



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERICHO**

**ELC APPEAL NO.1 OF 2020**

**CHRISTINE OYOO NYANGAGA.....APPELLANT**

**VERSUS**

**CRATER VIEW AUCTIONEERS.....1<sup>ST</sup> RESPONDENT**

**REAL PEOPLE LIMITED.....2<sup>ND</sup> RESPONDENT**

**SKYROCK ENTERPRISES LIMITED.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. Before me for determination is the Notice of Motion dated 26<sup>th</sup> February 2020 brought under *Order 40 Rule 1, 2 (1) and 9, Order 51 Rule 1, of the Civil Procedure Rules, Sections 3A and 63(e) of the Civil Procedure Act, Section 103 of the Land Act and all other enabling provisions of the law* where the Appellant/Applicant seeks for stay of sale of her property known as LR No. Kericho/ Kapsuer/4862 pending the hearing and determination of the intended Appeal.
2. The application is premised on the grounds thereto and on the Applicant's Supporting Affidavit dated the 26<sup>th</sup> February 2020 as well as the Applicant's written submissions in support thereto dated the 13<sup>th</sup> January 2021.
3. The Applicant's argument is that she had guaranteed the 3<sup>rd</sup> Respondent a loan facility of Ksh. 5,000,000/= whereby a charge had been executed over her property known as LR No. Kericho/ Kapsuer/4862 as security for the repayment of the loan. Subsequently the 3<sup>rd</sup> Respondent defaulted in re-payment of the loan prompting the Applicant to service the same.
4. However the 2<sup>nd</sup> Respondent through the 1<sup>st</sup> Respondent, on the account of the alleged default, caused the advertisement of the property for sale which was due on the 8<sup>th</sup> April 2019.
5. Through an application dated 28<sup>th</sup> March 2019, the Applicant was granted a conditional stay of sale upon payment of Ksh. 2,006,750/= which was an equivalent of a  $\frac{1}{3}$  of the alleged amount in default. That although the Applicant complied with the terms of the stay, the 2<sup>nd</sup> Respondent through the 1<sup>st</sup> Respondent yet again caused the advertisement of the property for sale on the 29<sup>th</sup> October 2019 prompting the filing of an application dated the 23<sup>rd</sup> October 2019 before the subordinate court and the current application, a subject of the intended Appeal.
6. The Applicant is aggrieved by the action of the 2<sup>nd</sup> Respondent through the 1<sup>st</sup> Respondent of re-advertising her property for sale despite there being a conditional stay order still in force and her Appeal having raised fundamental issues of law that ought to be ventilated.
7. That although the orders sought was rather peculiar in that they sought for an order of stay of sale in exercise of the statutory power of sale, the principles applicable were more or less the same as the order Appealed against, and unless stayed, it would render the Appeal nugatory. That the court had unfettered judicial discretion to grant stay of execution pending Appeal. That the Appeal was arguable and not frivolous, had overwhelming chances of success and therefore since the Applicant had met the threshold required, she should be granted the orders as sought.
8. The application was opposed by the 2<sup>nd</sup> Respondent through a Replying Affidavit dated the 21<sup>st</sup> May 2020 and a joint written submissions of both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents dated the 14<sup>th</sup> February 2022.

9. The position taken by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents is that the Applicant herein had not met the conditions stipulated under Order 42 Rule 6(2) of the Civil Procedure Rules, this being an application for stay of execution against the ruling/order of the trial Magistrate delivered on 20<sup>th</sup> February 2020.

10. That the Applicant did not demonstrate how she would suffer substantial loss, on the contrary, it was the Respondent who continued to incur losses due to the unpaid sums of money which the Applicant had guaranteed to the 3<sup>rd</sup> Respondent and which monies remain unpaid. That the Applicant was aware of the repercussions she would face in default of repayment of the loan when she entered into the agreement with the 3<sup>rd</sup> Respondent. She could not now shift goal posts by claiming that she would suffer substantial loss if the stay order was not granted.

11. That indeed although the Applicant had secured conditional stay orders, the same lapsed the moment she failed to comply with a subsequent consent recorded in court between the parties requiring her to pay an amount of Ksh. 100,000/= towards the outstanding loan. That it was upon non-compliance and the re-advertisement of the property that the Applicant filed an application for stay that the trial Magistrate through a ruling delivered on the 20<sup>th</sup> February 2020 had held that the re-advertisement had complied with the law that the Applicant filed the present Appeal. No stay had been granted as the application had been dismissed with costs.

12. That the Applicant's Appeal was delaying tactic meant to frustrate the 2<sup>nd</sup> Respondent from recovering what was rightfully due and owing to themselves. The Applicant had been accorded more than sufficient time to repay the outstanding balance by installments, to no avail. That he who comes with equity must come with clean hands must also do equity.

13. The Respondents' position was that when a party was exercising its statutory right of action, the court would not prevent that right from being exercised unless there was no basis, or if the right was exercised oppressively.

14. The Respondents further stated that the second limb as to whether or not the Application was brought without undue delay did not carry much weight in the decision to grant or not grant the order for stay. That the Applicant was not entitled to an order of stay of execution pending the hearing and determination of an intended Appeal and therefore the application ought to be dismissed with costs.

#### **Determination.**

15. I have considered the said application herein and from the gist of the same, it is not in dispute that the 3<sup>rd</sup> Respondent was advanced a financial facility of Ksh. 5,000,000/= by the 2<sup>nd</sup> Respondent which was secured by the Applicant's suit Land LR No. Kericho/ Kapsuer/4862 as security. The 3<sup>rd</sup> Respondent subsequently defaulted in re-payment and the 2<sup>nd</sup> Respondent begun the process of exercising its statutory power of sale.

16. The Applicant sought interim orders of injunction vide an application dated the 28<sup>th</sup> March 2019, pending the hearing and determination of the same, wherein the court obliged her granting her conditional temporary orders of injunction on condition that she deposited  $\frac{1}{3}$  of the monies loaned which amounted to 2,006,750/= monies which she paid on the 5<sup>th</sup> April 2019 as per the annexure marked as "CON 1".

17. It is also not in dispute that having complied with the order of the court thereby securing interim orders of stay, the 2<sup>nd</sup> Respondent through the 1<sup>st</sup> Respondent re-advertised the suit property for sale on the 29<sup>th</sup> October 2019 prompting the filing of another application dated the 23<sup>rd</sup> October 2019 before the subordinate court seeking stay of the sale. The Applicant also made a proposal to repay the outstanding loan by a monthly installment of Ksh. 100,000/=. The application was dismissed vide a ruling delivered on the 20<sup>th</sup> February 2020.

18. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents contention is that the interim orders lapsed the moment the Applicant failed to comply with the subsequent terms of the consent entered by the parties requiring that she pays Ksh. 1,000,000/= towards offsetting the outstanding loan amount, and which consent was recorded in court. This court has not had the privilege of confirming this line of submission through the perusal of the court proceedings which have not been availed.

19. Be as it may, it is not in contention that the Applicant having complied with the conditional orders of injunction pending the hearing and determination of the Application dated the 28<sup>th</sup> March 2019, the said order having been complied with is therefore still in force as an order of injunction granted without condition. The said interim order of injunction having the full force of law is binding until and unless it is vacated or varied by the court. It cannot therefore be true as the Respondents would want the court to believe, that the said interim orders of injunction was vitiated after the Applicant failed to comply with a subsequent consent between themselves. To my mind, there is still in existence an order of stay which if the Respondents had disobeyed, it was incumbent upon the Applicant to defend her position in an appropriate proceeding.

20. I shall therefore not venture into whether or not the Applicant has satisfied the conditions for issuance of stay of execution as this matter is premature before this court. At this stage I find that none of the contentious issues raised by parties as to the substance of the dispute can be heard and determined as that is within the purview of the Trial Court. The temporary injunction remains in force for 30 days within which time the matter shall be placed before Trial Magistrate's court to dispense with the pending application dated the 28<sup>th</sup> March 2019.

**Each party to bear its own costs.**

**DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 28<sup>TH</sup> DAY OF APRIL, 2022**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**