



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NUMBER 208 OF 2004

NAKURU TEACHERS HOUSING

CO-OPERATIVE SOCIETY LTD..... PLAINTIFF

VERSUS

WANJOYA ENTRPRISES LIMITED.....DEFENDANT

AND

NINE SISTERS LIMITED.....OBJECTOR

RULING

1. Further to the court's ruling dated the 6th April 2017 that granted the Respondent/plaintiff an order to attach and advertise for sale property known as **L.R. NO. MITI MINGI/MBARUK BLOCK 8/1604** to recover the decretal sum to the plaintiff in the sum Kshs.60,275,000/= as at 18th June 2015, the objector has brought the present application dated 11th April 2017, based on the provisions of **Section 3A, & 63 (e) of the Civil Procedure Act and Order 42 Rule 6 and Order 51 of the Civil Procedure Rules.**

2. The applicant seeks the following orders:

1. Spent

2. Spent

3. That the court be pleased to grant a stay of execution of the ruling of 6th April 2017 and any consequential decree made against the applicant pending hearing and determination of the applicants Appeal filed against aid ruling.

4. Costs of the application be provided for.

3. The grounds relied on are that the applicant has filed an appeal vide **Notice of Appeal dated the 11th April 2017** and filed on the same day against the said ruling, and that if execution effected, the appeal will be rendered nugatory for which the applicant will suffer substantial and irreparable loss. An affidavit in support is also filed and sworn by Maina Wanjigi on the 11th April 2017.

4. Ms. Wambui Gathara Advocate for the applicant citing the case **Joseph Simiyu Mukenya -vs- Agnes Nakiaka Cheseto (2012) e KLR** submitted that the application was brought without unreasonable delay and that the applicant is ready to offer security of another land parcel of equal value to the parcel under

threat of attachment and sale and to abide by any conditions that the court may give.

5. Ms. Nancy Njoroge in opposition to the application relied on a Replying Affidavit sworn by Solomon Kibaki the Secretary of the Respondent on the 20th April 2017.

It is deponed that the applicant did not disclose the particulars of the security it wishes to offer and that in the past, it has failed to honour all promises to pay the decretal sum and that the alleged substantial loss that may be occasioned should execution proceed is not disclosed.

6. It is further submitted that the land being offered as security is not disclosed and no valuation report has been evidenced and therefore no genuinity by the applicant has been shown coupled with the past conduct that all attachable assets were hidden away after proclamation. The respondent however was comfortable if the full decretal sum where to be deposited in court as security.

7. **Order 42 rule 6(2) of Civil Procedure Rules** provides the conditions that a party ought to demonstrate before orders of stay of execution may be granted, that:

(a) Substantial loss may result to the applicant unless the order is granted.

(b) That the application has been brought without undue delay.

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

8. The application has been brought timetiously within 5 days of the ruling.

The matter of substantial loss has been discussed in numerous decisions. It is the cornerstone of such application as what is sought to be preserved, if sold or damaged may render the appeal nugatory.

See **James Wangalwa & Another -vs- Agnes Naliaka Cheseto (2012) e KLR. J. Gikonyo** in the decision rendered that:

“-----the process of execution in itself does not amount to substantial loss, not even when execution has been levied and property sold does not in itself amount to substantial loss under Order 42 Rule 6 of Civil Procedure Rules, as execution itself is a lawful process. He further continued that the applicant must establish other factors which will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal.---”

9. The decree in the present application is a money decree. The applicant has to sufficiently demonstrated what substantial loss it would suffer if the property is sold. The only way of showing or establishing substantial loss in a money decree is by showing that the decree holder may not be able to pay back the money should the appeal be successful.

The applicant did not submit or allege such of the respondent to enable the respondent discharge its burden of establishing that it is able.

See **Equity Bank Ltd -vs- Taiga Adams Co. Ltd (2006) e KLR**

10. The court's discretion to grant an order of stay was invoked. However that discretion ought to be judiciously exercised, the conditions set out under **Order 42 Rule 6 of Civil Procedure Rules** ought to be demonstrated together with a demonstration on how execution of a monetary decree will render the appeal nugatory.

See **Hassan Guyo Walako -vs- Straman EA Ltd (2013) e KLR.**

All the conditions by necessity must be met and failure to demonstrate one of them dislodges the other.

11. A successful party in litigation is entitled to reap the fruits of its judgment unless the conditions stated above are met, such that the delay in the enjoyment by an order of stay or execution does not also prejudice its interests. Justice before the Law cuts both ways, and ought to be applied fairly to both the applicant, and the Respondent. In doing so, the court is under an obligation, donated by **Section 1A, 1B and 3A of the Civil Procedure Act and Article 159 of the Constitution 2010**, to facilitate the just expeditious proportionate and affordable resolution of Civil disputes. See also **Section 3A of the Civil procedure Act**.

Admittedly, the right of appeal to any party in a suit is a Constitutional and legal right. It should however not be made to oppress a successful party by unfairly blocking enjoyment of its Judgment by an order of Stay of execution.

See **Antoine Ndiaye -vs- African Virtual University (2015) e KLR**

12. For the above reasons, and after taking into account all relevant factors and more so that there is no appeal filed against the judgment in the suit delivered on the 29th January 2015, and the consent order by the parties to the suit thereafter on the 18th June 2015 acknowledging the monetary value of the judgment as Kshs.60,275,000/= all inclusive and there being no sufficient and demonstratable security offered by the applicant for the due performance of the decree pending appeal on the ruling dated the 6th April 2017, it is my finding that the application lacks merit.

13. However, considering that the respondents were comfortable if the decretal sum is deposited in court, I shall, and for the ends of justice to be met and to secure the decretal sum pending hearing and determination of the appeal, make the following orders:-

1. That the full decretal sum of Kshs.60,275,000/= as at 18th June 2015

a) Be secured by furnishing a bank guarantee for the said decretal sum by the applicant from a reputable bank to be agreed by both parties within 30 days of this order.

(b) None compliance and or default shall render the conditional stay of execution order to lapse.

(c) The applicant is condemned to pay costs of the application.

Dated, Signed and Delivered this 23rd Day of May 2017.

J.N. MULWA

JUDGE