REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL CASE NO. 15 OF 2018

PINE COURT MALINDI LIMITED.....1ST APPLICANT

MUMBU ESTATES LIMITED..... 2ND APPLICANT

VERSUS

IMPERIAL BANK OF KENYA (Under Receivership)..... 1ST RESPONDENT

KENYA DEPOSITORS INSURANCE CORPORATION....2ND RESPONDENT

TROPHY AUCTIONEERS ..... 3RD RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Mwagambo & Okonjo Advocates for the applicants

Munyao, Muthama & Kashindi Advocates for the respondents

RULING

I have before me an application by way of a notice of motion expressed to be brought under Order 22 Rule 22 Order 42 Rule 6 Order 51 Rule 1 and 3 of the Civil Procedure Rules Section 3 and 3A of the Civil Procedure Act and all enabling provisions of the law. The motion prays and seeks for stay of execution against the orders of this court in a Ruling delivered on 25.7.2019 declining grant of an interlocutory injunction.

That the applicant having filed a notice of appeal against the ruling, the said orders if not stayed would render the appeal nugatory. In support of the motion are grounds on the face of the application and further the dispositions in the supporting affidavit. In the aforesaid affidavit, the applicant depones that unless stay of execution is granted he will suffer substantial loss and that the intended appeal has high chances of success. He emphasized that if the orders are not granted there may be an alienation, transfer or sale of the suit property which would completely leave him ruined and difficult to be restored to the original position.

Mr. Atiang learned counsel for the applicant arguing in support of the application said that there are serious matters of law and fact for consideration by the Court of Appeal. That is why there is need to stay execution. The applicant counsel cited the decision of the High Court at Voi in **Mt. View Maternity and Nursing Home v Miriam Maalim Bishar, Jimale Hassan Court of Appeal No. 20 of 2016** in support of their prayer.

Mr. Ngoya for the respondent for the respondents vehemently opposed the application and relied on the replying affidavit in opposition filed on 18.9.2019. He submitted that this court has rendered its decision and there is no jurisdiction to grant injunctive orders which were declined in the first place.

The learned counsel argued that the refusal of the application would not render in anyway the intended appeal nugatory. According to learned counsel the applicant has not shown that he will suffer irreparable harm not compensable by way of damages.

It was his contention that the power to stay the orders which were granted on merit must be a jurisdiction to be exercised sparingly in order not to vary the substantive reliefs available to the respondent.

Further learned counsel argued and submitted that the application for stay of execution has not embodied any additional or new evidence that would occasion prejudicial or the nugatory effect of the appeal combined with the need for exceptional circumstances. Thus, he urged me to dismiss the application.

Analysis

In my conceded view to stay orders of the court in a sense is to suspend the execution and enforcement of a valid order of this court. The fact of the matter in law is that leave or notice to appeal against a Ruling or Judgment of the court is not a sine qua non for grant of stay of execution as urged by the applicant. The other paramount consideration is the legal principle that a litigant to a dispute if successful should not be deprived of the fruits of his or her Judgment in his or her favor without sufficient cause.

The other criterion for grant of stay of execution under Order 42 Rule 6 of the Civil Procedure Rules is that no order for stay should be made unless the court is satisfied that substantial loss may result to the applicant.

The applicant has also to demonstrate that he has moved the court without unreasonable delay and that there would be such security as the court may order for the due performance of the ultimate decree or order subject matter of the appeal.

In a discretionary matter like the one I am confronted with the burden of proof rests with the applicant to show on a balance of probabilities that if discretion is not exercised in his or her favor and stay of execution denied, he or she will be completely ruined.

In my view, I also hold the view that the application for stay the court should not lose sight of the procedural evidential matrix placed before it during the original proceedings giving rise to the application for the equitable remedy.

It appears to me that the application taken together pursuant to Order 42 Rule 6 there cannot be a stay of execution solely because a litigant is exercising his constitutional right of appeal. The provisions construed liberally the applicant is entitled to demonstate substantial loss.

In the persuasive case of **Venter v R [1907] 75910 Innes CJ** held that:

> ***"By far the most important rule to guide courts in arriving at the intention on the interpretation of any legal instrument is to take the language of the instrument, or of the relevant portion of the instrument, as a whole, when the words are clear and unambiguous to place upon them their grammatical construction and give them their ordinary effect."***

In deterring the question on substantial loss under Order 42 Rule of the Civil Procedure Rule. This court has to rely on the mortgage deed between the applicant and the respondent. In the context of this a full bench of the court in Namibia in the case of **Van As and another v Prosecution – General 2000 NR 271 Levy AJ** said:

> ***"It is true that a court must start with the interpretation of any written document whether it be a constitution, a statute, a contract or a will by giving the words therein construed their ordinary liberal meaning. The court must ascertain the intention of the legislator or authors of the document and there is no reason to believe that the framers of a constitution will not use words in their ordinary and literal sense to express the intention."***

The first respondent is a financial institutions duly registered by the Central Bank of Kenya to offer financial services. The first respondent is currently under receivership under the operation of the law placed under the management of the Kenya Deposits Insurance Cooperation an organization charged with the responsibility of securing the financial securities and deposits of the customers who may have been affected by the receivership.

The applicant – limited company in October 2013 approached the 1st respondent for a drawn down loan facility as supported by the letter dated 31.10.2013. The loan facility was secured by a mortgage deed over plot number **729LT 34 Folio 190/2 File 2372** in 20.7.2012.

During the pendency of the contract the applicants fell into arrears which became a subject of litigation. Faced with the said legal instrument the respondents exercised the statutory power of sale under Section 90, 92, 96 and 97 of the Land Act 2012. The general principles applicable to challenge enforcement of the mortgage contract to limit exercise of statutory power of sale therefore falls within the condition on substantial loss under Order 42 (6) of the Civil Procedure Rule.

The authorities show that in order to establish substantial loss the applicant must satisfy certain clear conditions. In **Kenya Shell Ltd v Kibiru & Another Civil Appeal No. 97 of 1986** the court held:

> ***"The application for stay made before the High Court failed because the 1st of the condition was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself or because it would lose its money, if payment was made since the respondents would be unable to pay the money."***

I also consider the following observations of **Lord Staughton** in the case of **Linotype – Hell Finance Ltd v Baker [1992] 4 ALL ER 887** provide a useful guide in which his Lordship held as follows:

> ***"Where an unsuccessful defendant seeks a stay of execution pending an appeal to the Court of Appeal, it is a legitimate ground for granting the application that the defendant is able to satisfy. The court that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success."***

This dominant principle as a condition procedure for grant of stay of execution was taken up by the court in Nigeria in **Econet Wireless Ltd v Econet wireless Nigeria Ltd FHC/KD/C539/208** where the court held thus:

> ***"A consideration of some collateral circumstances and perhaps in some cases inherent matters which may, unless the order of stay is granted it would destroy the subject matter or foist upon the court, a situation of complete hopelessness or render nugatory any order of the court or paralyze in one way or the other the exercise by the litigant of his constitutional right or generally provide a situation in which whatever happens to the case and in particular even if the applicant succeeds, there would be no return to the status quo."***

Dealing with the duration in this application as construed in the affidavit, I ask myself of whether the positive part of the covenant that the chargor shall exercise its statutory power of sale under Section 90 (1) of the Land Act would not be rendered nugatory.

This means that the legal instrument is being alienated for the purpose for which it was expressly granted knowing this and the knowing of the existent of the legal charge and of the clauses to recall the entire loan amount which might lead to the forfeiture of registered rights in the land, no judicial tribunal property directing its record can or at least order stay of execution unless substantial breaches of the law have been shown. The exercise of the constitutional right on access to court must be balanced with other cannons in enabling statutes so as not to defeat delivery of substantive justice where issues can easily be distilled from the evidence presented by the parties.

In determining whether a matter can amount to substantial loss special emphasis on this issue was laid down by **Gikonyo J** in **James Wangalwa & another v Agnes Naliaka Cheseto HC MISC 42 OF 2012** where he held:

> ***"No doubt, in law, the fact that the process of execution has been full in motion, or is likely to be put in motion by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say the attached properties have been sold as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rule. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or …the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein v Chesoni the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."***

In general, I would agree with this legal principle. However, in this case certain unusual features did emerge from the procedural history of the matter. Each case has to be decided on its own facts. In the circumstances of this case at one time the court ordered the applicants to continue servicing the loan repayments notwithstanding the filing of the suit against the respondents. There was certainly sufficient material for **Weldon J** to have exercised his discretion on 11.12.2018.

For some reason which is not apparent from the record no cogent evidence was led and in the considered ruling made by this court why the order was not complied with by the applicants. That until the order is varied or set aside, even though made before the ruling of this court dated 25th July 2019, on interlocutory injunction remains prima facie binding on the parties.

In my opinion, the applicant was entitled to present the court with evidence that with regard to the mortgage contract it would unreservedly suffer irreparable harm not compensable by way of damages. It will be true that the applicant has a right to access courts by way of an appeal but as correctly founded the administration of justice is a balancing act by a court of equity judge with the responsibility to ensure enforcement of private Law rights.

The additional test of relevance to this case is for the court having considered all the threshold issues in a matter to see to it that there is no likelihood or prejudice or injustice to be occasioned in the event the grant of stay of execution is granted. The 1st respondent having pleaded breach of the mortgage agreement and went ahead to invoke the statutory power of sale it was incumbent upon the applicant to show that he will be prejudice or suffer injustice. It may well be that the primary purpose of Order 42 Rule 6 of the Civil Procedure Rule is to meet the kind of remedies the applicant finds itself struggling with at the moment. But quite apart from the arguments and submissions on the various aspects of the notice of motion the applicant has not even attempted to propose such security or undertaking for damages for due performance of the decree which might arise at the end of it all on appeal.

This means that the writ of stay of execution sought by the applicant fails for lack of merit with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF OCTOBER 2019.

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R. NYAKUNDI

JUDGE

In the presence of:

Waithera for Ngoya for the respondent.