



Angwenyi v Co-operative Bank of Kenya (Environment & Land Case 1133 of 2016) [2023] KEELC 22078 (KLR) (6 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22078 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 1133 OF 2016**

M SILA, J

DECEMBER 6, 2023

BETWEEN

ANDREW MOKAYA ANGWENYI PLAINTIFF

AND

CO-OPERATIVE BANK OF KENYA DEFENDANT

RULING

1. The application before me is that dated 24 May 2023 filed by the plaintiff. The applicant seeks the following orders :-
 - i. Spent (certification of urgency)
 - ii. There be a stay of execution of statutory power of sale of land parcel Kisii Municipality/Block III/117 pending the hearing and determination of this application inter partes.
 - iii. In the alternative, there be stay of execution of the judgment and decree of this court given on 22 July 2021 pending the hearing and determination of Civil Appeal No. E159 of 2022 in the Court of Appeal at Kisumu.
 - iv. The court be pleased to direct the respondent to render a true and accurate account of Bank Account No. 016**** in the name of the applicant from 25 May 2005 until 18 February 2013.
 - v. The defendant/respondent's overdraft statement for account No. 016**** in the plaintiff/applicant's name be declared illegal, null and void.
 - vi. The honourable court be pleased to order the respondent to render true and accurate account of bank account No. 016**** from 10 July 2005 to date.
 - vii. This Honourable Court be pleased to direct and/or order the respondent to render true and accurate account for bank account No. 016**** as at 17 January 2006.



- viii. The notification of sale dated 6 June 2022 be declared null and void.
 - ix. The costs of and incidental to this application be provided for.
 - x. Any other suitable orders and/or directions be granted and/or given.
2. The application is opposed and before I go to the gist of it, I think it is important that I provide the background leading to the same.
 3. The applicant commenced this suit through a plaint filed on 16 December 2008. In it, he averred that he offered the land parcel Kisii Town/Block III/117 (the suit property) as security for a loan advanced by the respondent in October 1993. The title was thus charged to the respondent to secure the monies lent. He averred that he received money on two other occasions with the property as security until 14 November 2005 when the charge was discharged and the original certificate of lease released to him after discussion between him and the bank and that the bank agreed to waive the entire loan balance at the time. He complained that on 4 June 2008, the respondent engaged a firm of auctioneers who issued to him a demand letter to pay Kshs 13, 027,874.85/= in order to redeem the property. The demand was accompanied with a notification for sale for an auction intended for 15 August 2008. He averred that he approached the respondent who stopped the sale. However, another notice to sell was issued on 17 November 2008 informing the applicant that the property would be sold on 19 December 2008. It is this which prompted him to come to court seeking orders of injunction to stop the respondent from selling the suit property, damages, costs and interest.
 4. The respondent filed defence where she acknowledged lending the applicant money and charging the suit property as security. She denied waiving the loan or discharging the property. She pleaded being dumbfounded that the title has been discharged and contended that the purported discharge was fraudulently procured. She admitted instructing an auctioneer to sell the property owing to non-payment of the loan.
 5. It is on the basis of the above pleadings that the matter went to trial culminating in a judgment delivered on 22 July 2021 by Onyango J. In her judgment, the good judge framed the following issues :-
 - i. Whether the plaintiff is still indebted to the defendant.
 - ii. Whether any fraction of the loan was waived by the defendant in November 2005.
 - iii. Whether there was a valid discharge of charge of the title.
 - iv. Whether the cancellation of the discharge of charge and reinstatement of the charge was valid.
 - v. Whether the plaintiff is entitled to the reliefs sought.
 6. On the first issue, the judge found that the applicant had not proved that he had repaid the loan in full and he was thus still indebted to the respondent. On the second issue, the judge found that no part of the loan had been waived. On the third issue, the judge held that there was no valid discharge of charge registered. On the fourth issue, she held that the Land Registrar lawfully cancelled the entry that there had been a discharge of charge and was correct in reinstating the charge in the register. On the last issue, the judge was not persuaded that the applicant had made out any case and proceeded to dismiss his case with costs. Aggrieved, the applicant filed a Notice of Appeal on 3 August 2021.
 7. On 12 July 2022, the applicant filed an application seeking to have the respondent restrained from selling the suit property in exercise of her statutory power of sale and for a notification of sale served on 6 June 2022 to be declared illegal. The respondent filed a reply to that application. The applicant filed another application on 31 January 2023 seeking orders to have the respondent ordered to render



a true statement of accounts on the account No. 016**** from 19 July 2005 to date. On 14 February 2023, Mr. Bosire Gichana, learned counsel for the applicant, withdrew the two applications, stating that he would file one consolidated application. It was then that this application was filed and I have already pointed out the orders sought.

8. The application is based on grounds inter alia that the respondent wishes to exercise her statutory power of sale to claim Kshs 23,200,500/= when the contract was pegged at Kshs 13,000,000/= with zero interest. It is contended that the respondent is thus claiming a wrongful and illegal amount. The applicant also complains that the bank statements furnished by the respondent are incomplete and contradictory and that the amounts quoted in letters and notices to the applicant do not tally with the bank statements. He adds that the amount being claimed does not take into account the amounts paid. He further contends that the overdraft account No. 016**** is illegal. He has stated that after the judgment he was admitted at Oasis Hospital ailing from High Blood Pressure and High Sugar levels which took a long time to control. As a sign of good faith, he is willing to be depositing Kshs 108,000/= every month until the appeal is heard and determined.
9. The application is opposed by the replying affidavit of Duncan Matisero, a Legal Manager of the defendant. He believes that the application is misplaced since the proceedings herein are already concluded and further in view of the pending appeal before the court of appeal. He asserts that this court is *functus officio*. On whether the applicant deserves stay, he has deposed that after the judgment the respondent issued the applicant with a notification of sale dated 27 August 2021 where the applicant was given 40 days to pay the sum of Kshs 19,363,711.78/=. He defaulted and the applicant engaged an auctioneer who issued a 45 days notice of sale dated 6 June 2022. At this time the amount had gone up to Kshs 23, 200,500/=. He asserts that the respondent is entitled to proceed with the sale. He adds that the judgment was a negative order of dismissal and incapable of being stayed. He further adds that the applicant has not met the three conditions for stay pending appeal. He avers that there has been unreasonable delay inter alia since judgment was delivered on 22 July 2021 and this application was filed on 24 May 2023. He points out that the appeal before the Court of Appeal was filed on 1 July 2022 more than 10 months ago. He does not think that the applicant has demonstrated any proof that he will suffer substantial loss. On security he asks the court to reject the proposal to deposit Kshs 108,000/= every month. He does not think that any of the orders sought ought to be granted.
10. I invited counsel to file written submissions and also gave them opportunity to make oral highlights. I have taken these into account before arriving at my decision.
11. This is a fairly omnibus application. One limb of the application seeks orders to have the respondent provide the true statement of accounts for the account No. 016****. Another part of the application seeks to declare the intended sale of the property as null and void. The third limb of the application seeks stay pending appeal.
12. I agree, with Mr. Nicholas Bosire, learned counsel for the respondent, that this court is *functus officio* in so far as taking accounts is concerned. The trial court canvassed the issue of whether the applicant had paid the loan and the judge found that he had not so paid. It is not now for this court to revisit that. Indeed, the applicant has already exercised his right to appeal to the Court of Appeal. I cannot now issue orders for accounts to be rendered. In his submissions, Mr. Bosire Gichana, learned counsel for the applicant, submitted that a court is at liberty to take accounts even after judgment. I agree, but that would be where there has been judgment for accounts to be taken, which can then be taken subsequently. In our case there was never any order sought in the plaint regarding furnishing of statements of accounts and there was never any judgment requiring the parties to take accounts. I cannot therefore now issue orders regarding accounts. The second limb of the application is also unmerited. The case of the applicant was dismissed and the court declared that the charge still subsists.



It follows that if the respondent is of opinion that she is unpaid, then she has a right to sell the suit property in exercise of her statutory power of sale. If the applicant has a problem with the amounts stated in the notification of sale, that is not an issue to be canvassed within these proceedings, which are already concluded as pointed out by the respondent. There is no substance in asking this court to declare null and void the notification of sale issued on 6 June 2022.

13. This brings me to the last limb of the application relating to stay pending appeal. This is addressed in [Order 42 Rule 6\(2\)](#) which provides as follows :-

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) 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.

14. From the above, it will be observed that the court ought to consider three issues when addressing an application for stay of execution pending appeal. These are :-

(i) That the application has been made without unreasonable delay;

(ii) That the applicant satisfies the court that she stands to suffer substantial loss if the order for stay is not made;

(iii) That there is provision of security as the court may order for the due performance of the decree.

15. Starting with the issue of delay, this application was filed on 24 May 2023. The impugned judgment was delivered on 21 July 2021. That is just about two months shy to two years. That, is a considerable length of time. The applicant has tried to explain this delay by saying that he was admitted in hospital suffering from High Blood Pressure and High Sugar levels and that he had at some point tried to donate a power of attorney which ate up the time. I am not convinced. First, as pointed out by the respondent, no medical notes were attached. In any case, the applicant was well enough to instruct counsel to file the appeal at the Court of Appeal which was filed in July 2022. Why didn't he file this application at that time? Whichever angle you look at it, this application has been filed after unreasonable delay and must fail on that ground. I need not go to the other limbs of the application since the applicant has already stumbled and fell at the first hurdle.

16. It will be seen from the foregoing that I see no merit in this application and it is hereby dismissed with costs. The interim orders that had earlier been issued are hereby vacated.

17. Orders accordingly.

DATED AND DELIVERED AT KISII THIS 6 DAY OF DECEMBER 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

In the presence of: -

Mr. Bosire Gichana for the applicant

N/A on part of M/S Moronge & Co. for the respondent

