



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HIGH COURT CIVIL APPEAL NO. 233 OF 2016

JAMILA OYOO CHANZU.....APPELLANT

VERSUS

EQUITY BANK LIMITED.....1ST RESPONDENT

CAPITAL CONSTRUCTION CO. LTD.....2ND RESPONDENT

(Being an appeal from the Ruling of Hon. Obulutsa, Senior Principal Magistrate

delivered on 10th February, 2015)

BETWEEN

JAMILA OYOO CHANZU.....PLAINTIFF

VERSUS

EQUITY BANK LIMITED.....1ST RESPONDENT

CAPITAL CONSTRUCTION CO. LTD.....2ND RESPONDENT

RULING

The appellant herein filed a Notice of Motion under Sections 1 A,1B and 3A of the Civil Procedure Act, wherein an order is sought that pending the determination of the appeal the respondents be restrained from taking possession leasing, subleasing or interfering with property known as LR no. 1098/6 (LR No. 66702(Nairobi)).

The reasons for seeking such an order are that the respondents have issued a notification of sale, and the appellant lives and occupies the suit property with their family. The Respondents are said to have invoked a redemption notice which was suspended by a lawful court order and above all the charge on the property is illegal, unlawful and fraudulent. In any case, the appeal raises arguable grounds with high chances of success on merit and damages will not be sufficient to compensate the appellant of the loss.

The application is opposed by the respondents. Following service, the respondents have raised a Notice of Preliminary Objection stating that the proceedings before this court are fatally defective having been commenced *per incurriam* in violation of section 7 of the Civil Procedure Act Cap 21 and are therefore

an abuse of the court process.

Counsel have filed submissions. When this matter came up for hearing on 27th June, 2016, the issue raised by both counsel was whether or not a stay should be granted by the court. The application before me should have been filed under Order 42 Rule 6 of the Civil Procedure Rules which I shall address shortly hereunder.

I have taken some time to go through material presented before me. It is clear that this is not the first time the property in question is the subject of litigation. I say so because, there had been applications in the past which have been considered by the High Court and the Court of Appeal. In particular, there was Civil Application No. 251 of 2013 before the Court of Appeal which addressed a decision of the High Court (Mutava J) wherein stay of execution was denied.

In that application one Yusuf Kifuma Chanzu was the applicant while in this application Jamila Oyoo Chanzu is the applicant. The latter is the spouse of the former. Whatever the case, the substratum is the charge where the said property was the subject matter. Whether or not the present applicant has an arguable appeal is a matter to be considered at the time when the appeal is heard but for now, and both counsel agree, the issue is whether or not security has been provided pending that appeal.

In the application before me no security has been pleaded or offered in line with Order 42 Rule 6 (2)(b). There is evidence that the husband of the present applicant had in the past been allowed to post security to secure an order for stay. That order however, was never obeyed to the detriment of the respondents.

Even in this application, the respondents are prepared to concede the application provided security is offered. Time is of the essence and the request by the appellant for 45 days is not appealing to the respondents or the court. Although the parties are different, their relationship compels the court to observe that having there been default on the part of the husband there is no guarantee that the spouse will honour such an undertaking. In any case, the Court of Appeal having in the past declined to order a stay, it is not within this court to revisit the matter considering the provisions of Section 7 of the Civil Procedure Act.

I am not persuaded that a stay should be granted and therefore decline to allow the same. I must add however that, the respondents having offered to concede the application if security is posted, I shall allow the applicant to post such a security any time before the fall of the hammer. No order as to costs.

Dated, signed and delivered at Nairobi this 28th Day of June, 2016.

A. MBOGHOLI MSAGHA

JUDGE