



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 143 OF 2019

JUSTUS GITUMA.....1ST APPELLANT/APPLICANT

SIMON KATHURIMA.....2ND APPELLANT/ APPLICANT

EMMANUEL MURIUNGI.....3RD APPELLANT/ APPLICANT

MERCY KAGENDO.....4TH APPELLANT/ APPLICANT

HENRY MURITHI.....5TH APPELLANT/ APPLICANT

REUBEN GITONGA.....6TH APPELLANT/ APPLICANT

VERSUS

DANIEL KIMATHI.....1ST RESPONDENT

WILSON KIMATHI.....2ND RESPONDENT

TABITHA KANUGU.....3RD RESPONDENT

K-REP BANK.....4TH RESPONDENT

RULING

1. The Appellants and the 1st to 3rd Respondents being members of Lucern Self-help Group obtained a credit facility from the 4th Respondent bank at its Nanyuki Branch. The 1st and 2nd Respondents offered their properties namely Ngusishi Settlement Scheme/884 and Ngusishi Settlement Scheme/1520 respectively as security for the facility. There was an internal arrangement entered into among members of the self-help group that each member would contribute an equal sum towards repayment of the loan. Some of the members however defaulted and the 1st to 3rd Respondents, operating on the premise that the Appellants omitted to honour their respective installments towards repayment of the loan filed a suit namely Meru CMCC No. 306 of 2013.

2. Judgment in the matter was delivered in the lower Court on 28th November 2018 by Hon. Ndungu. The Judgement required the Appellants to pay all amounts that had fallen due to the 4th Respondent Bank. Being dissatisfied with the outcome of the Judgement, the Appellants filed the instant appeal. The Respondents have previously tried to execute by way making an application to have the Court give authority to auctioneers to proceed to auction the Appellant's properties. This application was allowed but for some reason the property was not sold then.

3. The Respondents were fearful that if the Appellants don't pay up the loan, the bank would sell their aforesaid properties which were registered as security for the loan. This prompted them to file an application in this Court seeking an injunction restraining the 4th Respondent Bank from selling their properties but this was refused. The Court rightly pointed out that the real dispute was against the Appellants and the 1st to 3rd Respondents and it could not therefore grant an injunction against an innocent lender, the bank.

4. On the part of the Appellants they also filed an application for stay in the lower Court but this was also refused. They then moved to this Court and filed a similar application for stay of execution. Their intention was to restrain the bank from selling the 1st, 2nd and 3rd Appellants' properties namely L.R No. Ngusishi/Settlement Scheme/1929, L.R No. Ngusishi/Settlement Scheme/698 and L.R No.

Ngusishi/Settlement Scheme/2407. Through this Court's Ruling of 4th March 2021, stay was granted on the condition that the Appellants deposit the sum of Ksh 575,058 owed to the bank as at 28th February 2020 plus interests in a joint interest earning account to be opened in the 4th Respondent bank in the joint names of the Advocates for the parties. This was to be done within 30 days of the Ruling i.e by 4th April 2021. The Court ordered that in default of the deposit, the stay orders would lapse and be of no effect. The Court also ordered that hearing of the appeal be expedited and be heard within 90 days.

5. The Appellants failed to comply with the orders for deposit of the funds. This deposit was to be done within 30 days i.e by 4th April 2021. They approached the Court once more way after the time frame given and by their application dated 8th April 2021, they sought extension of time to comply. Their application was certified urgent and it was served on the other parties. On the date of the hearing, the other parties did not oppose the application for extension of time and by consent recorded on 15th April 2021 the Appellants were granted a further 14 days to comply. The 14 days were to run up to 29th April 2021.

6. On 29th April 2021, the Appellants were still yet to comply and once more, they approached the Court under certificate of urgency through their application dated 28th April 2021 seeking further enlargement of time to comply. They urged that the sole signatory and proprietor of their Advocate's law firm, Hon Justice (Rtd) David Maitai Rimita was since deceased and the firm was still in the transitioning process to get a new signatory to their bank accounts. The Court declined to certify their application dated 28th April 2021 as urgent and ordered for the application to be served on the other parties. Come 30th June 2021, the matter was mentioned. Counsel for the Appellants informed the Court that they were yet to open the joint account and time had run out. Counsel for the Respondents opposed the application while Counsel for the Bank confirmed to Court that the Respondents' properties which had been offered as security had already been sold. The Court gave the Respondents 14 days each to respond.

7. On 6th July 2021, the Appellants once again approached the Court under certificate of urgency seeking orders for stay of public auction of their properties which were under threat of auction and in the alternative, that all the proceeds of the sale be deposited in Court pending the hearing and determination of the appeal. The Court certified their application as urgent and ordered for the same to be served and directions be issued on 7th June 2021, the next day. On 7th July 2021, the Appellant's came to Court but informed the Court that they had not been able to serve the Application on the Bank's Advocates who is said to be based in Nanyuki. The Court gave them time to serve and ordered that parties appear in Court for hearing on 8th July 2021. The Court ordered that the status quo be maintained.

8. Counsel for the Appellants and the 1st to 3rd Respondents appeared before Court on 8th July 2021 but the same was not heard. The Court fixed it for hearing on 15th July 2021. On 15th July 2021, parties made oral arguments as follows: -

9. Mr. Muchiri for the Appellants urged as follows: -

"I have been served with the replying affidavit. As prayer No. 2 is spent, we seek prayer No. 3 that proceeds from the auction be deposited in Court pending hearing and determination of the suit for reason that the parcels of land are valued at more than the decretal amount. Upon conclusion of the appeal, the money owed to the 3rd Respondent may be paid to him and the balance may be paid to the owners of the parcels of land. The money had been deposited with the law firm but because of the death of Rimita J, we were not able to process the payment. We pray for status quo to be maintained on the land and we also pray for inhibition."

10. Mrs. Kiome for the 1st, 2nd and 3rd Respondents urged as follows: -

"It is as if the Applicant is seeking an order for inhibition and order to stay on the land. I have no problem with money being deposited in Court. It is just 170,000/=. It is paid to the auctioneers. The buyer would not give us the final monies as there is an application in Court. The applicants have not complied with the order for stay. There has not been any application for extension. There is no application properly before the Court. We pray that the appeal be canvassed by way of written submissions. There should be no stay. They could bring a cheque of 500,000 and refund to pay interests and seek Court to stay the orders. We should proceed with the appeal and the 1st, 2nd and 3rd Respondents proceed on sale and the Court can give a ruling on prayer number 3. We oppose the stay as the Applicants have not complied."

11. Mr. Muchiri in reply to Mrs. Kiome urged as follows: -

"There was an application of 28th April 2021 seeking enlargement of time to open a joint account. Before the application was heard, the interested party proceeded to auction Mrs. Kiome's client and that is when Mrs. Kiome's client auctioned our client. To fast track the matter, let the proceeds with the auctioneer, Ksh 170,000/= be deposited in Court and any other funds received by the auctioneer and we abandon the application and proceed to the appeal. There is no point of going back and forth in the matter of the auction. We pray that status quo be maintained. Any proceeds to be received be deposited in Court."

Determination

12. The dispute before the Court concerns liability to pay a loan. The real question to be determined in the appeal is that of who between the Appellants and the Respondents is liable to pay the loan. It is a relief that the 4th Respondent Bank has already recovered if not fully at least partially their loan through the sale of the Respondent's properties which had been offered as security. It would not have been fair to drag the 4th Respondent Bank, an innocent lender to these proceedings any further.

13. Once the 4th Respondent's Bank sold the 1st, 2nd and 3rd properties, in some sort of retaliation, the said 1st, 2nd and 3rd Respondents sold the Appellants' properties, in execution of the Judgement of the trial Court which had found the Appellants liable.

14. It is unfortunate that despite having been granted stay orders, on condition that the Appellants deposit the amount of Ksh 575,058 owed to the 4th Respondent Bank as at 28th February 2020 plus interests in a joint interest earning account, they failed to take advantage of this stay orders. They gave some explanations including the fact of the death of the Appellant's Advocate's sole proprietor who supposedly happened to be the sole signatory to the firm's banks account. All in all, this Court finds that they had more than enough time from March when the conditionals stay orders were given to July when their properties were sold.

15. The Respondents claim that the properties were sold but they only have with them Ksh 170,000/= being 10% of the purchase price as the buyers would not complete the payment on account of the dispute in Court. The veracity of these assertions has not been tested.

16. If the Appellants are successful in the appeal, the Respondents would have the burden of repaying the Appellants the value of their properties. Should it turn out that the supposed buyers will have reneged on the sale, then the properties will be declared unencumbered and will be released to the owners, the Appellants.

17. If the Respondents are successful in the appeal, the Appellants will have to refund the Respondents for the sums that the Bank recovered from them. The easiest way to recover these would be by having the sale of the Appellant's properties effected.

18. For the above reasons, bearing in mind that the Appellants appear to have to come terms with the fact that their properties are already the subject of an ongoing sale transaction, and it being that neither the Court nor the Appellant are privy to the agreement for sale between the Respondents and buyers, this Court finds that the balance of convenience tilts towards preserving the status quo until the appeal herein has been determined.

ORDERS

19. Accordingly, this Court allows the Appellant's application dated 6th July 2021 in terms of prayer No. 3 and makes the following orders: -

i. The proceeds already recovered from the sale by public auction by Clear al Auctioneers of the Appellant's properties namely L.R No. Ngusishi/Settlement Scheme/1929, L.R No. Ngusishi/Settlement Scheme/698 and L.R No. Ngusishi/Settlement Scheme/2407 as well the proceeds that may subsequently be recovered from the sale of the properties be deposited in Court pending the hearing and determination of the appeal.

ii. In the interest of an expedited determination of the dispute herein the Court set the hearing of the appeal on 1st September 2021.

iii. Parties to file written submissions on the appeal.

Order accordingly.

DATED AND DELIVERED ON THIS 29TH DAY OF JULY, 2021

EDWARD M. MURIITHI

JUDGE

Appearances

Mitai Rimita & Co. Advocates for the Appellants

Charles Kariuki & Kiome Associates Advocates for the 1st, 2nd and 3rd Respondents

M/S J. M. Mwangi & Co. Advocates for the 4th Respondent

M/S Gikunda Anampiu & Co. Advocates