



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 019 OF 2020

SHAKIRA YUSUF SAROVA.....APPLICANT

VERSUS

NATIONAL BANK OF KENYA.....1ST RESPONDENT

MUSTAFA ADAN.....2ND RESPONDENT

KEYSIAN AUCTIONEERS.....INTERESTED PARTY

RULING

1. This ruling is in respect to the Notice of Motion dated 15th June 2020 wherein the applicant seeks the following orders: -

1. Spent

2. Spent

3. That this Honourable court be pleased to order stay of execution of the decree herein pending the hearing and determination of the intended appeal against the judgment of the Chief Magistrate's Court Milimani Nairobi, CMCC No. 5304 of 2018, dated 5th May 2020 delivered by Honourable G. Mmaso, SPM.

4. That costs of this application be provided for.

5. For any other or further relief that the honourable court may deem just and expedient to grant in the circumstances.

2. The application is supported by the applicants affidavit and is premised on the grounds that the applicant has preferred an appeal against the impugned judgment of 5th May 2020 which appeal is arguable and raises triable issues of law and fact.

3. It is the applicant's case that the appeal may be rendered nugatory unless the orders sought in the application are granted.

4. The 1st respondent opposed the application through the replying affidavit of its Manager Remedial and Recoveries **Mr. Vincent Yator** who avers that the orders sought in the application have been overtaken by events for the reason that the statutory power of sale was successfully and legally conducted following the auction of 22nd May 2018 wherein the suit property was sold to the 2nd defendant. He further states that as at the time of filing this application, the only matter pending was the execution of the transfer documentation so as to allow the 2nd defendant, an innocent purchaser for value, to take possession of the suit property.

5. He states that the subordinate court recognized the sale in the judgment of 5th May 2020. He further states that the 1st defendant executed the transfer documents and released the same to the 2nd defendant.

6. The 2nd respondent also opposed the application through his replying affidavit sworn on 29th July 2020 wherein he states that the applicant has not complied with the known procedure of instituting appeal before the High Court and is therefore not entitled to the orders sought in the application. He further states that as a bona fide purchaser of the suit property, the applicant has not legal justification for seeking orders

of stay of execution.

7. Parties canvassed the application by way of written submissions which I have considered. The main issue for determination is whether the applicant's intended appeal is competent and whether the applicant has made out a case for the granting of orders of stay pending appeal.

8. The 1st respondent observed that considering that the applicant had filed a Notice of Appeal instead of a Memorandum of Appeal against the impugned judgment, there is no valid appeal on which stay of execution orders can be issued. Reference was made to the decision on *Mariam Warfa & 2 Others v Maalim Ibrahim Mohamed* [2011] eKLR wherein the court held: -

“The applicant’s prayer for stay of execution pending appeal is defeated by the provisions of Order 42 of the Civil Procedure Rules because there is no Appeal in existence at present. A stay of execution can only be granted in an Appeal from the subordinate court to the High Court where such an Appeal has been instituted. In this case, no Appeal has been instituted. It is for that reason that the prayers for stay of execution cannot be granted.”

9. Order 42 Rule 6(6) of the Civil Procedure Rules (CPR) stipulates as follows: -

“Notwithstanding anything contained in Subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

10. Section 79G of the Civil Procedure Act provides that: -

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

11. In the instant case, the applicant did not deny that he has not challenged the trial court's decision not by filing a Memorandum of Appeal clearly therefore, there is no appeal pending before this court on which an order for stay of execution pending appeal can be issued.

12. My above findings on the issue of the non-existence of an appeal would have been sufficient to determine this application but I am still minded to consider the pertinent question of whether the orders of stay of execution is available to the applicant in light of the uncontested claim that the suit property has already been sold by the 1st defendant on 22nd May 2018 in exercising its statutory power of sale. I have perused annexure “NBK-1” to the 1st respondent's replying affidavit being the transfer documents executed by the 1st defendant in favour of the 2nd defendant.

13. From the foregoing annexure, it is clear that the 1st defendant has concluded the statutory power of sale process.

14. Section 99 (4) of the Land Act provides for the remedy available to a party in the event of an improper exercise of power of sale the said section stipulates as follows: -

“A person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising the power.”

15. A simple reading of the above provision reveals that the only remedy available to a party who is aggrieved by the exercise of statutory power of sale is compensation by way of damages. This is the position that was stated in *Simon Njoroge Mburu v Consolidated Bank of Kenya Ltd* [2014] eKLR where the court held that: -

“What is clear is that once a property has been knocked down and sold in a public auction by a charge in exercise of its statutory power of sale, the equity of redemption of the charger is extinguished. The only remedy for the charger who is dissatisfied with the conduct of the sale is to file suit for general or special damages.....”

16. I find that the 2nd defendant is a bona fide purchaser of the suit property whose interests are protected under the Land Act.

17. For the reasons that I have stated in this ruling, I find that the application dated 15th June 2020 is not merited and I therefore dismiss it with costs to the 1st and 2nd respondents.

Dated, signed and delivered via Microsoft Teams at Nairobi this 27th day of May 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:

Mr. Okello for the applicant

Court Assistant: Sylvia