



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CORAM: D. S. MAJANJA J.
CIVIL CASE NO. 245 OF 2010

BETWEEN

MOSES NJOROGE KABURI.....1ST PLAINTIFF

GEORGE MURIMI KABURI.....2ND PLAINTIFF

JAMES NDUNGU KABURI.....3RD PLAINTIFF

AND

LUCY WANGUI NJUGUNA.....1ST DEFENDANT

BARLCAYS BANK OF KENYA LIMITED.....2ND DEFENDANT

JOSEPH M. GIKONYO T/A GARAM INVESTMENTS.....3RD DEFENDANT

RULING

1. The application for consideration by the court is the Plaintiffs' Notice of Motion dated 1st December 2020 made, inter alia, under **Order 40 Rule 6** of the *Civil Procedure Rules 2010* seeking the following orders:

i. **Spent*

ii. **Spent*

iii. *THAT this Honourable Court be pleased to grant a stay of execution of the ruling delivered by the Honourable Justice F. Tuiyott on the 26th October 2020 together with all the earlier orders — original made on 28th April, 2020 pending hearing and determination of the appeal.*

iv. *THAT this Honourable Court be pleased to issue an inhibition Order to be registered against L.R. No. Naivasha/Mwicingiri/Block1/32 and Naivasha / Mwicingiri/Block1/208 to protect the suit property pending hearing and determination of the appeal.*

v. *THAT costs of this application be provided for.*

2. The application is supported grounded on the supporting affidavit of Moses Kaburi Njoroge, the 1st Plaintiff, sworn on 1st December 2020 and the further affidavit of Hon. Alice Muthoni Wahome, the Plaintiffs' counsel, sworn on 13th April 2021. It is opposed by the 1st Defendant through the Grounds of Opposition dated 25th January 2021 and by the 2nd Defendant ("the Bank") through the replying affidavit of Samuel Njuguna, its Legal Officer, sworn on 26th January 2021. There was no response from the 3rd Defendant. The parties have filed written submissions in support of their respective positions.

3. For ease of reference and for context, a rendition of the facts and developments in this matter is ideal. This suit was filed by Kaburi Njoroge ("the Deceased") on 20th April 2010. At the time, the Deceased was the registered proprietor of properties; Naivasha/ Mwichingiri /Block1/32 and 208. On or about 1st December 1987, he took out a loan facility with the Bank for KES. 230,000.00 secured by a further charge over property Naivasha/Mwichingiri/ Block1/208. He thereafter took out a further loan and overdraft facility of KES. 1,100,000.00 secured by a charge over Naivasha/ Mwichingiri /Block1/32.

4. Together with the Plaint, the Deceased's also filed an application seeking to stop the Bank from exercising its statutory power of sale over Naivasha/Mwichingiri/Block1/32. By the ruling dated 12th April 2011, the court found that the deceased had defaulted in repayment of the loan facility and that the Bank was entitled to exercise its statutory power of sale. The property was sold to the 1st Defendant on 13th April 2010 at KES. 1,810,000.00 and thus, the court declined to grant the injunctive orders sought by the Deceased due to the admitted indebtedness and the property having been sold.

5. The Deceased thereafter filed an application dated 15th April 2011 seeking stay of execution of the court's ruling pending the hearing and determination of an intended appeal. The court granted a temporary order of stay on 15th April 2011 but the case was not prosecuted following the death of the Deceased on 4th April 2013 and subsequent misplacement of the court file. The Plaintiffs, being legal representatives of the Deceased, applied to substitute the Deceased on 3rd April 2014. The application was allowed on 19th May 2014.

6. The representatives did not take any steps to prosecute the suit for close to five years prompting the Bank to file an application dated 1st February 2019 seeking to dismiss the suit for want of prosecution or in the alternative an order that the suit be marked as abated. By the ruling dated 28th April 2020, the court affirmed that the suit had abated and that any attempt by the Plaintiffs to file an amended plaint more than a year after 19th May 2014 was futile because the time of formalizing the substitution lapsed after 14 days from 19th May 2014 which was on or about 3rd June 2014 under **Order 8 Rule 6** of the **Civil Procedure Rules**.

7. The Plaintiffs then moved the court by an application dated 5th August 2020 seeking, inter alia, orders of stay of execution, setting aside and/or review of the court's earlier ruling dated 28th April 2020. By the ruling dated 26th October 2020, the court dismissed the application and affirmed that the suit had abated. The Plaintiffs are aggrieved by this decision and have evinced their intention to appeal against it. This is what has precipitated the filing of the application under consideration.

8. The question for the court's resolution is whether, in light of the facts and circumstances, the court should grant the application.

9. The Plaintiffs aver that there is an error apparent on the face of the record ruling dated 28th April 2020 which in effect found the suit to have abated. They are apprehensive that unless the orders sought are granted, the Defendants will commence the execution of the ruling and in that event, even if the Plaintiffs' appeal succeeds, the same will not be of assistance to the Plaintiffs as the object and the purpose of the application and proceedings will have been rendered nugatory. The Plaintiffs contend that

this matter has never gone for full trial, that the suit has merit and it is just and fair for court to give the Plaintiffs a chance to have the suit heard and determined as they maintain that the suit has not abated.

10. The 1st Defendant contends that the outcome of the rulings delivered on 28th April 2020 and 26th October 2020 were negative orders pursuant to which the suit was declared to have abated hence the resulting order are incapable of execution and as such not amenable to any order of stay. It contends that the Plaintiffs have failed to demonstrate with clarity and precision the alleged apparent error on the face of the record arising from the ruling of 28th April 2020 which was well reasoned on principles of law and that the Plaintiffs' equity of redemption in respect of the suit property was extinguished upon the sale of the suit property Naivasha/Mwicingiri/Block1/32 and therefore, no sufficient grounds exist to warrant the orders of inhibition on the suit property as sought by the Plaintiffs.

11. The Bank opposes the application and states that the suit is as dead as a dodo because of failure by the Plaintiffs to file an Amended Complaint within fourteen days of being granted leave to substitute the deceased meaning that the suit abated by operation of law on or about the 3rd of June 2014. The Bank submits that the Plaintiffs' intended appeal has no chances of success and that the Plaintiffs have not demonstrated evidence of the alleged substantial loss they would suffer if the orders of stay sought in the application are not granted. It submits that the Plaintiffs have not provided any security whatsoever and yet the same is one of the pre-conditions for grant of stay of execution. The Bank urges the court to dismiss the application on the ground that there has to be finality to litigation and that the Plaintiffs must not be allowed to vex and add to costs to the other parties.

12. The principles that guide the court in an application for stay of execution pending an appeal are now settled and grounded in **Order 42 Rule 6(2)** of the **Civil Procedure Rules**. In order to succeed, the applicant must demonstrate substantial loss may result unless the order of stay is made. It must also demonstrate that the application has been brought without undue delay and lastly, the applicant must give such security as the court may order for the due performance of the decree or order as the case may be. The principles have been reiterated in several cases among them **Kenya Women Microfinance Ltd v Martha Wangari Kamau KJD HC Civil Appeal No. 14 of 2020 [2020] eKLR** which cited the position of Warsame J., (as he then was) in **Samvir Trustee Limited vs. Guardian Bank Limited NRB ML HCCC 795 of 1997 (UR)** where he expressed himself as follows:

Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss....Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation ... At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to

give an order of stay with certain conditions.

13. With the aforementioned principles in mind, I now turn to determine whether the Plaintiffs have made out a case for stay of execution pending their intended appeal. This application was filed in just over a month after the court's ruling on 26th October 2020 thus, I am satisfied that it was timely and without unreasonable delay.

14. However, the Plaintiffs have not demonstrated what loss they would suffer if an order of stay is not granted. The court in its ruling dated 12th April 2011 held that the deceased's indebtedness is admitted as he defaulted in the repayment of the loan and found that the property; Naivasha/ Mwichingiri/ Block1/32 has already been sold by the Bank to the 1st Defendant in exercise of its statutory power of sale. As this court held in ***Margaret Josephine Akoth Ojoo & Another v African Banking Corporation Limited & Another*** ML HC HCCA No. E005 of 2020[2021] eKLR, 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. While Hon. Wahome deponed that property; Naivasha/Mwichingiri/Block1/32 ought to be preserved, the court found that the said property had already been sold to the 1st Defendant, it follows that the Plaintiffs no longer have any proprietary rights or interests over the said property capable of being protected or preserved.

15. The Plaintiffs' further argument that the intended appeal will be rendered nugatory if the order of stay is not granted can also not hold for the reason that the suit stands abated. All the Court of Appeal will do is to either reinstate the suit or affirm the court's decision that the suit has abated but this will not affect that fact that court dismissed the original application for injunction. Differently put, even if the appeal on the issue of abatement of the suit were to succeed, this would not automatically entitle the Plaintiffs to an injunction pending the hearing and determination of the suit as this was already dismissed.

16. The Plaintiffs sought an inhibition to protect the suit properties. Inhibitions are provided for under **PART VII sections 68-70** of the ***Land Registration Act, 2012. Section 68(1)*** states that, *'The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.'* In substance what the Plaintiffs seek is an injunction by any another name pending appeal. In this case, the court has already adjudicated on whether the Plaintiffs are entitled to an injunction pending the hearing and determination of the suit. Granting an inhibition would be granting the injunction relief it rejected through the back door. The result of my findings above is that this prayer of an order of inhibition by the Plaintiffs fails on both technical and substantial grounds.

17. For the reasons I have set out above, the Plaintiffs' application dated 1st December 2020 is dismissed with costs to the Defendants.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JULY 2021.

D. S. MAJANJA

JUDGE

Ms Akedi instructed by Wahome and Akedi Advocates for the Plaintiffs.

Mr Kabaiku instructed by Wainaina Ireri Advocates LLP for the 1st Defendant

Mr Chege instructed by Miller and Company Advocates for the 2nd Defendant