



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CIVIL APPEAL NO. 16 OF 2019

RURAL ELECTRIFICATION AUTHORITY.....APPELLANT

-VERSUS-

NICOLAS MUTURI MURATHE.....1ST RESPONDENT

RUOL AUCTIONEERS.....2ND RESPONDENT

RULING

The appellant/applicant, **Rural Electrification Authority** filed the notice of motion dated 29/01/2020 against **Nicolas Muturi Murathe** and **Ruol Auctioneers** (the 1st and 2nd respondents) seeking the following orders;

1) Spent;

2) That there be an unconditional stay of execution of the attachment commenced vide proclamation of attachment dated 15/01/2020 in respect of the applicants' assets listed therein as well as any or all process and orders consequential thereto;

3) Spent;

4) That the orders above persist until the hearing and determination of the appeal subject hereof;

5) Costs of the application be provided for.

The application is predicated upon grounds in the body of the application, the affidavit of Eunice Lumallas Advocate dated 29/01/2020 and a further affidavit dated 16/06/2020. The grounds are inter alia that the applicant was aggrieved by the judgment of S. Mwangi SRM dated 15/12/2018 in CMCC 112/2016 and sought an order of stay vide the application dated 07/02/2019 which was granted by the court on 12/11/2019 on condition that the applicant deposits the security in a joint account of the Advocates pending the hearing of the appeal; that the applicant complied and sent to the respondent's advocates duly signed forms for opening a joint bank account on 21/01/2020 with an undertaking to forward a bankers cheque as soon as the account was opened; that instead, the respondent instructed Ruol Auctioneers to issue a proclamation of attachment dated 15/01/2020 and illegally attached the applicants property which was in total disregard of the ruling delivered by the court on 12/11/2019; that the said actions were done in bad taste, mediocrity that the applicant stands to suffer irreparable damage if the respondent and or his agents are not restrained from selling, disposing off or alienating the attached assets or in any other manner interfering with the said property. This court is therefore urged to exercise its discretion, in the interest of justice and fairness to grant the prayers sought.

The first respondent, Nicholas Muturi swore a replying affidavit dated 19/02/2020 in which he deponed that on 12/11/2019, this court delivered its ruling in the presence of both parties staying execution of the subordinate court's judgment on condition that the applicant deposit Kshs.371,790/- in a joint interest earning account as security within 7 days of the date of the ruling; that the appellant did not take any steps; that on 22/11/2019, the respondent's advocate sent joint account opening forms to the appellant's advocate and informed them that if the money was not deposited as per the court's order, the respondent would proceed to execute. The respondent exhibited the two letters and forms NMM 2 and 3; that there was no response to their letters; that the appellant's Advocate returned the signed form after expiry of both proclamation and attachment notice filed – (NMM 4); that the stay that was granted by this court lapsed automatically when the time for deposit of security lapsed and the Respondent therefore instructed his advocates to commence execution proceedings. The warrants of attachment were issued to Ruol Auctioneers on 14/01/2020. Who proclaimed the applicant's goods on 15/01/2020 and notice of proclamation expired on 24/01/2020; that the auctioneers went to attach the proclaimed properties on 29/01/2020 but faced resistance. The instructed his Counsel to apply for break in order, but the file could not be traced. It is the respondent's view that the execution process was regularly commenced and that the court can not grant orders in vain; that the applicant having defaulted in complying within the court's orders is not entitled to the orders sought.

Directions were taken that the notice of motion be disposed of by way of written submissions.

Applicant's Submissions:

The applicant's submissions were filed on 08/07/2020 where Counsel argued that the application is brought under **Order 10 Rule 1, 2, 3 & 4 Civil Procedure Rules**; that an injunction order is merited to forestall the selling, alienating or disposing of the attached assets and hence a prima facie case with high chances of success has been established. See **Giella vs Cassman Brown (1973) EA 358**. Counsel relied on the decision of **Mrao vs First American Bank of Kenya Ltd & 2 Others (2003) KLR 125** where the court defined what a prima facie case is.

Counsel also relied on the decision in **Central Bank of Kenya Ltd & Uhuru Highway Development Ltd & 4 Others HCCA 36/1996** where the court emphasized that the order of injunction is discretionary and should be kept flexible and the court should not go into great detail of the evidence when considering such application.

Counsel also urged that the order sought is meant to preserve the status quo so that the applicant does not suffer loss during the pendency of the appeal. Counsel relied on the Court of Appeal decision in **Hutchings Biemer Ltd vs Barclays Bank of Kenya Ltd & Another (2006) eKLR (HCCA 312/2005) and Noormohammed Janmohammed vs Kassam Ali Virji Madham (1953) 20 KLR 8** where the courts emphasized the fact that the purpose of a temporary injunction is to preserve the status quo.

See also **Yego vs Tuiya & Another (1986) KLR 726 and Mbuthia vs Jimba Credit Finance Corporation and Another (1988) eKLR**.

As to whether the applicant will suffer loss if the injunction is not granted, Counsel relied on the decision of **Mbuthia's case (Supra)** where the court observed that it is usual for courts to grant injunction in matters land so as to protect the parties' interest in ownership.

As to the balance of convenience, Counsel argued that it tilts in favour of the applicant who has demonstrated that they complied with the orders of the court and will suffer harm if the orders are not granted and sufficient cause has been established as to why an order of injunction should be granted. Counsel also relied on the case of **Thomas Mungiria & 9 Others vs Joseph Mutuma & 4 Others HCCA 12/2010 (2012) eKLR and Alice Awino Okelo vs Trust Bank Ltd & Another LLR No. 625 (CCK)** Counsel urged the court to grant the orders sought on a balance of convenience if the other principles were not met.

Respondent's submissions:

The firm of Wahome Ndegwa, Counsel for the respondent filed their submissions on 09/07/2020. It was submitted that the orders of injunction should not be awarded to the applicant because the applicant has come to court with unclean hands having disobeyed the court order requiring it to deposit the Kshs.370,791/- in a joint account within 7 days; that the order of stay lapsed upon expiry of 7 days and it is an injustice for the court to stop a regular and lawful execution process; that from the applicant's conduct, they had no intention of complying with the court's order had the respondent not proceeded with execution proceedings; that the applicant is seeking a second stay order. Counsel urged the court to strike out the applicant's further affidavit filed in court on 29/06/2020 as it was filed without the leave of the court; that in the same affidavit, the applicant claims that the disobedience of the court was inadvertent and has not denied that the deposit was made after 7 days and that on its own admission, the application should fail. But in the event the court sees it fit to grant the order, it was urged that the applicant be condemned to pay the costs of the application and the auctioneer's costs.

I have now considered the application, affidavits on record and the rival submissions by counsel.

The first issue I need to deal with is whether the applicant's further affidavit dated 15/06/2020 and filed in court on 21/06/2020 is properly on record. This application was mentioned on 19/02/2020 after parties filed their respective affidavits and it was due for hearing on 28/04/2020. However, due to the breakout of the Covid 19 epidemic, the court was not hearing matters as of 28/04/2020. The parties took directions on how the matter would be disposed of and on 28/05/2020 with the agreement of the parties via email, it was agreed that the application would be determined through written submissions and the matter was slated for further mention on 09/07/2020 to confirm compliance. The applicant never intimated to the court that they wished to file a further affidavit yet they had ample time to do so. The applicant then sneaked onto the file the further affidavit dated 19/06/2020 without the leave of this court. The respondent was not given a chance to consider whether to object to it or not or whether they would have wanted to respond to it. I agree with the respondent's Counsel that the said affidavit is irregularly on record and is hereby struck off.

In its ruling of 12/11/2019, the court directed that the applicant do deposit the sum of Kshs.371,790/- in an interest earning account in the names of both Counsel pending hearing of the appeal and the deposit was to be made within 7 days of that date. It is not denied that the applicant never made the deposit within the said period. In fact it is the respondent's Counsel who prompted the applicant's Counsel by the letter of 22/11/2019, that the deposit had not been made and provided to the Counsel the opening forms for execution (MNM 2 & 3). Even with that prompting, the applicant did nothing till 21/01/2020 when the counsel returned the said forms to the respondent's Counsel. That was over two months since the deposit was to be made. The deposit should have been made on or before 19/11/2019. By 14/01/2020 when the warrants were applied for, it was well over 1 ½ months since the default in making the deposit. It is therefore wrong for the applicant to argue that the respondent's actions to commence execution were malicious and made in bad taste. The respondents were within their right to proceed with the execution.

Whether the orders sought can be granted:

I have looked at the application and although in Counsel's submissions, she purports to have brought the application under **Order 40 Rule 1, 2, 3 and 4**, no provision of law was indicated on the header of the application. Looking at the prayers in the notice of motion, Prayer 2 seeks for stay of execution of attachment. Prayer 3 seeks for an order of injunction pending hearing of the application inter parties, which is spent while the fourth prayer is that an order of injunction be issued pending the hearing of the appeal.

From the prayers sought, it can be deduced that the applicant intended to move the court under **Order 40 of the Civil Procedure Rule**. Order 40 Rule (1) Provides as follows;

“Where in any court it is proved by affidavit or otherwise-

a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree;

b)

The court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

The principles for grant of an order of injunction are well settled as was espoused in *Giella vrs Cassman Brown (Supra)*; i.e. the applicant must demonstrate;

- 1) That the applicant has a prima facie case with a probability of success;
- 2) That the applicant will suffer irreparable loss if the order is not granted;
- 3) That if the court is in doubt, it will decide the case on a balance of convenience.

Of Prima Facie case, in the *Mrao Case Supra*, the court defined a prima facie case as “*In Civil cases, it is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the letter.*”

As was held in *Central Bank case (Supra)* the court does not require to consider the evidence in a great detail in order to grant an order of injunction. The court said;

“In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then decide what is best to be done. The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules.

It is not part of the Court’s function at an interlocutory stage of litigation to try to solve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend or to decide difficult questions of law which call for detailed arguments and mature considerations.”

Injunctive orders are discretionary in nature, and meant to preserve the status quo so that the applicant can be given an opportunity to articulate its case. In the instant case, the court had issued an order of stay although it was on condition that the applicant deposits a certain sum in a joint account. The applicant acted indolently resulting in the respondents taking steps towards realizing of the fruits of his judgment which was his right. However, if the attachment proceeds, then the applicant will have been locked out of the justice seat to prosecute the appeal. For that reason, I am satisfied that the applicant has demonstrated that his right to its property is likely to be infringed and it is likely to suffer irreparably if an order of stay is not granted. The court also takes cognizance of the fact that the appeal has already been filed and the security has been deposited with the court and hence there is unlikely to be further delay or prejudice to the respondent.

However, the applicant having acted indolently till the respondent commenced the execution process which was regular, I condemn the applicant to bear the costs of this application and the auctioneer’s costs and the whole execution process that had kicked off. Thereafter, the applicant should prepare and serve the Record of appeal within 45 days and have the appeal admitted to hearing expeditiously to avoid any further delay. It is so ordered.

Dated, Signed and Delivered at NYAHURURU this 29th day of September, 2020.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Mwaniki holding brief for Mr. Maina Kairu for 1st Respondent

Joseph Esiti holding brief for Ms. Lumalla for the appellant.

Henry - Court Assistant