



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL CASE NO. 14 OF 2019

BENSON KINUTHIA MWAURA

(Suing as the legal representative of the estate of JOHN MWAURA

KINUTHIA (DECEASED)).....1ST APPLICANT

FELISTA NJOKI MWAURA.....2ND APPLICANT

VERSUS

DIAMOND TRUST BANK.....1ST RESPONDENT

STEPHEN KARANJA KANG'ETHE T/A DALALI TRADERS.....2ND RESPONDENT

RULING

1. On 24/05/2019 the **Gacheru J.** dismissed the motion dated 29th June 2017 that had been brought in the suit filed by **Benson Kinuthia Mwaaura** (suing as the legal representative of **John Mwaaura Kinuthia** – deceased) and **Felista Njoki Mwaaura** (hereafter the 1st and 2nd Applicants respectively), against **Diamond Trust Bank Limited** and **Stephen Karanja Kang'ethe t/a Dalali Traders** (hereafter the 1st and 2nd Respondents) respectively.
2. The motion sought an interlocutory injunction to restrain the Respondents from advertising for sale, selling, taking possession of, trespassing, disposing of, transferring, or interfering with the Applicants' occupation and ownership of land parcel **LR No. Githunguri /Kanjai/608** (hereafter the suit property) which had allegedly been charged to the 1st Respondent as security for a sum of Kshs. 12,000,000/= advanced on an overdraft facility in favour of **John Mwaaura Kinuthia** the 1st Applicant's deceased father and which facility was subsequently converted into a loan. Apparently by May 2016, the loan account was in arrears and the 1st Respondent sought to realize the security.
3. Following the decision of **Gacheru J.**, the Applicants filed a Notice of Appeal to the Court of Appeal dated 3rd June 2019, and a motion to this Court, expressed to be brought under Order 22 Rule 22 and Order 40 Rule 1 of the Civil Procedure Rules, the latter which is the subject of this ruling. The live prayer in the motion seeks a temporary injunction to restrain the Respondents from disposing of the suit property pending the determination of the appeal in the Court of Appeal.
4. The motion is supported by the affidavit of the 1st Applicant. To the effect that the Applicants being dissatisfied with the ruling of Gacheru J, have lodged an appeal, that the suit property is of great sentimental and irreplaceable value to the dependents of the deceased herein and that unless preserved through the order sought, the Respondents will dispose of it making it difficult for the Applicant to recover the property in the event the appeal succeeds, and thereby rendering the appeal nugatory.
5. The motion was opposed by the 1st Respondent through an affidavit sworn by **Francis Kariuki**, described as the Debt Recovery Officer of the 1st Respondent. The deponent points out several lapses on the part of the Applicants' appeal, including that the notice of appeal was filed outside the 21 days stipulated by the provisions of Rules 75(2) of the Court of Appeal Rules and served 55 days later contrary to Rule 77(1) of the Court of Appeal Rules, albeit that the Applicants had filed an application for the out of time admission of the appeal which was yet to be heard. The deponent therefore takes the position that there being no appeal in existence, this court cannot exercise its jurisdiction under Order 42 Rule 6 of the Civil Procedure Rules.

6. Further, the deponent swears that the 1st Respondent is a respected tier1 bank with over one hundred branches in East Africa and owns assets worth billions of shillings and is therefore capable of making good any award of damages that the court may make in the suit, hence the Applicants will not suffer substantial loss. Moreover, it is pointed out that the Applicants has not offered security and that the application is incompetent therefor.

7. The 1st Respondent had earlier filed a counterclaim naming the Applicants herein as the 1st and 2nd Defendants, as well as **Magann Pharmaceuticals Limited, Boniface Kabata Muraya, Ann Wambui Kiarie, Magdaline Wanjiku Mbugua and Erick King'ori Macharia** (as the 3rd to 7th Defendants, respectively). These latter parties though served did not participate in the instant motion which was canvassed by way of written submissions.

8. In their submissions in support of the motion, the Applicants reiterated the history of the matter and their affidavit material. It was submitted that the Applicants stand to suffer substantial loss in the event the suit property is sold. It was asserted that the record of appeal had been lodged in the Court of Appeal, and that save for a “*few preliminary applications*” that were pending, the appeal was ready for hearing. Citing Order 42 Rule 6 of the Civil Procedure Rules, the Applicants restated the requisite considerations and relied on the case of **Siverstein v Chesoni [2002] eKLR**, as cited in **Superior Homes (K) Ltd v. Musango Kithome [2018] eKLR** to emphasize the issue of substantial loss. It was submitted that no security can be furnished as no judgment has been given in this Court.

9. On their part, the Respondents through the 1st Respondent also restated pertinent facts and pointed out that the Applicants’ motion is premised on Order 22 Rule 22 and Order 40 Rules 1 and 3 of the Civil Procedure Rules but based its submissions on the presumption that the motion is one for stay of execution and/or injunction pending appeal, brought under Order 42 Rule 6(2) of the said Rules. The Respondents framed three issues for submission, namely whether there exists an appeal to warrant the granting of the orders sought, whether substantial loss has been established and whether a pledge has been given for security.

10. Concerning the first issue, the 1st Respondent restated earlier objections to the Notice of Appeal and referring to the application made by the Applicants to the Court of Appeal to address the cited lapses, attached to the submissions the decision of the Court dismissing the application. They submitted therefore that there was no appeal pending canvassing before the Court of Appeal. On the second issue it was submitted that the Applicants have not demonstrated likelihood of suffering substantial loss and referred to the case of **Mukoma Abuoga [1988] KLR 645** as cited in **Tabro Transporters Ltd v. Absalom Dora Lumbasi [2012] eKLR**. It was asserted that on the contrary, it is the 1st Respondent which stands to be prejudiced as the loan arrears continue to escalate and may well outstrip the value of the charged property. Finally, it was submitted that the application herein was not filed expeditiously and that the Applicants have not pledged security and the motion should fail.

11. The court has considered the rival affidavit material and submissions by the respective parties. The motion, in my considered view, turns on the question whether this court can entertain the application in the absence of an existing appeal. Nevertheless, a preliminary issue to be determined is the precise provision of the law under which the motion is brought. The live prayer in the motion is in the following terms: -

“That this court be pleased to issue an order of temporary injunction restraining the Respondents from disposing off the suit land number Githunguri/Kanjai/608 pending the final determination of the appeal filed herein.” (sic)

12. *Ex facie*, the provisions of Orders 22 Rule 22 of the Civil Procedure Rules which relate to execution of decrees, as invoked on the face of motion have no relevance thereto. Order 40 Rule 1 of the Civil Procedure Rules also similarly invoked may have some relevance in an application brought under Order 42 Rule 6(1) as read with Rule 6(6) the latter which empowers the court to grant a temporary injunction pending appeal.

13. Depending on whether a party is seeking an order to stay execution or for an injunction pending appeal, the principles applicable could vary. See **Butt V Rent Restriction Tribunal [1986] KLR 417** and **Shell Kenya Ltd v. Kibiru [1986] KLR 410** on the former instance; and **Madhupaper International Limited v. Kerr [1985] KLR 840, (1985) eKLR; Ruben & 9 Others v. Nderito & Another [1989] KLR 460; Patricia Njeri & 3 Others V. National Museums of Kenya [2004] eKLR; and Venture Capital and Credit Ltd. V. Consolidated Bank of Kenya Ltd Civil Application No Nai. 349 of 2003 (UR)** regarding the latter instance.

14. It appears to the court, based on the Applicants’ submissions and undisputed background to the motion, that the Applicants were relying on the provision of Order 42 Rule 6(1) as read with Rule 6(6) of the Civil Procedure Rules. Whatever the case, applications brought under Order 42 Rule 6 of the Civil Procedure Rules must be anchored on an existing appeal. Rule 6(6) provides that:

“Notwithstanding anything contained in sub-Rule (1) of this Rule, the High Court shall have power in 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”.

15. Granted, in considering an application for injunction pending appeal to the Court of Appeal, this Court would not be exercising its appellate jurisdiction as envisaged above, but a concurrent jurisdiction with the higher court, arising from an appeal (or notice of appeal) filed in the said Court.

16. In **Madhupaper International Limited v. Kerr**, the Court of Appeal reversed an order of the High Court declining to grant an injunction pending appeal after it had dismissed an application for injunction before it. The Court of Appeal stated:

“The reasoning of the learned judge was, with respect, incorrect. He was referred to *Erinford Properties Ltd v Cheshire County Council*, [1974] 2 All ER 443 in which Mr Justice Megarry held that where a judge dismissed an application for interlocutory injunction, he has jurisdiction to grant the unsuccessful applicant an injunction pending an appeal against the dismissal. It is unnecessary for him to apply to the Court of Appeal for it. There is no inconsistency in doing so. The purpose

of granting one having just refused to do it is to prevent the decision of the Court of Appeal being nugatory should it reverse the judge below, which sometimes happens.

In *Erinford's* case the unsuccessful applicant moved *ex parte* for the injunction pending the appeal which Megarry, J granted for six days and then heard it *inter partes*. It was submitted that he had no jurisdiction to let it go forth because he was *functus officio quoad* the injunction. He could not sit on appeal from his own refusal to grant one. The applicant must scurry upstairs to the Court of Appeal. Nothing new had occurred so how could it be right to allow what had a minute before been disallowed?

The applicant's reply was that the trial judge had jurisdiction to preserve the subject matter of the dispute until the appeal was concluded. He knew all along the relevant facts and law. It was speedier and more convenient to deal with it at the end of the main motion (or, in Kenya, summons). A judge can under the Rules of Court grant a stay of execution pending an appeal.

Megarry, J granted the intended injunction pending appeal which the applicant sought on the principle that-

“When a party is appealing, exercising his undoubted right of appeal, the court ought to see that the appeal if successful is not nugatory.”

It is preferable for the High Court to deal with such an application, in any event, not so much as to protect this court from a sudden inconvenient dislocation of its lists but more because this court would have the distinct advantage of seeing what the judge made of it. The learned judges of the High Court should take note of this concurrent jurisdiction which the two courts have and exercise theirs.

There are cases, however, where it would be wrong to grant an injunction pending appeal. These would include where the appeal is frivolous or to grant it would inflict greater hardship than it would avoid. And there will be others which we have not experienced yet”.

17. Whether a party is seeking an order to stay execution or for an injunction pending appeal in the Court of Appeal, or indeed the High Court, the existence of an appeal is a condition precedent for the court's exercise of its jurisdiction under Order 42 Rule 6 of the Civil Procedure Rules. See *Rosalindi Wanjiku Macharia v James Kiingati Kimani (suing as the legal representative of the Estate of Martin Muiruri (deceased))* 2017 (eKLR), as cited with approval by the Court of Appeal in *Abubaker Mohamed Al-Amin v Firdaus Siwa Somo* (2018) e KLR.

18. In *Gladwell Wangechi Kibiru v. Lord Melvin John Blackburn & 4 others* [2015] eKLR the same Court, while dealing with an application to stay execution pending appeal under Rule 5(2)(b) of the Court of Appeal Rules stated: -

“The existence of an appeal or intended appeal grants this court jurisdiction to entertain the application. This court in *New Ocean Transport Limited & Another v. Anwar Mohamed Bayusuf Limited* (2014) eKLR held that:

“--- under Rule 5(2)(b), such an application must be anchored on an appeal or intended appeal and nothing else.”

In *Safaricom Limited V. Ocean View Beach Hotel Limited & 20 others* civil application no. 327 of 2009, Omolo JA sitting with Waki and Nyamu JJA explained the application of Rule 5(2)(b) thus:

“At the stage of determining an application under Rule 5(2)(b) there may be no actual appeal. Where there is no actual appeal already lodged there nevertheless must be an intention to appeal which is manifested by lodging a notice of appeal. If no notice of appeal is lodged, one cannot get an order under Rule 5(2)(b) because as I have already pointed out the jurisdiction of the Court of Appeal is limited to hearing appeals from the High Court and if there is no appeal, or no intention to appeal as manifested by lodgment of the notice of appeal, the Court of Appeal would have no business to meddle in the decision of the High Court.”

19. There is now placed before this court a ruling of the Court of Appeal (*Karanja, JA*) concerning the fate of the Applicants' appeal in the Court of Appeal, and upon which the instant motion was anchored. The ruling was delivered on 14th August 2020. The effect of the said ruling was to render stillborn the Applicants' notice of appeal lodged therein, for having been filed out of time. Thus, the appeal in the Court of Appeal, upon which the instant motion was pegged is non-existent. The entire motion turns on this eventuality, and nothing more need be said concerning the merits or otherwise of the motion. This court cannot issue orders *in vacuo*. The motion dated 28/06/2020 is hereby dismissed with costs to the 1st Respondent.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 29TH DAY OF JULY 2021

C. MEOLI

JUDGE

In the Presence of:

For the Applicants: N/A.

For the 1ST & 2ND Respondents : N/A.

Mr Mathenge for the 3rd to 7th Defendants in Counterclaim

Kevin: Court Assistant