



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL APPEAL NO E058 OF 2021**

**LETSHEGO KENYA LIMITED.....1<sup>ST</sup> APPELLANT**

**JODEGAH ACTIONEERING SERVICES.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**ROSELINE AUMA OCHIENG..... RESPONDENT**

**(Being an appeal from the Judgment and decree of Hon R.K Ondieki (SPM) delivered at Kisumu in Chief Magistrate's Court Case No 362 of 2019 on 18<sup>th</sup> May 2021)**

**RULING**

1. In their Notice of Motion application dated 28<sup>th</sup> May 2021 and filed on 31<sup>st</sup> May 2021, the Appellants sought an order for stay of execution of the Judgment and/ or orders of Hon. R. K Ondieki, made on the 18<sup>th</sup> May 2021 in Kisumu Civil Suit No 362 of 2019 and the taxation of the bill of costs dated 24<sup>th</sup> May 2021.
2. Their said application was supported by an Affidavit that was sworn on 28<sup>th</sup> May 2021 by Winnierohi Wafula, the 1<sup>st</sup> Appellant's Legal Officer. The Appellants averred that the 1<sup>st</sup> Appellant offered the Respondent a loan facility of Kshs 4,000,000/= which was secured by a legal charge over Kisumu/Kogony/3963 (hereinafter referred to as the "subject premises") registered in the name of Donald Moses Osino.
3. They added that the Respondent defaulted in repaying the loan facility whereupon demand letters, statutory notices and the forty five (45) days' Redemption Notice were served upon her and the Chargor. After they failed to rectify the default, the 1<sup>st</sup> Appellant exercised its statutory power of sale of the subject premises by way of public auction by advertising the said subject premises for sale in the Daily Newspaper on 8<sup>th</sup> July 2019.
4. However, the Respondent filed suit **Kisumu Chief Magistrate Court Case No 362 of 2019** seeking a permanent injunction to restrain the 1<sup>st</sup> Appellant from recovering the debt. They stated that on 18<sup>th</sup> May 2021, the Trial Court delivered a judgment granting the Respondent all the reliefs it had sought in the said suit. Being aggrieved by the said decision, they preferred the Appeal herein.
5. They were categorical that the Respondent had served them with a bill of cost dated 24<sup>th</sup> May 2021 and scheduled for assessment on 21<sup>st</sup> June 2021 and that unless the said taxation proceedings were stayed there was imminent possibility that the said bill would be taxed.
6. They were apprehensive that unless a stay of proceedings and a stay of execution was granted, the intended appeal would be rendered nugatory and they would stand to suffer substantial loss. They were emphatic that they had a good arguable Appeal with high chances of success and stood to suffer as the Respondent already owed the 1<sup>st</sup> Appellant a sum of Kshs 3, 582, 451.87 as at 19<sup>th</sup> August 2019 which sum the Respondent would probably be unable to repay the assessed amount if the Appeal succeeded.
7. In opposition to the said application, the Respondent filed Grounds of Opposition dated 7<sup>th</sup> June 2021. They were filed on even date. She contended that the said application was misconceived, frivolous, constituted an abuse of the process of the court and was unsustainable owing to the express and mandatory provisions of Order 42 Rules 6(1) and (2) of the Civil Procedure Rules.
8. Her contention was that even though she filed her Bill of Costs, the same had not yet been taxed. She added that the Appellants had not disclosed any proof that they were likely to suffer any substantial loss in the event that they settled costs of the suit. She argued that in any event, if the order for stay of execution was not granted, the 1<sup>st</sup> Appellant still held her Title Deed as security returnable to her after settling all liabilities owing from the Respondent to itself in the event that the appeal is successful. She was apprehensive that the Appellants had not availed any security as would be necessary for the due performance of the decree hence the application ought to be dismissed.

9. The Appellants' Written Submissions were dated 24<sup>th</sup> June 2021 and filed on 28<sup>th</sup> June 2021 while those of the Respondent were dated 5<sup>th</sup> July 2021 and filed on even date. The Ruling herein is based on the said Written Submissions which both parties relied upon in their entirety.

## **LEGAL ANALYSIS**

10. The Appellants invoked Order 42 Rule 6(2) of the Civil Procedure Rules and cited the case of **Lagoon Development Limited vs Prime Aluminum Casements Limited [2020] eKLR** in arguing that they had met the conditions set by law for grant of order for stay of execution pending appeal.

11. They were categorical that they were likely to suffer substantial loss because the effect of the judgment resulted to a permanent injunction restraining them from ever auctioning the subject premises and further that if the Bill of Costs dated 25<sup>th</sup> May 2021 sought to recover Kshs 250,489.72 was taxed and the money remitted to the Respondent, there was a high likelihood that she would be unable to refund the money to them should the appeal succeed.

12. They placed reliance on the case of **National Industry Credit Bank Ltd vs Aquinas Francis Wasike & Another [2006] eKLR** where the court held that once an applicant expressed a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden then shifted to the respondent to show what resources he had to repay the monies since that was a matter which was peculiarly within his knowledge.

13. They argued that the Respondent had not filed any document showing that she would be able to refund the Appellants should the Appeal succeed. They were apprehensive that this application was filed promptly and without unreasonable delay.

14. It was their contention that they had an arguable appeal in arguing that the trial court had found that the statutory notices were proved to have been served upon the Respondent and the guarantor by way of registered post and that even if the trial court was unsatisfied with the valuation report, the court should have directed the Appellants to conduct another valuation instead of issuing a permanent injunction.

15. In this regard they relied on the case of **Patrick James Mbogo & Another vs Bank of Africa Kenya Limited [2017] eKLR** where the court stated that where the bank's right to exercise its power had accrued, a valuation which was not more than a year old had to be carried out. They also pointed out that the Chargor, Donald Osino did not take part in the trial court suit or challenge the 1<sup>st</sup> Appellants' right to exercise its statutory power of sale.

16. They further argued that they had been restrained from realising the security used in the acquisition of the loan. It was their submission that the loan balance was still outstanding and therefore there was no need to deposit any security. However, they asserted that they were ready to abide by the court's direction.

17. On her part, the Respondent submitted that the Trial Learned Magistrate did not err when he held that the Appellants had not conducted a forced sale valuation on the subject property as required by Section 97 (2) of the Land Act for the reason that a forced sale valuation had to be undertaken before a chargee could exercise its statutory power of sale.

18. She argued that costs follow events and ought to be awarded to a party whether his or her claim succeeded fully or partially and in this instance she should not be denied enjoying the fruit of prosecuting the lower court trial. She added that the object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case and must not be made merely as a penal measure.

19. In this regard, she placed reliance on Section 27 of the Civil Procedure Act Cap 21 (Laws of Kenya) and Judicial hints on Civil Practice by Justice (Rtd) Kuloba to the effect that costs follow the event which is that the party that succeeds in an action gets the general costs of the action.

20. She argued that the Learned Trial Magistrate rightly found that the process of realisation of the security was flawed and that the Appeal would not reverse that element. She asserted that it was not disputed that the 1<sup>st</sup> Appellant held her Title to the subject premises and that the same returnable was only after she had settled all her obligations with the Appellants. She added that in the event the appeal succeeded, the Appellants were still at liberty to recover from any proceeds of sale of the security the 1<sup>st</sup> Appellant presently held. It was therefore her argument that the Appellants did not stand to suffer any loss if they paid the costs.

21. She was categorical that the decree in the instant case was not a money decree and as such the stay application was only limited to costs. She was emphatic that the Appellants had not demonstrated that the appeal would be rendered nugatory if an order for stay is not granted. To buttress this point, she placed reliance on the case of **Kenya Shell Ltd vs Kabiru [1986] KLR 410** where the Court of Appeal held that if there was no evidence of substantial loss to be suffered by an applicant, it would be unlikely that the appeal would be rendered nugatory by some other event and that without such evidence, a respondent should not be kept out of his money.

22. She invoked that pursuant to the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules, the Appellants' application was premature as there was no risk of execution. She further pointed out that the Appellants had not offered any security. In this regard, she relied on the case of **Gianfranco Manenthi & Another vs Africa Merchant Assurance Company Ltd [2019] eKLR** where the court held that security is a pre-requisite to an application for stay.

23. A reading of the Trial Court's Judgment delivered on 18<sup>th</sup> May 2021 showed that the court awarded the Respondent the following reliefs:-

1. A declaration that the intended sale by public auction or any other way disposing off the interest of the plaintiff in the parcel of land known as Kisumu/Kogony/3663 is untenable in law, unlawful and improper in as much as it is illegal.

2. A permanent injunction restraining the Defendants, by themselves or through agents, servants or Advocates or any of them or otherwise from offering for sale by public auction, or purporting to sell by public auction the piece or parcel of land known as Kisumu/Kogony/3663 Kisumu County or otherwise howsoever dealing with or interfering in any way whatsoever with the Plaintiff's proprietary interest thereof.

3. An order that the 1<sup>st</sup> Defendant be compelled to provide current loan statement for the facility to inform a court mandated independent audit and or mandated to taking accounts and determination of the Plaintiff's true level of indebtedness of the 1<sup>st</sup> Defendant.

4. Costs of the suit.

24. Before an order for stay pending appeal under Order 42, Rule 6(2) of the Civil Procedure Rules, can be granted, an applicant has to demonstrate the following:-

1. That substantial loss may result unless the order is made.

2. That the application has been made without unreasonable delay.

3. Such security as the court orders for the due performance of the decree has been given by the applicant.

25. The three (3) conditions for the grant of an order for stay of execution must be met simultaneously as they are conjunctive and not disjunctive. Having said so, this court noted that the decree herein was not a monetary one. Consequently, despite the Appellants having demonstrated the three (3) pre-requisites of being granted an order for stay of execution, an order for stay of execution could not be granted because the Trial Court issued negative orders that were not enforceable, a conclusion that this very court arrived at in the case of **Milcah Jeruto Tallam t/a Milcah Faith Enterprises vs Fina Bank Ltd & Another [2013] eKLR**.

26. Notably, an order for stay of execution herein could only be made in respect of the costs. However, the impugned bill of cost had not been assessed and/or taxed and there was no imminent danger of execution demonstrated by the Appellants warranting the grant of the orders sought as no entry of judgment on certified costs had been made. The case of **National Industrial Credit Bank Ltd vs Aquinas Francis Wasike & Another** (Supra) was not of any assistance to the Appellants herein as this court could not grant an order of stay of execution in *vacuo*.

27. This court restrained itself from commenting on whether or not the Appellant had an arguable appeal for the reason that the present application was misplaced and incompetent as far as the granting of orders for stay of execution pending appeal were concerned.

#### **DISPOSITION**

28. The upshot of this court's decision was that the Appellants' Notice of Motion application dated 28<sup>th</sup> May 2021 and filed on 31<sup>st</sup> May 2021 was not merited and the same be and is hereby dismissed with costs to the Respondent herein.

29. It is so ordered

**DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF NOVEMBER 2021**

**J. KAMAU**

**JUDGE**