



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCA NO. E005 OF 2020

MARGARET JOSEPHINE AKOTH OJOO.....1ST APPELLANT

MOSES CLIPCAP MUKHAYA.....2ND APPELLANT

VERSUS

AFRICAN BANKING CORPORATION LIMITED.....1ST RESPONDENT

PHILMARK SYSTEM SERVICES LIMITED.....2ND RESPONDENT

RULING

1. The appellants/applicants herein, who are the plaintiffs before the Lower Court in Milimani CMMC No. 6 of 2020, moved the said court for orders of injunction to restrain the respondents from exercising their statutory power of sale in respect to the applicants' charged property, to wit, LR. NOS. NAIROBI /BLOCK72/934 and 20604/156 (ORIGINAL NO.20604/2/19).

2. The Lower Court dismissed applicants' said application for injunction thus precipitating the instant appeal before this court and an application for injunction pending appeal.

3. Through a ruling delivered on 8th October 2020, this court granted the applicants' the order of injunction restraining the respondents from exercising their statutory power of sale, but on condition that the appellants deposit "the outstanding loan due in an interest earning account in a financial institution of repute to be held in the joint names of counsel for both parties within 60 days from the date of this ruling".

4. The ruling of 8th October 2020 precipitated the filing of the application dated 3rd December 2020 that is the subject of this ruling. The applicants seek the following orders in the said application: -

1) SPENT

2) SPENT

3) THAT the Honourable Court be pleased to stay its order made on 8.10.2020 requiring the appellants to provide security by way of depositing unquantified outstanding loan due as a condition for the temporary injunction granted or in the alternative to issue an order restraining the 1st respondent either by itself, employees, servants, agents, instructed auctioneers or whosoever acting on its behalf from advertising for sale, selling whether by public auction or private treaty disposing or otherwise howsoever completing the conveyance or transfer of any sale concluded by public auction or private treaty, taking possession or exercising any power of a charge to lease, charge or otherwise howsoever interfere with the applicants ownership and title to all those parcels of land known as LAND REFERENCE NUMBER NAIROBI/BLOCK72/934 in the name of MARGARET JOSEPHINE AKOTH OJOO on the one hand and TITLE NUMBER KJD/OLCHORO ONYORE 16396 and LAND REFERENCE NUMBER 20604/156(ORIGINAL NO.20604/2/19) both in the name of MOSES CLIPCAP MUKHAYA on the other hand pending the hearing and determination of the applicants intended appeal to the Court of appeal against the orders of this court made on 8.10.02020 on deposit of security as a condition for grant of a temporary injunction granted on the said 8.10.2020

4) THAT the honourable court be pleased to award the costs of this application to the applicants.

5. The application is supported by the 1st applicant's affidavit of and is premised on the main grounds that;

1. THAT this Honourable Court delivered a ruling on 8.10.2020 granting an injunction pending appeal to the appellants but on

condition that the appellants provide security by depositing outstanding loan due in a joint interest earning account held by counsel of the parties.

2. THAT the appellants have lodged a notice of appeal to this court intending to challenge, at the Court of Appeal, the aspect of the ruling and/or order(s) of this court delivered on 8.10.2020 conditioning its grant of injunction pending appeal to this court on provision of security by way of depositing unstated outstanding loan due in a joint account by counsel for the parties.

3. THAT both appellants stand to suffer substantial loss by way of losing their properties in an illegal and/or fraudulent process and or scheme by the respondents unless the orders sought herein are granted.

4. THAT this application has been made without unreasonable delay.

5. THAT this Honourable Court's formal order made on 8.10.2020 as to provision of security in the form of deposit of outstanding loan due was in any event unclear as to what that amount actually is.

6. THAT despite the unclear nature of this Honourable Court's formal order of 8.10.2020, as to deposit of security, the appellants are, nevertheless, unable to raise any substantial amount of money towards even an attempted compliance.

7. THAT the appellants' intended appeal to the Court of Appeal shall be raising serious arguable points to wit: -

a. The condemnation of the 2nd appellant by this Honourable Court without a hearing given that his affidavit in support of their joint application dated 18.3.2020 was completely ignored by this Honourable Court as can be gleaned from paragraph 2 of the ruling of this Honourable Court delivered on 8.10.2020

b. The imposition of a blanket condition without distinction on deposit of unspecified outstanding loan due on the appellants who are alleged by the 1st respondent to be chargors by way of guarantee and whose respective obligations, if any, arising from the separate impugned charge instruments are limited to allowing the 1st appellant proceed to sell their respective subject properties which is the only interest the appellants are trying to save in this litigation.

c. The reliance by this Honourable Court on an extraneous material in the name of a "cautionary notice" dated 31.8.2020 as gleaned from paragraph 14 of the ruling of this Honourable Court delivered on 8.10.2020.

d. The failure to appreciate that the rules governing stay pending appeal which was never sought by the appellants in their application dated 18.3.2020 are different from the rules on injunction pending appeal as sought by the appellants in the said application.

e. The elevation of affidavit depositions on behalf of the 1st respondent as proved facts even when seriously contested matters while relegating the affidavit depositions of the 1st appellant as "mere" claims.

8. THAT the issue of security as envisaged at Order 42 Rule 6(2) (b) in this matter is at most limited to costs of litigation which will ultimately have to be assessed at a later stage since even if the appellants will have ultimately failed in this litigation, the 1st respondent's asserted purported power of sale is a contractual and not judicial process.

9. THAT the appellants' properties that the 1st respondent is trying to illegally dispose of are in any event already held by the 1st respondent, albeit illegally as security.

10. THAT should the orders sought in this application not be granted, there is a real likelihood that the 1st respondent would immediately proceed to illegally dispose of the appellants' properties thereby rendering both this appeal and the appellants' intended appeal to the Court of Appeal a mere academic exercise.

11. THAT in addition potential bidders and/or buyers are likely to be roped into the litigation between the appellants on the one hand and the respondents on the other hand.

6. The 1st respondent opposed the application through the replying affidavit of its Legal officer **Ms Faith Nteere** who states that the applicants have not honoured the court order requiring them to deposit the outstanding loan amount in a joint interest earning account and that the 60 days' compliance period issued by the court had lapsed. She faults the applicants for seeking injunctive reliefs having been granted the same in the ruling dated 8th October 2020. She further avers that the applicants have not made any efforts to file or prosecute their appeal and that the instant application as an abuse of the court process.

7. The 1st respondent also opposed the application through a preliminary objection in which they list the following grounds: -

a. **THAT** there is no appeal pending determination at the court of appeal.

b. **THAT** the period provided of 60(Sixty) days after lodging a Notice of Appeal, and within which to institute Appeal under Rule 82 of the Court of Appeal rules lapsed on 9th December,2020.

c. ***THAT*** the Appellant has to date failed to make an application within thirty (30) days being proviso under rule 82 of the Court of Appeal Rules, to the trial court and this court for a copy of the typed proceedings, hence the appeal period which is already lapsed cannot be extended by issuance of a certificate of delay which happens when proceedings are not issued promptly

d. ***THAT*** the orders sought are not capable of being granted by this honorable court and the orders issued on the 13th January, 2021 should be vacated forthwith.

e. ***THAT*** the Present Application is Res Judicata as the issue of stay pending appeal was already heard and determined by this Court in its ruling of 8th October, 2020.

f. ***THAT*** this Court became Functus Officio with regard to the issue of stay pending Appeal once it delivered its ruling of 8th October, 2020

g. ***THAT*** the entire application is a nullity and an abuse of the court process.

8. Parties canvassed the application by way of written submissions.

9. The applicants submitted that under Order 42 Rule 6(1) of the Civil Procedure Rules the only security that could be contemplated for due performance of the decree was security of costs which had to be assessed. For this argument the applicant relied on the decision in ***Jogoo Kimakia Bus Services Ltd v Electrocom International Ltd*** [1985] eKLR where the Court of Appeal held that where the judgment debt had been secured in the property taken in execution, then what would be left as security would be the costs of the appeal.

10. The applicants also submitted that their application meets the threshold for the granting of orders under Order 42 Rule 6(1) of the Civil Procedure Rules and that the Preliminary Objection raised by the respondents is not merited.

11. The respondents, on the other hand, submitted that the application for stay pending appeal had already been determined by this court and that the application is *res judicata* and the court *functus officio*. The respondents further submitted that the only recourse for the applicant would be filing an application of stay at the court of appeal.

12. I have considered the application dated 3rd December 2020, the 1st respondent's response and the parties' respective written submissions. I find that the main issue for determination is whether the plaintiffs have made out a case for the granting an order for stay of execution pending appeal and whether the Preliminary Objection is merited.

13. The principles governing the granting of orders for stay of execution pending appeal are provided for under Order 42 rule 6(2) of the *Civil Procedure Rules* as follows: -

“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 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.”

14. In ***Butt vs. Rent Restriction Tribunal*** [1982] KLR 417 the court gave guidance on how a court should exercise this discretion and held that: -

“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 that 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. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2) (b) of the Civil Procedure Rules, 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.”

15. In the instant case, I note that the applicants filed the application dated 18th March 2020 (hereinafter “the Earlier Application”) seeking orders for injunction to preserve the suit properties. As I have already stated in this ruling, in the impugned ruling dated 8th October 2020,

this court allowed the earlier application but on condition that the applicants deposit the outstanding loan amount in an interest earning account as security.

16. Aggrieved by the impugned ruling the applicants filed the instant application seeking stay of execution pending appeal.

17. The court, in *RWW v EKW* [2019] eKLR, the court discussed the purpose of an order for stay of execution pending appeal and held that:

***“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.”

18. The applicants’ case is premised on the ground that the security envisaged in Order 42 Rule 6(2) (b) is limited to security of costs. In *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 Others* [2015] eKLR it was held: -

“... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”

19. In *Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd* [2019] eKLR, the court observed:

***“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.*”**

***Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.*”**

20. From the foregoing cases, it is clear that the purpose of the relief of stay pending appeal is to preserve the subject matter of the suit while balancing the rights of the appellant, to appeal and the rights of the respondent, to the fruits of the judgment so as to ensure that no one would be worse off when the appeal is ultimately determined.

21. In the present case, the Lower Court is yet to pronounce itself on the merits of the plaintiffs’ case as the main suit is yet to be heard. It was however not disputed that the trial court, in declining to grant the applicants’ prayer for injunction, found that they were truly indebted to the 1st respondent. It was further not disputed that the applicants defaulted in the loan repayments thus precipitating the 1st respondent’s exercise of its statutory power of sale.

22. My finding is that this court is *functus officio* having already pronounced itself on the subject of stay pending appeal and cannot be called upon to yet again deliberate on the same issue.

23. I have considered the grounds advanced by the applicants for seeking the orders for stay and in my humble view, the said grounds ideally fit in the category of grounds for an appeal and not an application for stay pending appeal.

24. Needless to say, the applicants have to date not complied with the conditional injunction orders issued by this court which orders were categorical on the lifespan of 60 days which have already lapsed. In my considered view, inviting this court to once again deliberate on the issue of stay of execution pending an appeal from the impugned ruling is tantamount to asking this court to sit on an appeal from its own decision. My take is that the best forum to present this application is the Court of Appeal by virtue of rule 5(2)(b) of the Court of Appeal Rules.

25. For the reasons that I have stated in this ruling, I find and hold that the application dated 3rd December 2020 lacks merit and I therefore dismiss it with costs to the 1st respondent.

Dated, signed and delivered via Microsoft Teams at Nairobi this 29th day of April 2021 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Ms Eboso for Mugisha for 1st Respondent.

Mr. Malanga for 2nd Respondent.

Mr. Malanga for Chimei for 1st and 2nd Appellants

Court Assistant: Sylvia.