



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 142 OF 2020

CHARLES WANJOGU NGATARA.....APPELLANT/APPLICANT

VS.

MY CREDIT LIMITED.....RESPONDENT

RULING

1. This is an appeal from a Ruling of the Resident Magistrate Court at Thika in Civil Case No. 69 of 2020. In that case the Thika Court dismissed the appellant's application for injunction by its ruling of 28th October, 2020. The appellant sought in that application to restrain the respondent from realising its security being Thika Municipality Block 24/1430 (the suit property).
2. The appellant on filing this appeal sought by its application, notice of motion dated 4th November, 2020 an order to preserve the status of the suit property.
3. That application was brought before this Court, *ex parte*, on 11th November, 2020. The order made by this Court on that day was that there was no urgency in the application to merit it being heard *ex parte*. The appellant was ordered to fix the application for hearing at the registry.
4. The date fixed for hearing the application *inter partes* was 14th December, 2020. On that date amongst other orders made was for the preservation of the suit property on condition that the appellant did pay Kshs.500,000/= to the respondent within 30 days. That order was informed by the Thika Court's finding that the appellant did not dispute that he had been advanced a loan of Kshs.500,000/= by the respondent and there was no evidence the appellant had repaid amount more than half of the principal sum.
5. When this matter came up before court on 15th March, 2021 the respondent informed the court that the appellant had not paid the amount ordered as condition of preserving the suit property. In response the appellant stated it had encountered hard economic times.
6. The appellant has now placed before court Notice of Motion application dated 19th April, 2021. That application was heard *inter partes* on 22nd April, 2021. The appellant by that application seeks an injunction to stop the respondent auctioning the suit property slated for today 23rd April, 2021.
7. By that application the appellant stated that he paid the respondent Kshs.300,000/= on 13th March, 2021 and a further Kshs.150,000/= on 16th April, 2021. He stated that he was unable to meet the condition of stay of 14th December, 2020 because of hard economic times.
8. The application was opposed on the ground that the appellant failed to comply with the condition of preservation of the suit property but had only paid Kshs.450,000/=, thus far and of that Kshs.450,000/= that he paid Kshs.150,000/= was paid three days before presenting to court the present application. The respondent faulted the appellant for failing to obtain review of the conditional stay order.
9. The appellant termed the failure to get a review of the conditional stay on the fact that such failure was a technicality which the court should overlook as provided under **Article 159** of the Constitution.

ANALYSIS

10. **Article 159(2)** of the Constitution provides:-

“in exercising judicial authority, the courts and tribunals shall be guided by the following principles:-

(a) ...

(b) ...

(c) ...

(d) *Justice shall be administered without undue regard to procedural technicalities.*”

11. The above Article is the one the appellant relied upon in stating that the court should overlook his failure to seek the Court’s review of the conditional order.

12. I wish to dissuade the appellant in his belief that failure to seek review of the conditional order is a procedural technicality. In the case of **RAILA ODINGA & 5 OTHERS VS. IEBC & OTHERS Supreme court petition No. 3 of 2013** the Supreme Court, while discussing **Article 159** stated:-

“It was never meant to oust the obligation of litigants to comply with procedure imperatives as they seek justice from courts of law...”

13. That fact was restated by the Supreme Court in the case of **MOSES MWICIGI & 14 OTHERS VS. IEBC 7 5 OTHERS (2016) eKLR** where on procedures stated as follows:-

“This court has on a number of occasions remarked upon the importance of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with substance of the case that it benefits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the court would not hesitate to declare the attendant pleadings incompetent.”

14. The Court of Appeal was of similar view in the case **KAKUTA MAINA HAMISI VS. PERIS PESI TOBIKO & 2 OTHERS (2013) eKLR:-**

“...the right of appeal goes to jurisdiction and is so fundamental that we are unprepared to hold that absence of statutory donation or conferment is a mere procedural technicality to be ignored by parties or a court by pitching tent at Article 159 (2) (d) of the Constitution. We do not consider Article 159 (2) (d) of the Constitution to be a panacea, nay, a general white-wash that cures and mends all ills, misdeeds and default of litigation”.

15. The appellant was obliged, absent a review of the court order to obey the court order on conditional preservation of the suit property. See the case **SHIMMERS PLAZA LIMITED VS. NATIONAL BANK OF KENYA LIMITED (2015) eKLR** thus:-

“We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not.”

DISPOSITION

16. There shall be a stay of sale by auction on 23rd April, 2021 of Thika Municipality Block 24/1430 on condition:-

(1) (a) The appellant will immediately pay the respondent Kshs.50,000; and

(b) The appellant will pay before today’s auction the Charlton Auctioneers’ cost for the auction of 23rd April, 2021.

(2) The cost of notice of motion dated 19th April, 2021 shall in any event be paid to the respondent.

RULING DATED, SIGNED AND DELIVERED AT KIAMBU THIS 23RD DAY OF APRIL, 2021.

MARY KASANGO

JUDGE

Coram:

C/A

Appellant:N/A

For the appellantMr. Muthomi

For the respondent.....Ms. Mwangi H/B for Mr. Chege

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE