



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA**

**AT NAKURU**

**CIVIL SUIT NO 55 OF 2011**

**LAMSONS INDUSTRIES LTD.....1<sup>ST</sup> PLAINTIFF**

**LAMS INVESTMENTS LIMITED.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**INVESTMENT AND MORTGAGE BANK LTD.....1<sup>ST</sup> DEFENDANT**

**SPORTLIGHT INTERCEPTORS LTD.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This is a ruling on application dated 8<sup>th</sup> June 2020 brought under order 42 Rule 6 seeking to restrain the 1<sup>st</sup> defendant/Respondent from exercising its statutory power of sale over the 2<sup>nd</sup> applicant's properties LR.NO. NAKURU MUNICIPALITY BLOCK 8/5 and LR.NO. NAKURU MUNICIPALITY BLOCK 11/59 pending the hearing and determination of intended appeal against judgment delivered on 21<sup>st</sup> May 2020.
2. Grounds on the face of the application upon hearing the plaintiff's suit seeking to permanently restrain the 1<sup>st</sup> defendant from auctioning the said property, this court dismissed the plaintiff's suit giving liberty to the 1<sup>st</sup> defendant to exercise power of sale over the property.
3. That the applicant being aggrieved by the said decision, lodged appeal on 28<sup>th</sup> May 2020 alongside a written request to the deputy registrar for typed proceedings.
4. That the applicant is apprehensive that if orders sought are not granted, the said plaintiff's properties may be auctioned exposing the applicants to irreparable and substantial loss and render the intended appeal nugatory; that the applicants have moved to Court timeously and titles are held by 1<sup>st</sup> defendant for loan advice to 1<sup>st</sup> plaintiff guaranteed by 2<sup>nd</sup> plaintiff.
5. That the applicants shall raise arguable grounds against the subject judgment and the two properties form the core source of income for the plaintiffs/applicants and it would be fair and just to allow stay pending appeal.
6. In response, the 1<sup>st</sup> respondent filed a replying affidavit dated 9<sup>th</sup> July, 2020 sworn by **Andrew Muchina**, Legal Manager of the 1<sup>st</sup> defendant's Bank. We have heard that the applicant suit sort to challenge the respondent's action taken in the year 2010 in exercise of the 1<sup>st</sup> defendant statutory power of sale by seeking to sell by public auction the two properties herein to recover outstanding loan which as at 1<sup>st</sup> June, 2010 stood at Kshs.161, 845,269.28 (at the prevailing exchange rate USD 1/ Kshs.79.22 as at 7<sup>th</sup> July, 2020 together with interest until payment in full. He attached statutory notice issued on 7<sup>th</sup> July, 2010.
7. He averred that at the time of seeking to exercise statutory power of sale the property were valued which forced the sale value of LR 8/5 at Kshs.35 million and LR 11/59 at Kshs. 6 million as at 19<sup>th</sup> November, 2007. He attached the valuation report.
8. He further, averred that as at 30<sup>th</sup> June, 2020 the outstanding owed to the 1<sup>st</sup> applicant stood at Kshs. 790, 644,928.45, He annexed a copy of the current statement of account. The 1<sup>st</sup> Respondent further averred as at 25<sup>th</sup> June, 2020 the forced sale value of the charged property was kshs. 142, 500,000.00 for LR Nakuru Municipality Block 8/5 and Kshs. 78,750.000.00 LR11/59 making up cumulative sum of Kshs.221, 250,000.00. He annexed the valuation report for 2020.
9. That in view of the above the value of the outstanding amount has over stripped the value of the charged property therefore, exposing the

1<sup>st</sup> respondent by over Kshs. 500,000,000.00 which the respondent may never recover and therefore, the charged property does not constitute sufficient security for performance of the degree.

10. The 1<sup>st</sup> respondent further averred applicants have not demonstrated the nature and extent of substantial laws which may be occasioned if orders are not granted and the delay of 7 days in filing this application has not been explained.

11. Further, that the application is misconceived as the applicant is seeking to appeal against the dismissal of the suit which is the nature of negative orders incapable of being stayed. He urged the Court to dismiss the application with cost.

#### **APPLICANTS/PLAINTIFF'S SUBMISSIONS**

12. In their submissions the applicants advocates restated ground of appeal and averments in the supporting and further affidavits and cited the case of **Butt Vs Rent Restriction Tribunal Civil Appeal No. NAI 6 of 1979** as cited in the case of **Maisi Mwita V Damaris Wanjiku Njeri [2016] eKLR (Madan, Miller and porter JJA)** who held that the grant or refusal of application for stay of execution is discretionary power and should be exercised in such a way as not to prevent an appeal and should not be refused if there are good grounds and the Court while considering the application should consider special circumstances of each case.

14. Further that in the case of **Maisi Mwita V Damaris Wanjiku Njeri [2016]eKLR (Madan, Miller and Porter JJA** the Court stated conditions to be satisfied for stay of execution to be allowed as follows: -

**1. Substantial loss may result if applicant unless the order is made**

**2. The application has been made without undue delay**

**3. Such security as to costs has been given by the applicant.**

14. Applicants submitted that if stay order is not granted, the 1<sup>st</sup> respondent will go ahead to exercise its power of sale over the 2<sup>nd</sup> plaintiff/applicant's property which form the core source of its livelihood for plaintiffs'/applicants' directors as it owns partly the 1<sup>st</sup> plaintiffs main business and the applicants will suffer loss by shutting their business and their daily source of income.

15. The applicants submitted that they are amenable to furnishing court with additional security as may be directed by this Court. The applicants further submitted that the respondents replying affidavit do not bring the true picture of facts of the case and urged this court to consider their further affidavit.

16. Applicants further cited the case of **Sentrim Contractors Ltd Vs Joseph Mutinda Menya [2016] eKLR** where the Court stated conditions for grant of stay of execution pending appeal as captured in paragraph 9 above.

17. On filing appeal timeously, the applicants submitted that judgment was delivered on 21<sup>st</sup> May 2020 and this application was made on 8<sup>th</sup> June 2020, a period of 18 days which does not amount to unreasonable delay

18. On whether appeal filed is arguable, the applicants submitted that the appeal raises weighty issues of law and fact as shown in draft memorandum of appeal attached to the application; that the applicants appeal is meritorious and it would be in the interest of justice to grant stay.

#### **RESPONDENT'S SUBMISSIONS**

19. The respondent started by stating principles applicable in an application for stay of execution pending appeal as held by **Justice Odunga in Victory Construction Vs. BM (suing through next friend one PMM [2019] eKLR** where he stated the guiding principles as provided by order **42 Rule 6(2)** as follows: -

**“No order for stay 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 and the application has been made without unreasonable delay**

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

20. The applicant submitted that under **Order 42 Rule 6 of the Civil Procedure Rules 2010** the question as to whether appeal is arguable is not consideration for an application under **Order 42 Rule 6 of the CPC 2010** the position was confirmed in the case of **John Wanjoi V Gerald Wanjohi [2019]eKLR** where **justice Gitari** held that such consideration will prejudice the appeal.

21. The respondent submitted that the applicants have not demonstrated how they stand to suffer substantial loss and the sale of charged property is clear and sale of matrimonial property or business property which is charged does not amount to irredeemable loss or irreparable injury nor can it amount to substantial loss. The respondent cited the case of **Anita Chelangat O'donovan & 2 others Vs Fredrick Kwame Kumah & 2 others [2017]eKLR** where the Court state as follows:-

**“The law has long been that once a property is offered as security for financial advances, it immediately becomes liable to be liquidated as a commodity in the property market the tender memories and deep emotions associated with it notwithstanding.”**

22. The respondent cited other High Court cases where the High Court adopted the above position in dealing with the issue of substantial loss and submitted that it is clear from the principle set out in the decided cases that the applicants have not met the threshold of proving that they will suffer substantial loss.

23. On filing this application after 18 days from the date of judgment, the respondent submitted that the applicants have failed to explain why it took them 18 days to file this application

24. On providing security, the respondents submitted that from the applicants’ affidavits and submissions. Their properties charged are sufficient as security for loans advanced but the valuation reports do not indicate forced sale prices which the respondent would be seeking to recover in exercise of statutory right of sale; and defendant’s valuation reports remain unchallenged and undisputed by any evidence.

25. The respondent submitted that the forced value of the 2 properties is kshs 221,250,000 and defendant contend that the outstanding principal sum is kshs 790,644,928.45 and defendants are exposed to a tune of kshs 569,394,928.00 and it is the defendants’ submission that the applicants have failed to provide sufficient security for ultimate performance of the judgment should the appeal fail; and submitted that in the event this court will be inclined to allow the application, the applicants be ordered to deposit kshs 569,394,928.00 as condition for stay order sought.

26. The respondents in conclusion submitted that this Court in judgment delivered on 21<sup>st</sup> May 2020 issued negative order being dismissal of plaintiffs’ suit, a declaration already which cannot be recalled and costs; that there is nothing for this Court to stay as it did not issue positive order capable of being stayed.

**ANALYSIS AND DETERMINATION**

27. **Order 42 Rule 6 of the Civil Procedure Rules** provide conditions for grant of stay of execution pending appeal as captured in paragraph 16 above. This has been confirmed in both Court of Appeal and High Court cases some of which have been cited by the parties herein in their submissions. The applicant however added 4<sup>th</sup> condition of arguable appeal being demonstrated. I do agree with counsel for the respondent and that it is not one of the condition for grant of stay pending appeal provided under **Order 42 Rule 6**. In my view, the appellate court upon hearing the appeal may arrive at different finding from mine and it would not be appropriate to make any comment in respect of strength of the intended appeal. I believe the rules committee never included that condition in **Order 42 Rule 6** for valid reasons

28. On whether this application was filed timeously, it is not disputed that it was filed after 17 days. Counsel for the respondent have argued that the filing after 17 days has not been explained. I am however of the view that 17 day delay period in this time of corona pandemic does not constitute to unreasonable delay

29. On whether substantial loss is to be suffered by applicant if the order is not granted, I do agree that one property is offered as security for loan, the charger has agreed to allow disposal of property in the event of non-payment irrespective of any attachment or benefit offered by the property.

30. Whether the applicant has offered security for performance of the judgment if the appeal fail, from the 1<sup>st</sup> respondent’s valuation, the property fall short of outstanding amount and the 1<sup>st</sup> respondent and the 1<sup>st</sup> respondent is likelihood that the decree may not be fully satisfied and it’s the 1<sup>st</sup> respondent’s argument that the properties its holding are not sufficient and fall short of kshs 500,000,000 as per forced market value done. The applicants on the other hand have expressed willingness to provide security as the court may direct.

31. Upon considering the above, I am of the view that it would be fair and just to allow stay of execution pending appeal on condition that the applicants deposit additional security of kshs 100,000,000.00

**32. FINAL ORDERS**

1. Stay of execution do issue pending hearing and determination intended appeal on condition that a sum kshs 100,000,000.000 is deposited in a joint interest earning account in the names of both counsels herein.
2. Compliance on order 1 above to be within 60 days from the date of this ruling
3. Costs of this application to abide by the outcome of the intended appeal.

**Ruling dated, signed and delivered via zoom at Nakuru This 17<sup>th</sup> day of December, 2020**

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**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Jenifer - Court Assistant

Mr. Situma for the Appellant

Ms. Wahinya holding brief for Mr. Nyabori Counsel for the Respondent