



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI AND LAND DIVISION

ELC NO 1043 OF 2012

ESTHER NJERI KOMU.....APPELLANT/APPLICANT

VERSUS

CONSOLIDATED BANK LIMITED1ST RESPONDENT

LEAKEY AUCTIONEERS.....2ND RESPONDENT

RULING

The application for consideration is the Notice of Motion dated **25th October 2013** brought under **Order 42 Rule 6 (1) and Order 51 Rule 1 of the Civil Procedure Rules and section 1A, 1B and 3A of the Civil Procedure Act** seeking for orders that a stay of execution of the ruling and orders delivered on 4th October 2013 be granted preventing the 1st and 2nd Respondents, their agents, servants, assigns or anyone acting through them, from in any way executing the orders herein against the Plaintiff/Applicant pending the hearing and determination of the Plaintiff/Applicant appeal.

This application is premised on the grounds stated on the face of the application and the supporting affidavit of **Esther Njeri Komu**, who deposed her affidavit that she resided on her matrimonial home **LR No. Kiambaa/Kanunga/T215**, and that a ruling was delivered on **4th October 2013** in which the court dismissed the application dated 21st December 2012 but no stay of execution was granted by the court. She avers that she instructed her advocates to get a certified copy of the ruling and the proceedings in preparation of the appeal and subsequently filed the appeal. She stated that it is necessary for this court to grant her stay of execution pending appeal. She averred that she learnt that her matrimonial home the subject of this suit property was slotted for sale through a public auction slated for **29th October 2013**. That this being her matrimonial house for 15 years, no amount of compensation can compensate her for the physical and psychological torment and anguish that this will cause her if the Respondents are allowed to carry on with the intended auction and sale of her matrimonial home. She believes her appeal has high chances of success and that she was ready to abide by any order of security or condition for grant of stay of execution as may be made by this honourable court for the grant of the orders sought in the application and that this application has been brought without undue delay. That in the interest of justice she prays that this court allows the orders sought in the application.

This application is opposed. The 1st Respondent through **Julius Gikonyo** filed his Replying Affidavit on 4th November 2013, where he stated that this court delivered its ruling on the applicant's application where it dismissed the application on the basis that the applicant has failed to establish a prima facie case. That the applicant is guilty of material non-disclosure of facts as she has not disclosed the fact that her

husband **Francis Komu Gitau** had earlier brought a suit **HCC No 899 of 2010** seeking to restrain the Respondent from exercising the power of sale which was dismissed on 24th February 2012. That the applicant has also failed to disclose that there was another suit number **281 of 2012** still pending in court and that no appeals were ever preferred after the court dismissed the interlocutory applications seeking to restrain the 1st Respondent from exercising its power of sale. He also added that the second applicant's application restraining the 1st Respondents from exercising its power of sale was dismissed therefore the bringing of this application from for stay the applicant is simply frustrating the 1st Respondent's efforts of recovering the amount owed to the bank. He further added that the applicant is not the registered proprietor of the suit property which belong to her husband therefore she cannot suffer any irreparable injury as claimed and neither was she a party to the transactions. That the applicant's husband is in default of repayment of the loan advanced by the 1st Respondent and that the applicant cannot stop the 1st Respondent from exercising its statutory power of sale as the court had held. He contended that there was no valid appeal as they have not been served with a **Notice of Appeal** neither has the applicant filed a memorandum of appeal therefore she cannot claim to have an arguable appeal with a probability of success. He prays that this application be dismissed.

In a rejoinder, a the applicant stated that she had indeed filed her Notice of Appeal and that there was an oversight in service and the Respondents have not been served. She also added that she was a separate legal entity from her husband and should not be vilified but the application herein should be heard and determined on merit.

Parties filed their submissions as ordered by the court. The plaintiff filed her submissions on 15th November 2013, where she submitted that the law on stay of execution pending appeal was clear in that the applicant has to demonstrate that the appeal if successful will be rendered nugatory if the orders sought are not granted. She further added that the subject of this suit was a matrimonial property and that there was an outstanding loan owed to the 1st Respondent. What is in dispute is whether the applicant can take up the loan and service it where her husband had defaulted. That the instant case is whether the Land Act 2012 applies to the instant case or not. She relied on **Section 103 to 106 of the Land Act**.

The 1st Respondent filed its submissions on 16th November 2013 where in it submitted that the applicant had not provided sufficient reasons to warrant the orders of stay and that the applicant had not exhibited a copy of any order the court sought to be stayed. She has not demonstrated that she would suffer substantial loss as she is not the registered proprietor of the subject property and therefore not competent to litigate and that she had not deposited any security for due performance of any obligations that may be binding. He further submitted that the debt owed by her husband continues accruing interest and that he bank should be left to exercise its power of sale to recover monies owed to it by Mr Komu. The 1st Respondent also submitted that courts should not restrain a mortgagee from exercising its statutory power of sale because the amount due is in dispute and that it will be restrained if the mortgagor pays the amount claimed in court.

I have considered the affidavits; the submissions and the authorities relied upon by the parties herein. The issue for consideration is whether the applicant has satisfied this court that the prayers for stay of execution. This Court has discretionary powers to grant stay of execution, should be granted where it appears to be equitable to do so with a view to temporarily preserving the status quo. As a general rule the ground for stay of execution is for the applicant to show that once the property is disposed off there is no likelihood of getting it back should the appeal succeed.

As I understand it, the applicant is seeking to have a stay of execution of the order of the court in this matter made on 4th October 2013. In that order, as correctly argued by the 1st Respondent, there was no positive order made that can be a subject of an order of stay. What this court did was to dismiss the prayer for injunction having failed to meet the required threshold for the grant of the interlocutory injunction. The words of Law V.P. in **Western College of Arts and Applied Sciences –vs-Orange (1976) KLR 63** cited with approval by the Court of Appeal in **Attorney General –Vs- Law Society of Kenya Court of Appeal, Civil Appeal No. 144 of 2009 (Unreported)** held that,

“In the instant case the High Court has not ordered any of the parties to do anything or refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this court, in an application for a stay, to enforce or restrain by an injunction. Similarly, the order of the superior court which is the subject matter of the stay application is not capable of execution as it did not order any party to do anything or to refrain from doing anything or to pay any sum. The application for stay of execution is to that extent misconceived”

The learned judge’s statements are clear and I am in agreement with his sentiment entirely. The reason is that what the applicant is asking the court to stay is a dismissal order, which is not an order capable of execution, or of being stayed. Further if the applicant’s appeal succeeds her appeal will not be rendered nugatory. This is because her remedy will be to have the order of this court set aside and the applicant’s application for injunction granted by the Court of Appeal. I am being persuaded by the case of **Royal Media Services –Vs- Telkom Kenya Limited & 13 others [2005] e KLR** where Ransley J (as he then was) held that

“.....the order which was dismissed was a negative order which is not capable of execution. If the orders sought is not granted the appeal will not be rendered nugatory because if the appeal succeeds the dismissed order will be set aside and the suit will be rest stored on the register” .

This court also notes that the applicant has not demonstrated that she has lodged any appeal at the appellate court since service has not been effected upon the Respondents and in the circumstances, it would be very difficult for this court to issue stay as there is no suit being pursued at the Court of Appeal which would hamper the applicant’s right of appeal.

I therefore agree with the 1st Respondent that the application dated 25th October 2013 is totally misconceived and must therefore fail and the same is dismissed with costs to the Respondents.

It is so ordered.

Dated, Signed and Delivered this 11th day of December 2014

L.N. GACHERU

JUDGE

In the Presence of:-

.....For the Appellant/applicant

.....for the 1st Respondent

.....for the 2nd Respondent

Kamau : Court Clerk

L.N. GACHERU

JUDGE