property, but she has therein obtained orders to preserve that property. Accordingly, I am satisfied that the 1st objector has proved her claim and her application is allowed.

29. As regards the objection by the 2nd objector, its claim was that it had charged the suit property following a loan of Kshs 63,000,000/= advanced to the 1st respondent. It was the 2nd objector’s case that it took over the assets of Chase Bank including the subject charge thus it had a legal interest in the suit property. That it was holding the original title document to the property.

30. Section 79 of the Land Act provides for informal charges as follows: -

“79(6) An informal charge may be created where –

- (a) a chargee accepts a written and witnessed undertaking from a chargor, the clear intention of which is to charge the chargor’s land or interest in land, with the repayment of money or money’s worth, obtained from the chargee;
- (b) the chargor deposits any of the following-
 - (i) a certificate of title to the land;
 - (ii) a document of lease of land;
 - (iii) any other document which it is agreed evidences ownership of land or a right to interest in land.

...



- (8) An arrangement contemplated in subsection (6) (a) may be referred to as an "informal charge" and a deposit of documents contemplated in subsection (6) (b) shall be known and referred to as a "lien by deposit of documents."

31. Section 2 of the *Land Act* further defines a charge as: -

“Charge” means an interest in land securing the payment of money or money’s worth or the fulfillment of any condition, and includes a subcharge and the instrument creating a charge, including –

- a. an informal charge, which is a written and witnessed undertaking, the clear intention of which is to charge the chargor’s land with the repayment of money or money’s worth obtained from the chargee....”
32. In the present case, the 3rd respondent admitted to the taking of the loan. He admitted that the 2nd objector was holding the original title to the property. That a charge by way of deposit of title document had been created. There was evidence of a Letter of Offer, Deed of Assignment and Transfer of assets and the lending. Clearly the 2nd objector had an interest in the said property.
33. The charge may not have been registered to warn 3rd parties including the plaintiff and the Court of the 2nd objector’s interest. However, that in no way impairs the 2nd objector’s right to that property. The existence of the interest has now been brought forth to the plaintiff and the Court and it cannot therefore be ignored.
34. In *Tassia Coffee Estate Limited and Another v Milele Ventures Limited* (2014) eKLR, the court held that by depositing the title deed with the plaintiffs, the defendant had created an informal charge in favour of the plaintiff over the suit property as security for payment of the balance of the purchase. The plaintiffs became chargees of an informal charge over the suit property and enjoyed a lien by deposit of the documents.
35. Similarly in this case, an informal charge was created once the 3rd respondent deposited the original title with the 2nd objector. The informal charge was by way of instrument and evidenced in writing, and the letter of offer dated February 16, 2016 was also executed by the 3rd respondent.
36. In light of the above, the 2nd objector’s objection is upheld but the order of delivery of the property is rejected.
37. The 3rd respondent filed an application dated August 16, 2021 seeking leave to file an appeal out of time and stay of execution of the deputy registrar’s ruling.
38. A preliminary objection was raised to the appearance by the firm of Ndege Ogwaka Advocates on the ground that there was no leave granted for them to come on record. It is not in dispute that the said firm took over the matter after judgment.
39. On record however, is a consent letter dated 28/8/2020 the firm of Njuguna Kimani Nduhiu Advocates consenting to the firm of Ndege Ogwaka & Co Advocates to take over the conduct of the matter. To my mind, that consent is enough and no further leave was required. The objection was misconceived and is rejected.
40. There were prayers for stay and leave to appeal out of time. On stay, the legal basis for grant of stay pending appeal is order 42 rule 6 of the *Civil Procedure Rules*, 2010. That provision requires an applicant to demonstrate substantial loss and offer security. Although the application was made



timeously, the 3rd respondent did not demonstrate the substantial loss he would suffer nor did he give any security. The prayer for stay is therefore not merited and is declined.

41. As regards leave to appeal out of time, the ruling sought to be appealed against was given by the Deputy Registrar. The applicable provision is order 49 of the Civil Procedure Rules and not the ones cited in the application.
42. That provision requires the appeal to be filed by way of a memorandum of appeal within 7 days of the decision. In *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi*- Civil Application No Nai 255 of 1997 (unreported), the Court of Appeal held: -

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of the time are: first, the length of delay; secondly the reason for delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”
43. From the foregoing, extension of time is discretionary. The court has to consider the length of the delay, the reason for the delay and the prejudice, if any, to be suffered by the opposite party.
44. In the present case, the ruling sought to be appealed against was made on 23/7/2021. The present application was lodged on 10/8/2021. The delay was for 10 days only. That delay was in my view not inordinate.
45. As regards the reasons for the delay, the 3rd respondents advocate swore that he had travelled home to attend to his sick parent and that he failed to inform the 3rd respondent that the ruling had been delivered. To my mind that is good reason. A counsel taking care of an ill-health parent is not uncommon or out of the ordinary.
46. As regards prejudice, none has been shown that will be suffered by the plaintiff if the extension is granted.
47. Accordingly, the 3rd respondent’s application is meritorious and I allow the same.
48. In the end, the court makes the following orders: -
 - a. The 1st objector’s Notice of Motion dated August 16, 2021 is allowed.
 - b. The 2nd objector’s notice of motion dated August 16, 2021 is allowed but the prayer for delivery of the property is declined.
 - c. The 3rd respondent’s application dated August 10, 2021 is partially allowed. Leave to appeal against the decision dated 23/7/2021 is hereby granted. The memorandum of appeal to be filed within 7 days of the date hereof. The prayer for stay is declined.
 - d. As regards costs, in the circumstances of this case where the plaintiff was well within its right to execute a decree made in its favour, I direct that each party do bear own costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF AUGUST, 2022.

A. MABEYA, FCIArb

JUDGE

