



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL DIVISION

CASE NO. E003 OF 2020

SHAH REKHAVANTI PANKAJ.....PLAINTIFF/APPLICANT

VERSUS

BANK OF BARODA.....1ST DEFENDANT/RESPONDENT

SPORTLIGHT INTERCEPTS AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

1. The plaintiff/applicant has brought two applications before this court for hearing and determination. The first one is a Notice of Motion dated 11th January, 2021 brought under the provisions of Section 10 (2)(b) of the High Court (Organization and Administration) Act, 2015, Rule 17 of the High Court (Organization and Administration) (General) Rules, 2016 and the inherent jurisdiction of the Court. The applicant seeks the following orders-

(i) Spent;

(ii) That the Honorable Court be pleased to issue an order for to set aside (sic) the ruling of Honourable Justice P.J. Otieno delivered on the 27th of November, 2020 on E3 of 2020 (sic) and issue an order stopping the 1st and 2nd respondents from completing the sale under auction pending the hearing and determination of the appeal;

(iii) That this Honourable Court be pleased to issue an order for stay of further proceedings in the High Court matter E3 of 2020 (sic) pending the hearing and determination of the appeal against the ruling of Honourable Justice P.J. Otieno delivered on the 27th of November, 2020 on E3 of 2020 (sic);

(iv) That the applicant be at liberty to apply for further orders and/or directions as the Honourable Court may deem fit and just to grant;

(v) That this Honourable Court do grant such further orders as it deems necessary and expedient in the circumstances; and

(vi) That costs of this application be provided for.

2. The application is anchored on the grounds on the face of it and is supported by an affidavit sworn on 11th January, 2021 and a further supporting affidavit sworn on 5th February, 2021 by Shah Rekhavanti Pankaj, the applicant herein. The respondents filed a replying affidavit on 18th January, 2021 sworn by Neela K. Raj, the Branch Manager of the 1st respondent's Nyali Branch.

3. The 2nd application is a Notice of Motion dated 9th February, 2021 brought under the provisions of Order 40 Rules 1, 2, 4 & 8 and Order 51 of the Civil Procedure Rules, 2010, Sections 103(1)(a) & 3, 104(1) & (2) of the Land Act, 2012 and Sections 1A, 1B, 3A & 63(e) of the Civil Procedure Act Cap 21, Laws of Kenya and all other enabling provisions of the law. The applicant seeks the following orders-

(i) Spent;

(ii) That the Court be pleased to order that the 1st and 2nd respondents by themselves or by their agents, servants or otherwise howsoever be restrained from leasing, mortgaging, charging, transferring, assigning, entering upon, trespassing on, taking possession

of and/or otherwise dealing with property L.R. No. MN/1/1185 CR 10161, Mombasa pending the lodging, hearing and determination of the intended appeal from the ruling and order made by the superior Court on 27th of November, 2020, in High Court Civil Suit No. E3 of 2020 (sic). That the 1st and 2nd defendants be restrained from giving vacant possession to the alleged purchaser pending the hearing of the appeal lodged by the applicant in the Court of Appeal;

(iii) That this Court does issue an order to the Chief Land Registrar Mombasa ordering him to strike out the entry of the transfer to the alleged purchaser from the register and restrains the Chief Land Registrar from entering any transfer of the property known as L.R No. MN/1/1185 CR 10161 or in the alternative prohibiting any further dealing with the property pending the hearing of the appeal lodged by the applicant is heard and determined (sic);

(iv) That this Honourable Court be pleased to grant such further orders as it may deem fair and just; and

(vii) That costs of this application be provided for.

4. The application is premised on the grounds on the face of it and is supported by an undated affidavit sworn by Shah Rekhavanti Pankaj, the applicant herein. The respondents filed a replying affidavit sworn by Neela K. Raj, the Branch Manager of the 1st respondent's Nyali Branch.

5. This Court gave directions that both applications would be canvassed by way of written submissions. The applicant's submissions were filed on 22nd April, 2021 by the law firm of Rutere & Kalu Associates. while the respondents' submissions were filed by the law firm of Gathaiya & Associates Advocates on 27th April, 2021.

6. Mr. Rutere, learned Counsel for the applicant submitted that vide a ruling dated 27th November, 2020, Honourable Justice P. J. Otieno dismissed the applicant's application dated 15th September, 2020 and that being dissatisfied by the said ruling, the applicant filed a Notice of Appeal seeking to challenge the said ruling. He also filed the application dated 11th January, 2021 before the High Court seeking to review the said ruling. The applicant's Counsel stated that on receiving the respondents' replying affidavit, the applicant realized that the 1st respondent had transferred the property in issue to the alleged successful bidder, notwithstanding the fact that it was aware that the pending appeal had been served upon them on 24th December, 2021.

7. On whether the Court can issue orders stopping the handing over of vacant possession, Mr. Rutere submitted that the 1st and 2nd respondents and the successful bidder were aware of the filing of the appeal since the Notice of Appeal was served upon them on the 24th December, 2021. He stated that they however proceeded with the transaction without any regard to the fact that the appeal was ongoing. He relied on the case of **Naftali Ruth Kinyua v Patrick Thuita Gachure & another** [2015] eKLR, where the Court of Appeal held that purchase made of a property actually in litigation for a valuable consideration and without any express or implied notice in point of fact, affects the alleged successful bidder in the same manner as if he had notice and would accordingly be bound by the judgment or decree in the suit.

8. Mr. Rutere also relied on the case of **Grace Chemutai Koech v Franices Kiplangat Chebiror & 2 others** [2018] eKLR, where it was held that a Court should take whichever course appears to carry the lower risk of injustice if it turns out to have been wrong. He submitted that this Court should lean towards the preservation of the property to avoid any injustice, in the success of the appeal. The applicant's Counsel submitted that the 1st respondent was yet to give vacant possession to the alleged successful bidder and that the borrower was still in possession of the property. He was of the view that there would be no difficulty occasioned to the alleged successful bidder as claimed by the respondents. He asserted that this Court has the power to maintain the status quo and stop vacant possession from being handed over, pending the hearing and determination of the appeal.

9. In regard to the issue of the prayer for the rectification of the register to transfer the property back to the original owners pending the hearing and determination of the appeal, it was submitted by the applicant's Counsel that Section 80(1) & (2) of the Land Registration Act No. 3 of 2012 empowers this Court to order for rectification of the register in certain cases where the Court is persuaded that there was fraud or mistake. He further submitted that in the present case, there was collusion by the 1st and 2nd respondents and the alleged successful bidder, to ensure that they were the sole participants in the auction which did not adhere to the laws set out, as it was carried out in the wrong place and time.

10. Mr. Rutere contended that Section 80(2) of the Land Registration Act No. 3 of 2012 only limits this Court's powers in an instance where the proprietor is in possession of the property but that is not the case herein as the borrower and his elderly father are living on the property in issue. The applicant's Counsel relied on the provisions of Section 26(1)(b) of the said Act which states that while the title deed issued is an indefeasible title, it is not absolute and it can be challenged in the instance where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

11. He submitted that the applicant had alleged collusion between the bank, the Auctioneer and the alleged successful bidder and in a case where an applicant can prove collusion as claimed in the memorandum of appeal filed by the applicant, the title shall be a fruit of a corrupt scheme hence giving this Court powers to rectify the register pending the hearing and determination of the appeal.

12. Mr. Rutere submitted that if the orders sought are not granted, nothing will stop the alleged successful bidder from selling and/or charging the property which would render the appeal nugatory as the subject matter of the appeal might be sold thus the need to preserve the same. Counsel stated that costs should ordinarily follow the event and urged this Court to grant the orders sought.

13. Mr. Gathaiya, learned Counsel for the respondents submitted that when the applicant's application was dismissed on 27th November, 2020 by Honourable Justice P. J. Otieno, the applicant did not seek and was not granted stay (sic). That on 27th November, 2020, the

successful bidder Dilipkumar Nathoo Meghji duly paid the balance of the purchase price to the 1st defendant in line with the contractual completion date envisaged in the memorandum of sale and on 8th January, 2021, the suit property was transferred to the successful bidder.

14. It was submitted by Mr. Gathaiya that the orders being sought cannot be granted under the law and rules cited. He also submitted that the jurisdiction of this Court had not been properly invoked thus the remedies sought in the application dated 12th January, 2021 could not be granted. Counsel contended that the order the applicant seeks to stay is a negative order. He relied on the case of **Western College Farts and Applied Sciences v Oranga & others** [1976] KLR 63, where the Court held that a negative order is incapable of being stayed for lack of nothing to stay. He submitted that this Court has no mandate to grant an order for stay of execution in the manner prayed for. Mr. Gathaiya further submitted that the applicant was seeking an order for setting aside the ruling delivered on 27th November, 2020, but no grounds had been adduced in support of the said application. He urged this Court to dismiss the application dated 11th January, 2021.

15. In regard to the application seeking orders for an injunction, Mr. Gathaiya submitted that the applicable principles were restated in the case of **Nguruman Limited v Jan Bonde Nielson & 2 others** [2014] eKLR, where it was held that for an application for interlocutory injunction to be granted, the party seeking the said order has to satisfy the following principles; establish his case at a *prima facie* level, demonstrate irreparable injury if a temporary injunction is not granted and show that the balance of convenience is in his favor. Counsel submitted that the applicant had not established sufficient cause to warrant grant of an interlocutory injunction.

16. He stated that the respondents admitted that they entered into an agreement for sale of the subject property with the successful bidder, which had a completion period of 90 days. That the suit property was transferred to the said successful bidder on 8th January, 2021 before the application for stay of execution was filed in Court. Mr. Gathaiya submitted that the applicant was not a party to the said sale agreement and as such, he should not have sought an injunction which is a benefit in the terms of a contract that he is not a party to.

17. The respondents' Counsel contended that the applicant had failed to prove that she has a *prima facie* case. He stated that the applicant had failed to demonstrate that she would suffer any injury that could not be adequately compensated by an award of damages since the properties in question had been offered as security for various loans given by the 1st respondent to the borrowers, who failed to repay the said loans. He further indicated that the 1st respondent had realized its security and the applicant stood to suffer no loss as she had not paid a single cent towards the purchase of the suit premises.

18. It was submitted by Mr. Gathaiya that the applicant had failed to offer any security for the due performance of such decree or order as may ultimately be binding on her thus rendering the application for stay of execution unmeritorious for failure to comply with the provisions of Order 42 Rule 6(2)(b) of the Civil Procedure Rules, 2010. He further submitted that the applicant had not met the conditions for grant of orders for stay of execution. He relied on the case of **Equity Bank Limited v Taiga Adams Company Limited** [2006] eKLR, where Mutungi J held that for the success of an application for stay of execution pending appeal, the applicant must meet all the tenets of Order 41 Rule 4 of the Civil Procedure Rules and failure to satisfy any one of the tenets stipulated in that rule is fatal to an application for stay of execution.

19. The respondents' Counsel submitted that the application dated 9th February, 2021 had been overtaken by events as the transfer of the property in issue was effected on 8th January, 2021 and was evidenced by the transfer, search and stamp duty payment receipts in favour of the successful bidder. He further submitted that the application dated 9th February, 2021 was *res judicata* and tantamount to the applicant seeking a second bite of the cherry since the subject matter, remedies sought and the parties in the said application are similar to those in the application dated 16th September, 2020.

20. He urged that the 1st respondent is a sound financial institution capable of paying damages in the event the appeal succeeds, which capacity had not been challenged by the applicant. He relied on the case of **John Nduati Kariuki T/A Johester Merchants v National Bank of Kenya Ltd** [2006] 1EA 96, where the Court of Appeal was of a similar view.

21. He prayed for this Court to dismiss the applicant's application for stay of execution for failure to establish the conditions that attach to an application of this nature. He similarly prayed for dismissal of the application seeking an order for interlocutory injunction dated 9th February, 2021 for having been overtaken by events.

ANALYSIS AND DETERMINATION.

22. I have considered the two applications filed herein, the affidavits filed in support thereof, the replying affidavits by the respondents and the written submissions by Counsel. The issues which arise for determination are as follows-

(i) Whether this Court should set aside the ruling dated 27th November, 2020;

(ii) Whether this Court can grant an order for an injunction;

(iii) Whether the defendant has satisfied the requisite conditions to warrant grant of an order for stay of execution and proceedings pending appeal.

23. In the affidavit sworn on 11th January, 2021 by the applicant, she deposed that she was misled by the 2nd respondent on the status of the auction by informing her representatives that the auction had been postponed due to a suit that had been filed by the borrower, whose property was up for sale. That her agent was later informed that the sale had been carried out in the evening after receiving confirmation from Court that the borrower had not complied with orders issued by the Court at 3.21 pm. She stated that the winner of the said auction was the only participant at the auction with all other attendees being the valuer, bank representatives, and the Auctioneers, thus leaving no independent person to verify the time when the auction took place and if the same was carried out in line with the advertisement for auction.

24. The applicant averred that subsequently, the 1st and 2nd respondents entered into a sale agreement with the purported winner of the auction, which had a completion period of 90 days, thus the property was under imminent threat of being sold to the purchaser if the orders for stay (of execution) pending appeal were not granted. She further averred that she lodged a Notice of Appeal on 11th December, 2020 against the ruling dismissing her application dated 16th September, 2020 and had sought for typed and certified copies of proceedings of the orders issued on 27th November 2020.

25. The applicant deposed that she has an arguable appeal with high chances of success which was discernible from the draft memorandum of appeal thus if the orders sought were not granted, the appeal would be rendered an exercise in futility as the suit property would be transferred and she would suffer irreparable loss and prejudice. She further deposed that taking into consideration the uniqueness of land and the fact that no one property is ever similar to another and especially the proximity of the said property to Shah Community Temple, the property has a high sentimental value to the Shah Community.

26. In the further supporting affidavit, the applicant deposed that the 1st and 2nd respondents had allegedly finalized the transfer of the said property. She also deposed that this Court has powers to order a rectification of the Lands Register in this case as the transfer was done illegally and unlawfully

27. In the affidavit filed on 10th February, 2021 in support of the application for an injunction, the applicant deposed that in the ruling delivered on 27th November, 2020, the learned Judge failed to take into consideration key legal principles and facts when determining the application dated 16th September, 2020. That she was dissatisfied with the said ruling and proceeded to file a Notice of Appeal and an application for stay of proceedings and to restrain the 1st and 2nd respondents from transferring the property to the alleged purchaser.

28. It was deposed by the applicant that she had no way of confirming independently the veracity of the transfer but had erred on the side of caution and assumed that the same was legitimate. She also deposed that she had filed the present application to have this Court intervene and preserve the property pending the hearing of the appeal.

29. The respondents in their replying affidavit deposed that the 2nd respondent advertised for sale by public auction property No. LR. No. MN/1/1185 CR10161 on 27th August, 2020 vide a newspaper advertisement. That prior to the said advertisement, the 1st respondent had issued all the statutory notices to the borrower who had defaulted in loan payments of Kshs. 52,022,950.00 as at 31st March, 2018, which amount continues to accrue interest.

30. It was stated by the respondents that the 2nd respondent conducted a public auction on 27th August, 2020 at the offices of Kinyua & Company and Mr. Dilipkumar Nathoo Meghji bid of Kshs. 65,400,000/= was accepted at the fall of the hammer and he paid 25% of the purchase price to the 1st respondent. It was averred that the purchaser was required to pay the balance of the purchase price within 90 days as per the memorandum of sale. The respondents averred that upon dismissal of the applicant's application dated 16th September, 2020, and there being no order for stay (of execution) the successful bidder duly paid the balance of the purchase price to the 1st respondent on 27th November, 2020 in line with the contractual completion date envisaged in the memorandum of sale. Consequently, the property was transferred to him on 8th January, 2021.

31. It was further deposed by the respondents that in view of the foregoing, the orders sought by the applicant would not only be in vain but she was seeking the exercise of the Court's mandate in futility.

Whether this Court should set aside the ruling dated 27th November, 2020.

32. In the application dated 11th January, 2021, in prayer No. 2, the applicant seeks an order to set aside the ruling delivered on 27th November, 2020 and an order for stay of execution. In prayer No. 3, he seeks an order for stay of proceedings in the case before this Court pending the hearing and determination of the appeal.

33. At the outset, it is important to point out that the said application dated 11th January, 2021 was brought under the wrong provisions of the law. Nevertheless, this court will consider the application on merit. In order for this Court to set aside the ruling by Judge P.J. Otieno that was delivered on 27th November, 2020, it will be required to sit in its capacity as a review Court. Section 80 of the Civil Procedure Act provides that where a party opts to apply for review, such a party cannot after the review is rejected exercise the option to appeal against the same order he sought review of. Order 45 of the Civil Procedure Rules lays out the procedure and the conditions that an applicant must satisfy in an application for review. The provisions clearly show that a party cannot contemporaneously seek review of an order and file an appeal arising from the same order. Section 80 of the Civil Procedure Act provides as follows-

“Any person who considers himself aggrieved –

*(a) by a decree or order from which an appeal is allowed by this Act, **but from which no appeal has been preferred; or***

*(b) by a decree or order from which no appeal is hereby allowed by this Act, **may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.**” (emphasis added).*

34. In regard to Order 45 Rule 1(a) and (b), it sets out the conditions that an applicant in an application for review has to meet so as to be successful. Once a party has opted for an appeal, then the option for review cannot at the same time be available to the said party. This is buttressed under sub-rule 2 of Order 45 of the Civil Procedure Rules, 2010 which states that-

“A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for review. (emphasis added).

35. In this court’s view a proper reading of Section 80 of the Civil Procedure Act and Order 45 Rules 1 and 2 of the Civil Procedure Rules makes it abundantly clear that a party cannot apply for review and appeal from the same decree or order. In the present case, the applicant first lodged a Notice of Appeal on 11th December, 2020 and thereafter filed an application dated 11th January, 2021, seeking to set aside the same ruling he intended to appeal against at the Court of Appeal. That is tantamount to an abuse of the Court process since the applicant filed different applications and/or pleadings seeking the same reliefs. In view of the fact that the Notice of Appeal preceded the application for review, the application for review must surely fail since litigation cannot be conducted in the manner in which the applicant has set out to do.

Whether this Court can issue an order for an injunction.

36. In regard to the prayer for an injunction, it is evident that the same was overtaken by events as the property in issue was transferred to a 3rd party on 8th January, 2021.

Whether the defendant has satisfied the requisite conditions to warrant grant of an order for stay of proceedings pending appeal.

37. The ruling which forms the subject of the application dated 11th January, 2021 was delivered on 27th November, 2020. It dismissed the applicant’s application dated 16th September, 2020. The applicant did not seek for any orders for stay of execution and proceedings and the Court *suo moto* did not grant any such orders. The applicant being dissatisfied with the said decision, lodged a Notice of Appeal on 11th December, 2020 and served it upon the respondents notifying them of her intention to appeal against the said ruling.

38. Orders for stay of execution and proceedings are granted under the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010 which state as hereunder: -

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside”

39. With regard to the prayer for stay of proceedings, the foregoing provisions are clear that in the absence of an order for stay of proceedings, a pending appeal cannot operate as a stay of this Court from dealing with any applications or the hearing of this case.

40. The applicant submitted that she has an arguable appeal with high chances of success and as such, if the orders for stay of execution are not granted, nothing stops the alleged successful bidder from selling and/or charging the property, which would render the appeal nugatory as the subject matter of the appeal may be sold, thus the need to preserve the same. In the alternative, the applicant urged this Court to prohibit any further dealing with the property pending the hearing and determination of the appeal lodged by her.

41. The respondents on their part argued that the applicant had failed to demonstrate that she has a *prima facie* case and that she would suffer substantial loss. The 1st respondent averred that it is a sound financial institution that could compensate the applicant in the event that she succeeded in her appeal. It also stated that the applicant’s failure to address herself on the issue of security, renders her application fatal.

42. Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 provides that an applicant seeking an order for stay of execution pending appeal must demonstrate the following: -

a. Substantial loss may result to the applicant unless the order was made;

b. The application was made without unreasonable delay; and

c. Such security as the court orders for the due performance of such decree or order as may ultimately binding on him has been given by the applicant.

43. The above 3 prerequisite conditions set out in Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The word **“and”** is used conjunctively and not disjunctively. It connotes that all three (3) conditions must be met simultaneously. The respondents also submitted that the order by Hon. P.J. Otieno was a negative order since it dismissed the applicant’s application dated 16th September, 2020. In the case of **Milcah Jeruto vs Fina Bank Ltd [2013] eKLR**, the Court declined to issue conservatory orders since the order issued therein by Judge Ogola, was a negative order.

44. Under Section 2 of the Civil Procedure Act, the definition of a decree alludes to an order that is capable of being executed. In the present case, there was and there is still no order to be executed. The exercise of statutory power of sale was not an order emanating from the Court. It is a right that crystallizes by operation of the law when borrowers default in repaying loans advanced to them.

45. In the case of **Sonalux Limited & another v Barclays Bank of Kenya Limited & 2 others [2008] eKLR**, the Court of Appeal addressed its mind on whether an order for stay of execution can be granted against a negative order and held as follows-

“As regards the matter before us all we can say is that the ruling of the superior Court (Kasango, J.) in no way ordered any of the parties to do anything or to abstain from doing anything or to pay any sum of money. Consequently, it is incapable of execution. It therefore follows that no order of stay can properly issue relating to that ruling.”

46. In view of the foregoing this Court finds, that it cannot grant such orders for stay of execution and proceedings since the order issued by Judge P.J. Otieno on 27th November, 2020 was a negative order incapable of being executed.

47. This Court’s finding is that the applications dated 11th January, 2021 and 9th February, 2021 are devoid of merit and the same are hereby dismissed with costs to the respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 24TH DAY OF SEPTEMBER, 2021.

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April, 2020 and subsequent directions, the ruling herein has been delivered through Teams Online Platform.

NJOKI MWANGI

JUDGE

IN THE PRESENCE OF-

MR. KALU FOR THE PLAINTIFF/APPLICANT

MR. GATHAIYA FOR THE DEFENDANTS

MR. OLIVER MUSUNDI- COURT ASSISTANT