



**REPUBLIC OF KENYA**

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

**(CORAM: CHERERE-J)**

**COMMERCIAL CASE NO. 79 OF 2018**

**BETWEEN**

**BLUE WATERS HOTEL LTD.....1ST PLAINTIFF/APPLICANT**

**WILLIAM OSEWE GUDA.....2ND PLAINTIFF/APPLICANT**

**STELLA MUTHEU OSEWE.....3RD PLAINTIFF/APPLICANT**

**AND**

**GUARANTY TRUST BANK(KENYA) LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

**Background**

1. This court after hearing the Plaintiffs'/Applicants' Notice of Motion dated 27.06.2018 and amended on 06.07.2018 made the following orders on 28th July, 2020:

**1) The Bank's Notice of Motion dated 24.07.2018 and filed on 25.07.2020 is allowed in terms of prayer (3) and the interim mandatory injunction order issued on 29.06.2018 compelling the Defendant to issue a written undertaking to the Plaintiffs and the Tourism Finance Corporation that it will release its charge over the *South C property* in terms of clause 9.1 (ii) of the Loan Agreement dated 12.05.17 is hereby discharged and set aside.**

**2) The Plaintiffs/Applicants' Notice of Motion dated 27.06.2018 and amended on 06.07.2018 fails and is disallowed in its entirety**

**3) The Plaintiffs/Applicants shall pay the costs of both applications to the Defendant/Respondent.**

2. On 05.08.2020, the Plaintiffs'/Applicants' filed a notice of motion dated 03.08.2020 seeking the following orders:

**a) The Court be pleased to issue an interim injunction restraining the Defendants, its agents and/or assigns from exercising its statutory power of sale and/or in any way dealing with, disposing of, selling or otherwise interfering with the ownership of Land Title KISUMU MUNICIPALITY/BLOCK 13/16 registered in the name of the 1st Plaintiff and/or L.R NO. 209/14340 in South C, Nairobi registered in the name of the 2nd and 3rd Plaintiffs/Applicants pending the hearing and determination of this application**

**b) The Court be pleased to issue an interim injunction and/or conservatory orders as the court shall deem fit, restraining the Defendants, its agents and/or assigns from interfering with the ownership of Land Title KISUMU MUNICIPALITY/BLOCK 13/16 (Kisumu Hotel) and all that parcel of land registered as L.R NO. 209/14340 (the South C Apartments) and developments thereon pending the hearing and determination of the intended appeal from this court's order dated 28.07.2020**

**c) The court be pleased to stay these proceedings pending the hearing and determination of the intended appeal from this court's order dated 28.07.2020**

**d) Costs be in the cause**

3. The application is based on the grounds among others THAT:

- a) **The Plaintiff/Applicants are greatly aggrieved and intend to appeal this court's ruling dated 28.07.2020**
- b) **That Plaintiff/Applicants are apprehensive that the Respondent might sell their properties**
- c) **The intended appeal has a reasonable chance of success**
- d) **The Plaintiff/Applicants' financial obligations to the Respondent are secured by multiple securities whose value is 4 times more than the Plaintiff/Applicants' loan obligation**
- e) **The Kisumu Hotel is located in a prime beach front area and is difficult to replace**
- f) **Plaintiff/Applicants have made concerted efforts to redeem the suit property**
- g) **The Plaintiff/Applicants are likely to suffer substantial loss**
- h) **The suit is unlikely to proceed soon since the Respondent has not filed its defence**

4. The application is supported by the supporting affidavit sworn on 03.08.2018 by the 2nd Plaintiff/Applicant in which he reiterates the grounds on the face of the application. Annexed to the affidavit are copies of title documents for Kisumu Hotel and the South C Apartments (**marked A**), statutory notices issued by the Respondent (**marked B**), this court's ruling dated 28.07.2020 (**marked C**), copy of draft memorandum of appeal (**marked D**), letter requesting for certified copies of typed proceedings, ruling and order (**marked E**), 5 days' notice to alienate the suit properties issued by the Respondent on 29.07.2020 (**marked F**), copy of loan offer letter dated 12.05.14 (**marked G**) and franchise agreement with Soric International (**marked I**).

5. The application is opposed on the basis of a replying affidavit sworn on 01.09.2020 by **JOSEPHINE WANJIRU GACHURU**, the Defendant's/Respondent's (**Bank**) legal officer. She avers that the Bank's statutory power of sale has arisen and that the assertion that the Plaintiffs/Applicants are servicing the loan which stood at Kshs. 328,817,065.65 as at 10.08.2020 is not factual. The deponent avers that the bank is not a party to the franchise agreement and this application is meant to delay the realization of the securities. It has further been argued that the Plaintiffs/Applicants have not established substantial loss.

#### **Plaintiffs/Applicants' Submissions**

6. Plaintiffs/Applicants hold the view that this court has jurisdiction to stay its own orders pending appeal and in support thereof cited **Madhupaper International Ltd v Kerr [1985] eKLR** where the court held 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.

7. The Plaintiffs/Applicants urged the court to exercise its discretion to grant a stay pending appeal and in support thereof relied on The Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417** where the court held that discretion ought to be exercised in a manner that would not prevent an appeal.

8. The court has been urged to give effect to the overriding objectives under the Civil Procedure Rules and reliance has been placed on **John Gachanja Mundia v Francis Muriira Alias Francis Muthika & another [2016] eKLR** where the court reiterated the need to do substantive justice in interpreting the prescriptions of law designed for grant of relief and **Victory Construction v BM (a minor suing through next friend one PMM) [2019] eKLR** where Odunga J cited **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365** in which the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the **Civil Procedure Rules** is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security.

9. Reliance was also placed on a decision by **Warsame, J** (as he then was) in **Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** where he expressed himself as hereunder:

**“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement.**

10. Concerning substantial loss, the Plaintiffs/Applicants relied on **Rhoda Mukuma v John Abuoga [1988] eKLR** where the court of appeal held that substantial loss is the cornerstone of both jurisdiction and that what has to be prevented is such loss as would render the appeal nugatory.

11. Finally, the Plaintiffs/Applicants also argued that damages would not be an adequate remedy because the subject property was irreplaceable. They relied on the cases of **Banana Hill Investment Ltd vs Pan African Bank Limited & 2 others [1987]**

**Defendants/Respondents' Submissions**

12. Defendants/Respondents urged the court to find that there was no positive order capable of being stayed and relied on **Kanwal Sarjit Singh Dhiman v. Keshavji Juvraj Shah [2008] eKLR**, the Court of Appeal, while dealing with a similar application for stay of a negative order, held:

**“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see Western College of Arts & Applied Sciences vs. Oranga & Others [1976] KLR 63 at page 66 paragraph C).”**

17. The same reasoning was applied in the case of **Raymond M. Omboga v. Austine Pyan Maranga** (supra), that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:

**“The Order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order ... The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise...”**

13. Defendants/Respondents argued that the appeal is not arguable for the reason that the Plaintiffs/Applicants are indebted to the Bank and that the Defendants/Respondents having tendered the properties as security are estopped from pleading that the loss of the properties in the circumstances amounts to substantial loss. (See **David Mburu Githere & another v Jamii Bora Bank Limited [2017] eKLR**)

14. It has also been argued that this application ought to be rejected for it invites the court to grant an injunction it already declined to grant.

**Analysis and Determination**

15. I have considered the record in light of rival pleadings, authorities and submissions of learned counsel for the parties. The gravamen of this application revolves around whether this court ought to stay its order dated 28.07.2020 dismissing the Plaintiffs/Applicants application for an injunction.

16. This application ought to be looked at from the point that Plaintiffs/Applicants invite the court to grant an injunction it already declined to grant in its ruling dated 28.07.2020.

17. The substantive law of access for the relief sought is Order 42 (6) of the Civil Procedure Rules which provides:

**(2) No order for stay of execution shall be made under sub rule**

**(1) Unless—**

**a. The court is satisfied that substantial loss may result to the applicant unless the order is made**

**b. That the application has been made without unreasonable delay; and**

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

18. In this court’s ruling dated 28.07.2020, this Court came to the conclusion, after careful consideration, that the injunction sought by the Plaintiffs/Applicants was not merited and dismissed their application. Thus, there was is decree or order capable of being enforced that was issued for purposes of **Order 42 Rule 6 of the Civil Procedure Rules**. The order thus fell within the ambit of what may be deemed as a **negative order**.

19. In the case of **Western College Farts and Applied Sciences vs. Oranga & Others [1976] KLR 63**, the Court of Appeal whilst considering whether an order of stay can be granted in respect of a negative order and which I fully adopt stated *inter alia* as follows: -

**“But what is there to be executed under the judgment, the subject of the intended appeal the High Court has merely dismissed the suit with costs. An execution can only be in respect of costs.....”**

**The High Court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court Judgment for this court in an application for stay to enforce or restrain by injunction.”**

20. And in the case of Kanwal Sarjit Singh Dhiman v Keshavji Jivraj Shah [2008] eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:

**“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see Western College of Arts & Applied Sciences vs. Oranga & Others [1976] KLR 63 at page 66 paragraph C).”**

21. The same reasoning was applied in the case of Similarly, in Raymond M Omboga vs. Austine Pyan Maranga Kisii HCCA No. 15 of 2010, where Makhandia, J (as he then was) held:

**“..... The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order.....”**

22. It is trite law that stay of execution pending appeal can only be granted against the order being appealed against. Put differently, an order for stay of execution pending appeal cannot be granted if the intended appeal is not against the order sought to be stayed; yet this is what obtains in this application where the Plaintiffs/Applicants appeal is against the order of dismissal of his application, yet the stay sought is against the Defendants/Respondents’ exercise of statutory power of sale.

23. In considering whether the intended appeal will be rendered nugatory if the stay order is not granted, I am cognizant of the fact that each case must depend on its facts and peculiar circumstances. (See David Morton Silverstein v Atsango Chesoni, Civil Application No. Nai 189 of 2001). I also adopt the holding by the Court of Appeal in Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others [2013] eKLR that:

**“Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.” [emphasis added].**

24. The Plaintiffs/Applicants have argued that their proprietary interest in the suit properties will not only be threatened but also extinguished and become unrecoverable. The Plaintiffs/Applicants did not however allege or demonstrate that the Defendants/Respondents would be unable to adequately pay them any damages as may be ordered should the intended appeal ultimately succeed.

25. I have considered whether the court can invoke Section 1A of the Civil Procedure Act enshrines the overriding objective of the court to grant the orders sought. Section 1A provides:

**(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.**

**(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).**

26. The principles that guide the invocation of this provision have been crystallized by case law. The principles that guide the court on the invocation of this rule were restated by Musinga, JA in the case of Equity Bank Limited vs. West Link Mbo Limited [2013] eKLR where the following observations were made: -

**“Courts of law exist to administer justice and in so doing they must of necessity balance between competing rights and interests of different parties but within the confines of the law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without its being derived from the Constitution or statute. Such power enables the judiciary to deliver on their Constitutional mandate.....**

**Inherent power is therefore the natural or essential power conferred upon the Court irrespective of any conferment of discretion.”**

27. From the totality of the material placed before the court, I find that both written and case law does not favour the invocation of the overriding objectives of the court to grant an order staying a negative order.

For those reasons this court makes the following orders:

**(1) The notice of motion dated 03.08.2020 and filed on 05.08.2020 fails and it is accordingly dismissed with costs to the Defendants/Respondents.**

**(2) The interim injunction and/or conservatory orders as the court shall deem fit, restraining the Defendants, its agents and/or assigns from interfering with the ownership of Land Title KISUMU MUNICIPALITY/BLOCK 13/16 (Kisumu Hotel) and all that parcel of land registered as L.R NO. 209/14340 (the South C Apartments) and developments thereon issued on 06.08.2020 is discharged**

DATED AT KISUMU THIS 23rd DAY OF October 2020

**T. W. CHERERE**

**JUDGE**

Court Assistants

For Plaintiffs/Applicants

- **Ms. Amondi/Ms. Okodoi**

- **Mr. Awele for Awele & Bashir Advocates LLP**

For Defendants/Respondents - **Ms. Nzuki for Macharia-Mwangi & Njeru Advocates**