



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
LAND CASE NO.28 OF 2015

MALKIT SINGH PANDHAI.....PLAINTIFF

VERSUS

N.IC BANK LIMITED.....1ST DEFENDANT

JOSEPH GIKONYO T/A GARAM INVESTMENT2ND DEFENDANT

RULING

1. **Malkit Singh Pandhal**, the Plaintiff, filed the notice of motion dated 3rd March 2016 seeking for stay of execution of the order of 4th November 2015 pending the hearing and determination of this application, an order allowing the Plaintiff to liquidate the sum arising from the ruling of 4th November 2015 in equal monthly instalments of Ksh.2,000,000/= with effect of 15th March 2016 until payment in full. The application is based on the seven grounds on its face and the supporting affidavit of **Malkit Singh Pandhal** sworn on 3rd March 2016.

2. The Application is opposed by **NIC Bank Limited and Joseph Gikonyo T/A Garam Investments**, 1st and 2nd Defendants respectively, through the affidavit sworn by Kelvin Mbaabu, a Manager Legal Services with 1st Defendant, sworn on 11th March 2016.

3. The plaintiff's counsel appeared before the Deputy Registrar on 3rd march 2016 and obtained interim stay orders. The counsel for the parties appeared before the Deputy registrar on 10th March 2016 and had the interim orders extended to 24th March 2016 when again the orders were extended to 3rd May 2016. The matter came before this court on 2nd June 2016 when the court directed that written submissions be filed. The Plaintiff's counsel filed their undated written submission on 13th June 2016 while the Defendants' counsel filed theirs dated 5th July 2016 on the 8th July. 2016.

4. The issues for determination are as follows:

- a) Whether the orders of the court of 4th November 2015 are capable of execution, and if so whether the plaintiff has made a case for an order of monthly installment payment.
- b) Who pays the costs.

5. The court has carefully considered the grounds on the notice of motion, the affidavit evidence by both

parties, the rival written submissions and come to the following findings;

a) That from the evidence availed, the submissions by counsel and the court's perusal of the ruling of this court of 4th November 2015, it is obvious that the subject matter of that ruling was the notice of motion dated 30th January 2015 in which the Plaintiff had among others sought for injunctive orders over land parcel **Kisumu Municipality/Block 8/204**, voiding of the Defendant's notices dated 27th June 2014, 1st October 2014 and 16th December 2014.

b) That the court ruled as follows in its ruling of 4th November 2015;

“ (f) That the fact that the Applicant (Plaintiff) disputes the interest and other fees charged on the loan by the 1st Respondent (1st Defendant) is not enough to make the 1st Respondent (1st Defendant) exercise of right of sale illegal so long as the loan facility has fallen into arrears. The charged property is a commercial property whose value is easily determinable and incase the applicant (Plaintiff) succeeds in any of the prayers, after the hearing of the main suit, appropriate order will be issued. The 1st Respondent (1st Defendant) is not said to be an institution of straw that is not capable of meeting any decree that is likely to be issued against it.

That for reasons set out above, the court find that there is no merit in the application dated 30th January 2015 and the same is dismissed with costs”

That the Plaintiff then filed the notice of motion dated 12th November 2015 seeking for stay of execution of the ruling and orders of 4th November 2015 pending appeal among others. That the application was heard and a ruling rendered on 3rd February 2016 by Kaniaru J, in which the court held as follows;

“ 10. The appeal, if successful, could well order compensation. But more important is the issue of security for it seems clear the borrower is in default. And if the Applicant's greatest argument is about defect and non-service of the statutory service – something that the ruling being challenged seems to have dealt with- I don't see a court of law forever protecting the applicant's land. Instead, it is more likely the case that a proper notice would be ordered to be properly served. The sale would then surely follow if default is not addressed.

11. I therefore take the position that the applicant has not persuaded the court well to grant him orders of stay. His application is silent on the issue of security and is not convincing on the issue of possible loss.

12. The application is therefore found unmeritorious and is hereby dismissed with costs.”

c) That the finding in (a) and (b) above on the rulings of 4th November 2015 and 3rd February 2016 clearly leaves no doubt that the issue of staying the ruling or order of 4th November 2015 is already decided on by this court which is a court of competent jurisdiction and hence res judicata in terms of **section 7 of the Civil Procedure Act**, Chapter 21 of Laws of Kenya. That it was therefore an abuse of the courts process for the Plaintiff to raise that prayer again, as he did in prayer 2, even if it was meant to last until the determination of the application.

d) That it is apparent the main prayer before this court in respect of the notice of motion dated 3rd March 2016 is prayer 3 which is reproduced herein below:

“3. That the Applicant (Plaintiff) be allowed to liquidate the sum arising and accruing under the ruling and order of this honorable court dated 4th November 2015 by equal

monthly installments of Kenya shilling two Million (Ksh.2,000,000/=) with effect from 15th March 2016 until full payment thereof”

That it is important to state from the outset that the court’s ruling of this court of 4th November 2015 was a negative one in the sense that it declined to grant the orders of injunction and voiding of the notices that the Plaintiff had sought. That the ruling of 4th November 2015 did not award anything capable of being stayed or executed. That it merely retained the parties to the position they were before the interim order in respect of the notice of motion dated 30th January 2015 was issued.

e) That further to the finding in (d) above the status of the ruling of 4th November 2015 echoes the position that this court pronounced itself on when dealing with a similar application in Kisumu ELC No.124 of 2013, **Cane Land Limited -V-African Banking Corporation Limited** as follows:’

“c. That the court ruling of 8th February 2016 did not amount at restoring or according the Defendant any right or interest that it did not possess before the ruling that can be stopped through an order of stay. The scenario before this court is more or less similar to that addressed by the Court of Appeal, whose decisions are binding on this court, in the case of Venture Capital Credit Ltd –V- Consolidated Bank of Kenya (supra) where the court declined to grant injunction of stay of the High Court order dismissing an application for injunction in the following words;

“.. the learned Judge never made any positive order in favour of the Respondent which is capable of execution, rather, the learned Judge merely dismissed the application for interlocutory injunction with the result that neither party was given any interlocutory relief.”

f)That this court ruling of 4th November 2015 did not contain any element of any money ordered to be paid by or to any of the parties. That there is no basis of the court being asked to consider allowing a party to pay the other any money in instalments. That can only arise where judgment for payment of money has been entered against one party and in favour of the other and decree issued. That there is no decree issued for money payment in this suit.

6. That flowing from the foregoing the court finds that, the Plaintiff notice of motion dated 3rd March 2016 is without merit and is dismissed with costs.

It is so ordered.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 19TH OF OCTOBER 2016

In presence of;

Plaintiff Absent

Defendant Absent

Counsel Mr Menezes for Plaintiff/Applicant

Mr Onyango for Onyikwa for Defendant/Respondent

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

19/10/2016

19/10/2016

Before S.M. Kibunja J.

Oyugi court assistant

Parties absent

Mr Menezes for Plaintiff/Applicant

Mr Onyango for Onyikwa for Defendant/Respondent

Court: The ruling dated and delivered in open court in presence of

Mr Menezes for Plaintiff/Applicant and Mr Onyango for Onyikwa for Defendant/Respondent.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

19/10/2016