



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO 131 OF 2011

THOMAS RATEMO OIRA.....PLAINTIFF

VERSUS

EQUITY BANK LIMITED.....DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion dated 24th September 2012 and filed on 26th September 2012 was brought under the provisions of Order 42 Rule 5 and Order 51 Rule 10 of the Civil Procedure Rules 2010 and Civil Procedure Act Cap 21 of the Laws of Kenya and all other enabling provisions of the law. It sought one main prayer being, that this Honourable Court be pleased to grant a stay of execution of the Ruling herein pending the hearing and determination of the Civil Appeal in the Court of Appeal.

THE PLAINTIFF'S CASE

2. The application was supported by the Plaintiff's Affidavit that was sworn on 24th September 2012. The Plaintiff's written submissions were dated 20th January 2014 and filed on 21st January 2014.
3. The Plaintiff's case was that the Defendant advertised his property without serving him with a Notification of Sale and that it had highly inflated the borrowed amount. It was his contention that there was no inordinate delay in making the current application, judgment having been delivered on 18th May 2012 and that the Civil Appeal had good chances of success. He said that he would suffer substantial loss and his appeal rendered nugatory if the Defendant was to sell his properties before the pending appeal was heard and determined. He therefore prayed that his application be allowed as prayed.

THE DEFENDANTS' CASE

4. In response to the application, on 15th October 2012, the Defendant filed the Replying affidavit sworn by Purity Kinyanjui on 12th October 2012. Its written submissions were dated and filed on 28th January 2014.
5. The Defendant's case was that the Plaintiff was guilty of unreasonable delay in filing the

- application. Further, that the said application was an abuse of the court process since the Plaintiff had not made any efforts to repay the loan since the time he filed the suit and that the Plaintiff filed the present application after it advertised his property for sale on 20th September 2012.
6. It was its contention that on 18th May 2012, the court dismissed the Plaintiff's application for injunction and that the Plaintiff was seeking the same orders through a different avenue. It therefore urged the court to dismiss the present application with costs to it.

LEGAL ANALYSIS

7. This court noted that the application was filed under the wrong provisions of law as was observed by the Defendant. However, under the provisions of Article 159 (2) (d) of the Constitution of Kenya, 2010, the court is mandated to administer justice without undue regard to technicalities. The provisions of Order 51 Rule 10 (1) and (2) of the Civil Procedure Rules provide that every order, rule or other statutory provision under or by virtue of which application is made must ordinarily be stated but that no application shall be refused merely by reason of failure to comply with the said rule and that no application shall be defeated on a technicality or for want of form that does not affect the substance of the application.
8. Indeed, an application for stay of execution by the High Court is premised on Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules and not Order 42 Rule 5 of the Civil Procedure Rules as had been indicated by the Plaintiff. However, in view of the aforesaid provisions, the court was of the view that the application could stand and need not be rendered defective.
9. The conditions are that an order for a stay of execution is generally granted if the applicant has successfully demonstrated that he will suffer substantial loss unless the order is made, that the application was made without unreasonable delay and that the applicant has provided sufficient security.
10. It is worthy to note that this court is not concerned with whether or not the Defendant's appeal has good chances of success or if the same would be rendered nugatory if the stay is not granted. That is within the jurisdiction of the Court of Appeal as can be seen in Rule 5 (2) (b) of the Court of Appeal Rules.
11. The Ruling the Plaintiff sought to appeal from was delivered on 18th May 2012 while the current application was filed on 26th September 2012. That was approximately four (4) months after the said ruling was delivered. The Plaintiff averred that the delay in filing the application for stay of execution was caused by the Honourable Judge who allegedly did not release the court file to the Registry.
12. Unfortunately, this allegation was unsubstantiated as there was nothing to show that the Plaintiff could not file this application due to unavailability of the court file, if indeed that was the position or that he had written to the Executive Officer seeking assistance to obtain the said file.
13. An application for stay should ideally be filed immediately or soon thereafter following the delivering of a ruling or Judgment. It therefore cannot be said that this application was filed on time particularly as the Plaintiff had been granted a temporary injunction for fourteen (14) days pending the filing of a formal application for stay of execution pending appeal.
14. In fact, the application was only filed after the Defendant advertised the subject properties for sale in realisation of its securities. It seems that this was what prompted the Plaintiff to move to court and file the current application. The court was not therefore satisfied that the Plaintiff had any reasonable or plausible explanation for the delay.
15. On the issue of substantial loss, the Plaintiff submitted that the properties charged in favour of the Defendant were family properties and that his parents were currently residing in the said properties. He further submitted that his parents were suffering from high blood pressure and any move by the Defendant to sell the said properties would make them to suffer serious injury. It was therefore his case that he would suffer irreparable damage if the orders sought were not granted.
16. The court can only sympathise with the Plaintiff's parents' conditions. However, he was aware that in the event of default in repaying the loan, the charged property would be subject of sale. His application for injunction was dismissed and the court therein held that there was no good reason for the Defendant to be restrained any longer from exercising its statutory power of sale. In that case, the court was of the view that the issue of substantial loss did not arise.
17. Evidently, the three (3) prerequisite conditions set out in Order 42 Rule 6 of the Civil Procedure

Rules, 2010 cannot be severed. The key word is “and”. It connotes that all three (3) conditions must be met simultaneously. The court therefore found that the Defendants had not made out a good case why this court should grant him a stay of execution pending appeal as he did not submit on the issue of security and/or provide sufficient any or at all.

18. As this very court held in the case of Siegfried Busch vs MCSK [2013]eKLR

“A superior court to which an application has been made must recognise and acknowledge the possibility that its decision for refusal to grant a stay of execution could be reversed on appeal. It would be best in those circumstances to preserve the status quo so as not to render an appeal nugatory. Even in doing so, the court should weigh this against the success of a litigant who should not be deprived of the fruits of his judgment...”

19. In the case of Kenya Shell Limited vs Kibiru & Another [1986] KLR, Platt Ag JA observed as follows:-

“The application for the stay made before the High Court failed because the first of the conditions set out in... was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents would be unable to pay the money..”

20. The above notwithstanding, the court wishes to point out that it was immaterial if the Plaintiff had met all the prerequisites under Order 42 Rule 6 of the Civil Procedure Rules, 2010. In the case of Milcah Jeruto vs Fina Bank Limited [2013] eKLR, this very court made declined to grant a stay of execution pending appeal as the plaintiff therein had sought to stay a negative order. This court found that as the said plaintiff’s application had sought injunctive orders and it had been dismissed, there was nothing to be stayed.

21. This was a position that was also set out in the case of Civil Application No NAI 219 of 2007 (134/2007 UR) Sonalux Limited & Another vs Barclays Bank of Kenya Limited & others (unreported), in which the Court of Appeal declined to stay the orders as there was nothing to be stayed. The superior court had in that case dismissed an application for injunction which essentially made it a negative order.

22. Quoting Ndungu Kinyanjui vs Kibichoi Kugeria Services & Another Civil Application No NAI 79 of 2007 (unreported) in the case of Sonalux Limited & Another vs Barclays Bank of Kenya Limited & others (Supra), the Court of Appeal had this to say:-

“This Court has repeatedly stated in previous decisions... that in an application under Rule 5 (2) (b) for stay of execution, where the court whose order is sought to be stayed, has not ordered any of the parties to do anything, or to pay any sum there would be nothing arising out of that decision for this court to enforce or to restrain by injunction.”

23. Undoubtedly, the Plaintiff strongly felt that he has an arguable appeal at the Court of Appeal. However, this court cannot sit on an appeal in a matter that had been handled by a court of equal and competent jurisdiction. It cannot issue the same orders that Havelock J refused to grant on 18th May 2012. Indeed, there is no provision under the law that would allow this court to grant stay orders where an application that had sought injunctive order was dismissed. The said learned judge’s order did not order that any party do or refrain from doing a particular act.

24. Accordingly, having considered the pleadings, affidavit evidence, written submissions and case law in support of the parties’ respective cases, the court came to the conclusion that it had no jurisdiction or power to grant the orders that had been sought by the Plaintiff as if granted the same, the Plaintiff would no doubt achieve what he had sought when his matter was heard by the said judge and dismissed, a matter that is now a matter that is subject of an appeal.

DISPOSITION

25. In the circumstances foregoing, the upshot of this court’s ruling is that the Plaintiff’s Notice of

Motion dated 24th September 2012 and filed on 26th September 2012 was not merited. The same is therefore dismissed with costs.

26. For the avoidance of doubt, the orders for stay of execution issued by Musinga J (as he then was) on 27th September 2012 and subsequently extended thereafter are hereby vacated and/or set aside.

27. It is so ordered.

DATED and DELIVERED at NAIROBI this 23rd day of April 2015

J. KAMAU

JUDGE