

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL SUIT NO. 8 OF 2018

JOSEPH MUTHURI & 32 OTHERS.....APPLICANTS

-V-

COOPERATIVE BANK LIMITED & 15 OTHERS.....RESPONDENTS

RULING

1. Before me is a Notice of Motion dated 1st November 2018, which is expressed to be brought under **Order x1 of the Civil Procedure Rule section 1(a)1 (sic) of the Civil Procedure Act**. The applicants seek an order of stay of execution of the ruling and order dated 26th September, 2018.

2. The second order which the applicants seek is an order **“to substitute the matter to read civil case No.8 of 2018 formerly NTIMINYAKIRU RURAL SACCO SOCIETY LTD High court ELC case No. 258 of 2016 for an error apparent on court record and negligence or omission during filing of the same ”**.

3. The application is based on the grounds of the face of it and the supporting affidavit sworn by Joseph Muthuri on 1st November, 2018. These are, inter alia, that the applicants had filed a notice of intention to appeal against the ruling delivered on 26th September 2018; that the applicant was waiting for certified proceedings; that the respondents **‘may implement sale by auction order before determination of the appeal’** and that unless an order of stay is issued, there would be failure of justice and the applicants would suffer irreparable loss and damages.

4. When the matter came up for hearing on 14th November 2018, Mr. Muthuri who appeared in person stated that he was relying on the affidavit in support and the grounds on the face of the motion. On the other hand, Mr. Marete for the respondents submitted that there was no positive order capable of being stayed as the impugned ruling of 26th September 2018, was a dismissal. Consequently, he urged the court to dismiss the application.

5. I have carefully considered the affidavits on record and the rival contentions by the parties. In their application dated 29th March 2018, the applicants had sought a temporary injunction to restrain the respondents from auctioning or selling **L.R MERU MUNICIPALITY BLOCK 11/268** pending the hearing and determination of the suit. The application was dismissed on 26th September, 2018. In that ruling, the court only dismissed the application and did not order the doing of or refraining from doing anything. An order of dismissal is negative in nature.

6. In **Kanwal Sarjit Singh Dhiman –Vs- Keshavji Jivraj Shah [2008] eKLR**, while dealing with the issue of stay of a negative order, the Court of Appeal 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).” (Emphasis mine)

7. Similarly, in **Raymond M. Omboga vs. Austine Pyan Maranga Kisii HCCA No. 15 of 2010, 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...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 do not arise... 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 applicant’s appeal is against the order of dismissal of his application, yet the stay sought is against the subordinate court’s judgement or decree.”

8. This perfectly applies to the matter before court. In its ruling appealed against, the court did not order any party to do or refrain from doing any particular act. It merely dismissed an application for a temporary injunction. There is therefore no positive order capable of being

stayed. Prayer 1 of the Motion fails.

9. As regards prayer 2, the same was so ungodly worded that the court was unable to comprehend what the applicants were seeking. With its muddled nature, the same cannot be executed if it was granted. Accordingly, the same likewise fails.

10. Accordingly, the applicants' application dated 1st November 2018, is without merit and the same is dismissed in its entirety.

DATED and DELIVERED at Meru this 29th day of November, 2018.

A. MABEYA

JUDGE