



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION
CIVIL SUIT NO. 6 OF 2018

ETHICS & ANTI-CORRUPTION COMMISSION.....PLAINTIFF/RESPONDENT

V E R S U S

CATHERINE NKIROTE T/A VENYTE SUPPLIERS &

JOSCATE SALES AND SUPPLIES 1ST DEFENDANT

JOHN KAGO MURIMA 2ND DEFENDANT

JANE MAKENA MAINGI T/A

Q/SETTERS INVESTMENTS 3RD DEFENDANT

RULING

1. Before me for consideration are two (2) applications dated 8th April 2020 and 5th May 2020 variously filed by the opposing parties herein. By a Notice of Motion dated 8th April 2020 filed under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act and Orders 42(6) and 5(d) of the Civil Procedure Rules, the applicant sought orders as follows;

(i) This application be certified urgent and service thereof upon the defendants/respondents be dispensed with in the first instance.

(ii) Pending the hearing and determination of this application inter partes, this Honourable Court be pleased to grant an order of stay of execution of the Judgment delivered by this Honourable Court on 8th April 2020.

(iii) This Honourable Court be pleased to grant an order of stay of execution of the Judgment delivered by this Honourable Court on 8th April 2020.

(iv) This Honourable Court be pleased to grant such orders as it may deem fit and just to grant to safeguard the interest of the applicant.

2. The application is premised upon grounds advanced on the face of it and further amplified by an affidavit sworn on 8th April 2020 by Jackie Kibogy counsel appearing for the applicant.

3. It is the applicant's contention that the direction by the court vide its Judgment dated 8th April 2020 thereby unfreezing freezing orders and or preservation orders issued on 4th April 2018 against the defendants' various accounts alleged to have been holding funds obtained by the defendants through corrupt conduct would jeopardize an intended appeal thus render it nugatory should it succeed.

4. That by the said Judgment lifting the orders restraining the respondents from transferring or disposing off LR No. 14968/210 IR No. 97853 deemed to have been bought out of the money obtained corruptly by the defendants/respondents, the said property will be exposed and if stay is not granted, the same will be disposed off to 3rd parties thus rendering the appeal nugatory should it succeed.

5. In reply, the respondents through a replying affidavit sworn on 28th April 2020 by John Kago Murima (3rd defendant) on his own behalf and that of the other respondents opposed the application. It was averred that the amount of money preserved and frozen in five accounts is

Kshs. 29,207,976.28 and the value of the preserved land reference No. 14968/210 IR 97853 which was bought at Kshs. 26,000,000/- as evidenced by the sale agreement attached far exceeds the total amount sought to be recovered by the commission. That in total the amount frozen in the bank plus the value of the preserved land is Kshs. 55,217,976. yet the applicant is seeking to recover Kshs. 45,517,241.

6. He averred that the balance between Kshs. 55,207,976 and Kshs. 45,517,241 is Kshs. 9,690,734 which money should be withdrawn from the frozen accounts and be released to the respondents as the same is not being claimed and therefore not affected by stay of execution proceedings.

7. Further, the respondents contended that the application if allowed will prejudice them yet they are law abiding citizens who have gone through the entire court process.

8. That in the event the court grants the application, the same be subject to the order that the money in the frozen accounts be transferred to an interest earning account.

9. During the pendency of the said application, the respondents filed a separate application dated 5th May 2020 but filed on 6th May 2020 seeking that;

i. This application be certified as urgent and apt for hearing on a priority basis during the Covid-19 interruption period and exparte.

ii. This Honourable Court be and is hereby pleased to issue directions necessary towards ensuring the expeditious disposal of this application fairly with the plaintiff /respondent's application dated 8th April 2020 by way of video conferencing either through Zoom or Skype during the Covid-19 interruption period.

iii. That in view of the Covid-19 Pandemic, this Honourable Court be pleased to order the service of that application herein through electronic means to wit; email and or whatsapp.

iv. That as a condition to grant of stay of execution this court be and is hereby pleased to allow the applicants to withdraw a total of only Kshs. 9,697,334.88 from Account No. 0020192678243 Equity Bank of Kenya Ltd in the name of John Murima Kago.

v. That this court be and is hereby pleased to order transfer of the monies totalling to an aggregate of Kshs. 19,517,241.44 in five bank accounts held by the defendants/applicants into an interest earning account.

vi. Costs of the suit.

10. The application is grounded upon facts stated on the face of it and an affidavit of John Kago Murima sworn on 5th May 2020 which is a replica of their replying affidavit in response to the plaintiff's application dated 8th April 2020.

11. In response to the defendant's application, the plaintiff filed a replying affidavit sworn by Catherine Ngari in which she averred that there is no guarantee that the subject landed property will attract a sum of 26 million or more given the fact that sale of land by public auction is subject to reserve price and other attendant costs hence it would be premature to assume that it will fetch over and above the alleged purchase price.

12. Due to Corona Epidemic, the two applications were consolidated by consent of both parties and virtually canvassed with each party reiterating their respective affidavits in support of their application or reply to each party's application. Both parties were however in agreement that should the application for stay be granted, the money held in the frozen accounts be transferred to an interest earning account.

13. In submission, Mrs. Kibogy for the plaintiff/original applicant reiterated the averments contained in the affidavit in support of their application and reply to the respondent's application dated 5th May 2020. It was counsel's submission that the application for stay is not perse opposed as its grant is pegged on fulfilment of two conditions.

14. On the first condition on the transfer of the money held in the frozen accounts to an interest earning account, she was in agreement and did propose that a joint interest earning account be opened in the names of counsel on record for both parties at KCB Bank Ltd Milimani Branch Nairobi. Counsel further proposed that the money held in various accounts at Equity Bank and Co-operative Bank be transferred to the joint interest earning account opened.

15. Regarding the second condition on withdrawal of Kshs. 9,690,334. from the frozen account, counsel contended that the amount alleged to be over and above the amount claimed by the Commission is subject to conditions set out under Sections 97 and 98 of the Land Act which governs sale by auction. Counsel referred the court to Section 97 of the Land Act 2012 which provides for duties of a chargee exercising power of sale and that this provision includes the exercise of power to sell pursuant to a court order.

16. She further averred that under Section 97 of the Land Act, valuation of the property is crucial before sale and that a property can be sold at 25% less the market value. Further, that exercise of power of sale is subject to reserve price in compliance with Section 96(2) of the Land Act.

17. Counsel contended that the money should await the final determination of appeal and the resultant sale thereof. That the withdrawal of Kshs. 9, 690,734 will be prejudicial to the general public interest since the money in the frozen accounts was obtained through corrupt

conduct.

18. That every effort to file the appeal has been made and in exercise of its discretion, the court should balance the interest of both parties and that none should be worse off as a result of its orders. In support of this proposition, counsel referred the court to the decision in the case of Tabro Transporters Ltd v Absalom Dova Lumbasi Civil Appeal 31/2012 (2012)eKLR in which the court held that:-

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. Then the court is faced with a novel task of balancing the two competing rights to an almost constitutional symmetrical bound.”

19. On his part, Mr. Shedrack Wambui also reiterated the contents in their replying affidavit to the application dated 8th April 2020 and affidavit in support of their application. He further relied on their submissions filed on 20th May 2020. Mr. Wambui contended that they were not opposed to the application for stay provided that the court orders release of Kshs. 9,690,734.88 to the respondents and secondly, the money in the frozen accounts be transferred to an interest earning account.

20. In conclusion, Mr. Wambui urged that both parties have a right to access justice and it is the court’s duty to strike a delicate balance by granting orders of stay on the stated conditions. In support of this proposition, counsel placed reliance on the decision in the case of Kenya Red Cross Society v Mbondo Katheke Mwanja (2019)eKLR.

Analysis and Determination

21. I have considered the applications herein, responses thereto and submissions by both counsel. Issues that crystalize for determination are;

a) whether the original applicant (plaintiff) has met the threshold for grant of stay of execution orders.

b) whether the court can order withdrawal and release of Kshs. 9,960,734.88.

22. The law governing grant of stay of execution orders is enshrined under Order 42 Rule 6 of the Civil Procedure Rules. Rule 6(2) provides conditions precedent to granting an order for stay of execution as follows;

i) the court must be satisfied that substantial loss may result to the applicant unless the order is made

ii) that the application has been made without unreasonable delay and;

iii) The applicant is ready to furnish such security as the court may order for the due performance of such decree or order.

23. In the case of Jaber Mohsen Ali & Another v Priscillah Boit & Another [2014]eKLR the court emphasised on the need for the applicant seeking stay of execution to prove the three ingredients set out herein above. At paragraph 9 the court stated thus;

“The applicant needs to demonstrate three elements. There must be demonstration that substantial loss will result if stay is not granted; secondly, the application must be made without unreasonable delay; and finally, there needs to be security for the due performance of the decree. Much has been said about the respective strengths of the cases of the parties but that is not a consideration under Order 42 Rule 6. Apart from the three elements, the essence of an application for stay pending appeal is aimed at preserving the subject matter of litigation to avoid a situation where a successful appellant only gets a paper judgment.”

24. It therefore follows that where stay of execution is sought pending appeal against the decree or order appealed against, the applicant must prove that the appeal will be rendered nugatory. See Lisamula v Independent Electoral and Boundaries Commission and 2 Others (2014)KLR –ECK.

25. However, it is trite that a court seized of the matter has wide discretionary powers to determine on whether to grant or not to grant a prayer for stay depending on the worthiness of the application (see Mwangi v Kenya Airways Ltd (2003)KLR. 486).

26. However, it is worth noting that exercise of such discretionary powers is not executed in a vacuum. A court adjudicating on such application must take into consideration the interests of both parties and have the same balanced for the ends of justice to be met as stated in the case of Reliance Bank v Nor Lake Investments Ltd (2002)IEA 227.

27. Similar position was held in the case of Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & Another (2015)eKLR where the Court of Appeal stated that:-

“In seeking to balance the interests of the respective parties, the approach we have always taken in determining whether or not to grant a stay of execution is to ensure that applicants are not denied their opportunity to ventilate their legal cases as afforded under the laws through the appeal process, with the possibility of success, while at the same time, respondents are not denied the fruit of judgment in their favour and their rights are safeguarded. In our view, the balance tilts in favour of

the applicant in this application.”

28. Although the original applicant did not specifically state that they are seeking stay pending appeal, the spirit of the application can be deduced from the tone of the affidavit in support and replying affidavit to the defendants’ application dated 5th May 2020 together with the Notice of Appeal dated 16th April 2020 and letter seeking for proceedings.

29. Despite filing their application under Order 42 rule 6 of the civil procedure rules, the applicant did not argue the application based on any of the three grounds stated under Order 42 rule 6(2) of the civil procedure rules. However, given that judgment was delivered on 8th April 2020 and the application filed the same day, the application was filed within reasonable time. As regards depositing security, none of the parties raised the issue. However, the properties and or assets in question are still preserved hence no risk of loss nor prejudice likely to be suffered without furnishing such security.

30. Regarding the possibility of the plaintiff suffering substantial loss or appeal being rendered nugatory, it is clear that the subject assets which includes money and land if withdrawn or disposed to 3rd parties, it will be cumbersome, costly or almost difficult to recover the same. In any event, the defendants have not demonstrated ability to refund the money should they withdraw and spend the frozen amount.

31. Considering the circumstances of this case, public interest thereof and value of the subject property, the original applicant (plaintiff) is likely to suffer substantial loss if the property is disposed off and money withdrawn. Equally, the appeal will be rendered nugatory should it succeed.

32. Since the application was not opposed subject to fulfilment of two conditions, I will discuss the two conditions separately in so far as the defendant’s application dated 5th May 2020 is concerned. Firstly, the defendants sought transfer of the funds frozen in the five affected accounts to an interest earning account. The plaintiff is not opposed and has even proposed who to be signatories. That prayer is consequently allowed.

33. The second condition is that the court should allow the withdrawal and release of Kshs. 9,690,734 being the excess money over and above the sum of Kshs. 45,513,124.40 claimed by the plaintiff. Mr. Wambui submitted that the preserved land was bought at Kshs. 26,000,000/- by the defendants. Counsel is working on the assumption that the property if sold must realise the 26 million or even more. Learned Counsel has failed to take into account that unlike sale by private treaty, a public auction has its own rules of operation among them reserve price, auctioneers’ expenses and attendant costs including other statutory deductions and legal expenses.

34. There is no guarantee that the property will fetch that amount for the court to order release of what is purported to be excess preserved money. It will be premature and speculative for the court to start determining the value of the property and the likely sale price at this stage. For those reasons, that prayer is disallowed.

35. Accordingly, the applications dated 8th April 2020 is allowed to the extent that;

- a) Stay of execution of the judgement delivered on 8th April 2020 be and is hereby allowed pending filing of the intended appeal.**
- b) That the stay of execution orders granted herein above shall last for a period of 45 days from the date of delivery of this ruling within which period the plaintiff/applicant would have filed the intended appeal before the Court of Appeal.**
- c) That money in the frozen account in Equity and Co-operative Bank as per the Judgment of 8th April 2020 be transferred to an interest earning account to be opened at KCB Ltd Milimani High Court Branch and the same be held in the joint names of counsel appearing for the parties herein.**
- d) Costs in the cause.**

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29TH DAY OF MAY,2020.

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J. N. ONYIEGO

JUDGE