



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 722 OF 2010 (O.S)

THIONG'O KIUNGA.....PLAINTIFF

-VERSUS-

KENYA COMMERCIAL BANK LIMITED..... DEFENDANT

AND

PETER MACHARIA MWANGI

PATRICK GITHINJI MWANGI

STEPHEN MAINA KIMANGA.....INTERESTED PARTIES

RULING

INTRODUCTION

1. The Application before the Court is the interested parties' (herein the Applicants) Notice of Motion dated **13th February 2015** and filed on even date. It is expressed to be brought under the provisions of **Sections 1A, 1B and 3A** of the **Civil Procedure Act** as well as **Order 22 Rules 22 & 25, Order 40 Rules 1 & 2, Order 45 rule 1 (a) and Order 51 Rule 1** of the **Civil Procedure Rules**. The Application sought for the following orders;-

1. Spent

1. ***THAT the Honourable Court be pleased to grant a stay of execution of the Judgment, Decree/Orders given on 26th January, 2012 by the Honourable Justice J.M Mutava and the Orders dated 6th December, 2012 by the Deputy Registrar (Mr. R.N Nyakundi) that appointed Messrs Watt Enterprises Auctioneers, and gave orders for the sale, until the hearing and determination of the Application for stay of execution and jurisdiction now pending in the Court of Appeal and/or further orders of this Honourable Court.***
2. ***THAT in the alternative and without prejudice to the foregoing this Honourable Court does review vary and/or set aside the orders issued by the Deputy Registrar on the 6th of December 2012, as the same was in excess of his jurisdiction, and offends the principle of natural services (sic) as the right to be heard to the applicants.***
3. ***THAT in the alternative, and or in addition to the above the Honourable Court do issue an Order stopping, restraining or injuncting the 1st Respondent and/or any other persons taking instructions or authority from the decree/orders issued herein on 26th January,***

2012 pending the hearing of the intended appeal against the ruling/orders made on and varied on 6th December, 2012 by the Deputy Registrar and Messrs Watts Auctions or Watts Auctioneers be stopped, restrained from offering, alienating, transferring, executing any Agreement for sale, or selling by public auction on 26th February, 2015 or any part of the property known as L.R No. 36/VII/500 (Original No. 36/47/7/VII) and/or any other day pending the hearing and determination of the intended appeal, or further orders of this Honourable Court and the hearing and determination of this instant application.

4. THAT any other or such orders as the Honourable Court shall deem fit and just.

THE APPLICANTS' CASE

2. The application is based on the grounds set out therein and is supported by the Affidavit of PETER MWANGI MACHARIA and CHARLES NJURU KIHARA both sworn on **13th February, 2015**.
3. The Applicants filed the instant application to stop the intended sale of the suit property by way of public auction pending an appeal. The Plaintiff had advertised in the Standard Newspaper of **23rd January, 2015** that the suit property was up for public auction on **26th February, 2015** at 11.00am. In a ruling dated **19th December, 2014** this Court denied the Applicants' application for review or setting aside of the Judgment of Justice J. M Mutava dated **26th January, 2012**. The effect was that the Plaintiff was free to execute the said Judgment and particularly the suit property would be sold by way of public auction and the proceeds distributed equally to the Plaintiff and other co-owners, if any.
4. It is the Applicants' case that they were aggrieved by this Court's ruling and are desirous of proffering an appeal against the same. They averred that they had now filed in the Court of Appeal, **Civil Application NAI 30 of 2015** seeking extension of time to file Notice of appeal and the record of appeal out of time and **Civil Application NAI 31 of 2015** seeking a stay of execution of the Judgment dated **26th January, 2012** pending the hearing and determination of the appeal.
5. It was however the Applicants' contention that the said applications at the Court of Appeal had not been allocated hearing dates and they were informed that the earliest dates available were in May, 2015. Therefore, at the time of filing the present application, there were no orders staying the execution of the said Judgment.
6. It was therefore the Applicants' case that if the orders sought for herein against the sale by public auction are not granted, they may suffer irreparable loss and damage.

THE PLAINTIFF'S/RESPONDENT'S CASE

7. In opposition to the application, the Plaintiff (herein the Respondent) filed a Replying affidavit sworn by himself on **18th February, 2015**.
8. The Respondent acknowledged the existence of the application for stay of execution in the Court of appeal and contended that the Applicants could not seek for the same orders before this Court while a similar application in the Court of appeal was still pending. The Plaintiff further contended that the Applicants had not satisfied the conditions for grant of stay of execution pending appeal, which requires applicants to satisfy the Court that substantial loss may result to the applicants unless the order is made. It was also the Respondent's contention that the Applicants had not offered security for the due performance of the decree as required by the law.

LEGAL ANALYSIS

9. I have considered the application, the affidavits in support and opposition to the application as well as the oral submissions by Counsel. Having done so, I take the following view of the matter.
10. With regard to the Applicants' prayer seeking for review or the setting aside of the Deputy Registrar's Orders made on 6th December, 2012, Counsel for the Applicants argued that the said prayer was not sought for in the previous application. He submitted that the Deputy Registrar had no powers to grant the orders of sale by public auction without all the parties being served. To this

end, this Court is in agreement with the Respondent's argument to the effect that the prayer seeking to set aside or review the Deputy Registrar's decision is *res judicata*. In their application leading to the ruling of this Court dated 19th December, 2014, the Applicants in seeking to have the Judgment dated 26th January, 2012 reviewed or set aside, also sought for the review or setting aside of subsequent orders and rulings flowing from the judgment as well as the execution process. Among the grounds for setting aside or review was that they had not been part of the proceedings as they had not been served, which argument the Court took into consideration while coming up with its ruling. Therefore, this Court having dismissed the Applicants' application for review it follows that the orders of the Deputy Registrar were also not reviewed or set aside. In the circumstances, the orders of review against the Deputy Registrar's decision as prayed by the Applicants is *res judicata* as the same was already dealt with in this Court's ruling which the Applicants seek to appeal against.

11. I now turn to the substance of this matter which is whether this Court should grant the Applicants' stay of execution pending appeal. The Applicants brought the application for stay under Order 22 rules 22 and 25 of the Civil Procedure Rules. Order 22 rule 22 provides as follows:-

(1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.

(2) ...

(3) ...

From the provision above, it is not clear as to whether any decree has been brought to this Court for execution. Even so, if a decree had been brought before this Court for execution, this is still the Court by which the Decree was passed and therefore the Applicants should have proceeded under **Order 42 rule 6** of the **Civil Procedure Rules** to apply for stay of execution. In the circumstances, **Order 22 rule 22** of the **Civil Procedure Rules** is inapplicable and this Court will therefore determine the Applicants' application for stay of execution under **Order 42 rule 6** of the **Civil Procedure Rules**. Order 42 Rule (6) (2) provides that:

(2) No order for stay of execution shall be made under sub-rule (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.

12. However, bearing in mind that the applicants have already filed an application for stay of execution at the Court of appeal, it would only be efficient and logical not to substantively determine the application for stay of execution herein. Therefore in this case, the court will not delve into the requirements of establishing substantial loss and providing security as a prerequisite for stay. This Court can only grant a stay of execution order intermediate in nature pending the hearing of the Applicants' application for stay at the Court of Appeal. At the time of bringing this application, the Applicants had indicated that their application for stay of execution and leave to file appeal out of time had not been allocated dates and that the earliest available dates were in May, 2015. It is now way past May, and the Applicants have however not updated the Court as to what became of the said available dates. It appears the applications have never been allocated a hearing date or perhaps the Applicants have not been vigilant in seeking for a date. This Court cannot ascertain the position of the said applications.

DISPOSITION

13. In view of the foregoing, the upshot of this court's ruling is that the Applicants' Notice of Motion dated **13th February 2015** and filed on even date is hereby allowed in the following terms:-

- a. *The Applicants are hereby granted a stay of execution of the Judgment, Decree/Orders given on 26th January, 2012 by the Honourable Justice J.M Mutava and the Orders dated 6th December, 2012 by the Deputy Registrar (Mr. R.N Nyakundi) that appointed Messrs Watt Enterprises Auctioneers, and gave orders for the sale, for a period of 60 days from the date of this Ruling.*
- b. *The costs of the application shall abide the outcome of the stay of execution application in the Court of Appeal.*

Orders accordingly.

DATED, READ AND DELIVERED AT NAIROBI THIS 18TH DAY OF SEPTEMBER 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Odoyo holding brief for Musyoka for Plaintiff

Mr. Wilson holding brief for Kihara for Defendants

Teresia – Court Clerk