



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC CASE NO. 27 OF 2019

JOSEPHINE NDERU..... APPLICANT/PLAINTIFF

-VERSUS-

BANK OF BARODA LTD.....1ST RESPONDENT/DEFENDANT

SKYHEIGHTS DEVELOPMENT LTD.....2ND RESPONDENT/DEFENDANT

PAPEAS LEWIS NDERU KINYANJUI.....3RD RESPONDENT/DEFENDANT

COUNTY LAND REGISTRAR

UASIN GISHU COUNTY..... 4TH RESPONDENT/DEFENDANT

THE ATTORNEY GENERAL.....5TH RESPONDENT/DEFENDANT

SEVENTY SEVEN AUCTIONEERS.....INTERESTED PARTY

RULING

1. This is a Ruling in respect of three related Applications all brought by the Plaintiff and a Preliminary objection brought by the 1st and 2nd Defendants.
2. The first Application is dated 13th July, 2021 and it seeks the following orders;-
 - 1) Spent
 - 2) Spent
 - 3) A stay of execution of the award delivered on 14th April, 2021 do issue pending the hearing and determination of the suit.
 - 4) The Arbitral proceedings and award be quashed.
 - 5) All necessary and consequential directions do issue.
 - 6) The costs of this application be provided for.
3. The second application is dated 16th September, 2021 and it seeks the following orders;
 - 1) Spent.
 - 2) **An injunction** do issue restraining the Respondent's agents, servants and or employees from interfering, transferring and or assigning **ELDORET MUNICIPALITY/BLOCK21 (KING'ONG'O) 4607-4619, 3338 & 33359.**
 - 3) Spent.

4) **A stay of execution** of the award dated 14th April, 2021 in Arbitration Case No.1 of 2019 between Skyheights Development Company Limited Vs. Papeus Lewis Nderu do issue pending the hearing and determination of this suit.

5) The Registrar of Lands be restrained from effecting any changes and or alterations in the suit properties titles pending the determination of this suit and this application

6) All necessary and consequential directions do issue.

7) The costs of this application be provided for.

4. The third Application is dated 24th September, 2021 and it seeks the following orders:-

1) Spent.

2) Spent.

3) **An injunction** do issue restraining the 2nd Respondent and the Interested Party's agents, servants and or employees from demolishing and or dealing in any way with the Applicant's matrimonial house that sits on **ELDORET MUNICIPALITY/BLOCK 21 (KING'ONG'O) 4607-4619, 3338 AND 3359** pending the hearing and the determination of this suit.

4) Spent.

5) **An injunction** do issue restraining the 2nd Respondent and the Interested Party agents, their agents, servants and or employees from taking over the possession of the Applicant's matrimonial home that sits on **ELDORET MUNICIPALITY/BLOCK 21 (KING'ONG'O) 4607-4619, 3338 & 3359** pending the hearing and the determination of the suit.

6) Spent.

7) **An injunction** do issue restraining the 2nd Respondent and the Interested Party's agents, servants and or employees from selling, alienating or in any way disposing of the attached matrimonial movable properties pending the hearing and the determination of the suit.

8) Spent.

9) **An injunction** do issue restraining the 4th Respondent, THE COUNTY LAND REGISTRAR – UANSIN GISHU COUNTY from effecting any changes or any alteration on the ownership documents of the matrimonial property **ELDORET MUNICIPALITY/BLOCK 21 (KING'ONG'O) 4607-4619, 3338 & 3359** pending the hearing and the determination of the suit.

10) All necessary and consequential directions do issue.

11) The costs of this application be provided for

5. The Preliminary Objection by the 1st and 2nd Defendant is based on the following grounds;

i. This Application is incompetent in so far the same is SUB JUDICE as similar Applications are still pending in the file.

ii. The Application as incompetent and an abuse of process of court.

BACKGROUND

6. The Plaintiff is the wife of the 3rd Defendant. The suit herein was triggered by a Sale Agreement between the 2nd and 3rd Defendant over LR.No. **ELDORET MUNICIPALITY/BLOCK 21 (KING'ONG'O) 4607-4619, 3339 & 3338** (suit properties) their subsequent registration in favour of the 2nd Defendant and eventual charging to the 1st Defendant.

7. The Plaintiff contends that the Sale Agreement, transfer and charge documents are void *ab initio* for want of spousal consent. During the pendency of this suit, there were arbitration proceedings going on between the 2nd and 3rd Defendants in **Arbitration Dispute No. 1 of 2019** arising from the Sale of the suit properties.

8. The Arbitral award was given on 14th April, 2021. The award was subsequently adopted as judgment of the court and execution of the decree commenced. This is what prompted the Plaintiff to file some of the applications under consideration in this Ruling. I will first deal with the issue of sub judice before I move on to the three Applications which I shall deal with together as they are related.

Whether the Present Applications are sub judice

9. The doctrine of sub judice is predicated on Section 6 of the Civil Procedure Act which provides as follows;

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

10. The Plaintiff had filed a notice of motion dated 22nd February, 2019 in which she sought injunction orders against the Defendants among other orders. The Application was argued ex-parte on 22nd February, 2019 before Justice Ombwayo who ordered that the status quo in respect of the suit properties was to be maintained until the application was heard. He further directed that there was to be no dealings over the suit properties.

11. While the Application dated 22nd February, 2019 was pending, the Plaintiff filed a notice of motion dated 18th June, 2020 seeking to stay proceedings in Arbitration Dispute No.1 of 2019. This Application was however abandoned on 24th September, 2020 and was later withdrawn vide withdrawal notice filed on 11th February, 2021.

12. The Plaintiff again filed a Notice of Motion dated 10th February, 2021 in which she sought stay of proceedings in Arbitration Dispute No.1 of 2019. This Application was withdrawn on 21st July, 2021.

13. The Plaintiff yet again filed a Notice of Motion dated 26th February, 2021 in which she sought to stay proceedings in Arbitration Dispute No. 1 of 2019. The Application was withdrawn on 21st July, 2021.

14. It is therefore, clear that there is only one previous Application pending which has never been prosecuted. This is the Application dated 22nd February, 2019. The pending Application seeks similar reliefs as the ones sought in the Notice of Motion dated 16th September, 2021 as well as the one dated 24th September, 2021.

15. It is therefore clear that these subsequent Applications are sub judice. Section 6 of the Civil Procedure Act refers to suits and Proceedings. For purposes of this Ruling, any applications filed fall under proceedings. The Plaintiff should not have filed the present applications when a similar one filed previously was still pending. It does not help the Plaintiff who claims that the application of 22nd February, 2019 was abandoned as it had been overtaken by events yet in the same breath claim that orders arising from that application were flouted.

The Three Applications

16. It is clear from the three applications that the Plaintiff filed each one of them as the circumstances in the suit kept changing. The 2nd Defendant was registered as owner of the suit properties on 13th April, 2016. The suit properties were charged to the 1st Defendant on the same date to secure a sum of Kshs.60,000,000/=

17. The 2nd Defendant thereafter started the process of executing a decree arising from Arbitration Dispute No.1 of 2019. The award had ordered that the 3rd Defendant do refund the 2nd Defendant a sum of **Kshs.23,476,850/=** which was an overpayment as a result of sale of the suit properties. The 2nd Defendant instructed the Interested Party to auction the 3rd Defendant's properties to recover the amount due to it.

18. The Plaintiff contends that she was not party to the Arbitral proceedings yet the execution process is affecting her as the 2nd Defendant is intent on taking up her matrimonial home which lies on the suit properties. It is her contention that the alleged spousal consent was a forgery as she did not sign any.

19. The Plaintiff further contends that if her matrimonial home is taken away, she will be rendered destitute as he has nowhere to go to. She further contends that the 2nd Defendant has threatened to demolish her matrimonial house which will greatly affect her as she has lived in the same for over three decades.

20. The Plaintiff wants the 4th Defendant to be restrained from effecting any changes in the register in respect of the suit properties. The Plaintiff seeks to have the process of execution of the decree in Arbitration Dispute No.1 of 2019 stayed. She argues that auctioneers had gone to her home and proclaimed various movable goods.

21. The 2nd Defendant opposed the Plaintiff's application based on a replying affidavit sworn on 5th October, 2021. The 2nd Defendant contends that the applications filed herein are only intended to vex it as the Plaintiff has filed similar applications before some of which have been withdrawn and another is still pending hence the current applications are sub judice.

22. The 2nd Respondent states that the three applications have been overtaken by events as the matrimonial house was demolished by the 3rd Defendant and that the execution process has been completed and the 2nd Defendant has taken over full possession of the suit properties which it has fenced.

23. The movable properties which the Interested Party proclaimed have since been sold. The 2nd Defendant further states that it cannot sell the suit properties as they are still charged to the 1st Defendant. The 2nd Defendant further argued that the Plaintiff cannot seek to stop proceedings where she was not Party to or even stop sale of goods belonging to the 3rd Defendant.

24. The 3rd Defendant filed two Replying Affidavits sworn on 25th October, 2021 both of which support the Plaintiff's application. The 3rd

Defendant blames the arbitrator in Arbitration Dispute No. 1 of 2019 whom he blames for proceeding with the arbitration despite being aware of this case. He claims that he has never seen the award and does not know what it stated. He states that the 2nd Defendant is intent on demolishing their matrimonial house and that auctioneers have attached movable goods some of which belong to his clients.

25. The 1st Defendant filed a Replying Affidavit sworn on 27th October, 2021 in which it states that the suit properties are charged to it to secure a loan of Kshs.60,000,000 which is being serviced by the 2nd Defendant. The deponent of the Affidavit states that the issue of sale of the suit properties does not arise as the 2nd Defendant has not defaulted in any payment.

26. The parties were directed to file written submissions in respect of the three applications and the preliminary objection by the 1st and 2nd Defendants. The 3rd Defendant indicated that he did not wish to file any submissions. The Plaintiff filed her submissions dated 19th October, 2021. The 1st and 2nd Defendants filed their submissions dated 8th November, 2021.

27. I have carefully considered the Plaintiff's Applications as well as the opposition to the same by the 1st and 2nd Defendants and the submissions of the parties. The issues which emerge for determination are firstly, whether a stay of the execution of the decree arising from Arbitration Dispute No.1 of 2019 should be granted or the proceedings resulting to the decree quashed. Secondly, whether an injunction should be given in the manner prayed for. Thirdly, whether the Land Registrar, Uasin Gishu County should be barred from effecting any changes in the register regarding the suit properties. Lastly which order should be made on costs.

28. The Plaintiff was seeking to stay execution of the decree arising from Arbitration Dispute No.1 of 2019. The execution process has since been carried through. The 2nd Defendant is in full possession of the suit properties which have been fenced. The matrimonial house has already been demolished by the 3rd Defendant himself. The submissions by the Plaintiff confirm that the matrimonial home is no more. The 3rd Defendant who is the husband of the Plaintiff did not deny the averments by the 1st and 2nd Defendants that he is the one who demolished the matrimonial house.

29. The attached movable properties have since been sold by the Interested Parties. The motor vehicles which the 3rd Defendant claimed belonged to his clients were sold and no objection proceedings were filed by any of the alleged owners.

30. The suit properties are charged to the 2nd Defendant which is servicing the loan. There is therefore no danger that the 1st Defendant will sell the suit properties.

31. It is clear from the arbitration award that the 3rd Defendant had tried to rescind the sale agreement and refund the monies paid by the 2nd Defendant for the purchase of the suit properties but he did not succeed. The 3rd Defendant even attempted to claim that the spousal consent was forged without any evidence to that effect.

32. The 3rd Defendant was being represented by the advocate who is now representing the Plaintiff. The Plaintiff is now claiming that the spousal consent was a forgery. Time will tell if it was indeed a forgery as claimed or not. A court of law cannot give orders in vain. It has been admitted that whatever was meant to be preserved has already been overtaken by events.

33. The Plaintiff was not a party to the arbitral proceedings. She cannot seek to have the proceedings quashed. The decree from the arbitral award is lawfully being executed. Most of the decree has been executed. There is no good reason given to warrant this court to stop the Land Registrar from amending the register to show the correct position on the ground in respect of the suit properties. The suit properties were registered in the name of the 2nd Defendant way back in 2016. The same are charged to the 1st Defendant. The loan is being serviced by the 2nd Defendant. I therefore find no merit in the three applications which are hereby dismissed with costs to the 1st and 2nd Defendants. It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 20TH DAY OF JANUARY, 2022.

E.O. OBAGA

JUDGE

In the virtual presence of;

Mr. Chigiti for Applicant

Mr. Mwetich for 1st and 2nd Respondents

Court Assistant: Mercy

Hon. E.O. OBAGA

JUDGE

20.01.2022

