



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Law Courts)

Civil Case 762 of 2009

HON. YUSUF KIFUMA CHANZU
PLAINTIFF/APPLICANT

V

EQUITY BANK OF KENYA LIMITED 1ST
DEFENDANT/RESPONDENT

CAPITAL CONSTRUCTION LIMITED 2ND
DEFENDANT/RESPONDENT

RULING

1. The Amended Notice of Motion before the court is dated **16th April 2013**. It is brought under Order 40 Rule 1, Order 42, Rule 6 (1) (2), (a), (b), (3), (4) (5), and Order 8 Rule 1 of the Civil Procedure Rules 2010. The application seeks orders:-

i. That pending hearing and determination of the Applicant's Appeal which is due for hearing before the Court of Appeal being Civil Appeal Number 164 of 2012 this Honourable Court be pleased to issue temporary orders of stay of execution staying execution of the orders and decree dismissing this suit and further restraining the 1st Respondent Bank from advertising for sale, disposing off, selling by private treaty or otherwise howsoever interfering with the Applicant's occupation, use and ownership of title or interest in ALL THAT parcel of land known as L.R. No. 1098/6 (title 66702), Nairobi.

(i) (a) That pending hearing and determination of this application this Honourable Court pleases to grant temporary orders of stay of execution staying execution of the orders and decree arising from the dismissal of this suit.

(i) (b) That pending hearing and determination of the Appeal being Civil Appeal No. 164 of 2012 this Honourable Court issues a temporary injunction restraining the 1st Defendant Bank, its servants or agents, Advocates or auctioneers or any other person acting for and on its behalf from doing the following acts of any of them that is to say from further advertising for sale, disposing off, selling by private treaty or otherwise howsoever charging, leasing, letting or otherwise howsoever interfering with the Plaintiff's possession, occupation use or ownership of the title to and or interest in ALL THAT parcel of land known as L.R. No. 10198/6 (IR. No. 66702), Nairobi.

(ii) That costs of this application be provided for.

2. The application is supported by affidavit of **YUSUF KIFUMA CHANZU** dated **15th April 2013** with annexures and is premised on the grounds set out therein among them that the 1st Respondent Bank was arbitrarily, illegally, unlawfully and without regard to this Court's Order for temporary stay of execution dated 27th September 2012 proceeded to issue Notice to sell the charged property on 8th May 2013, and secondly that the purpose of the stay of execution orders were to facilitate the Applicant to file a substantive appeal against the Judgement of the Superior Court which appeal has now been filed being Civil Appeal No. 164 of 2012 now pending hearing and determination, and finally that the Applicant's **Civil Application Number Nairobi, 138 of 2012 (UR 104/2012)** seeking injunctive orders before the Court of Appeal was withdrawn on the advice of the Court of Appeal that two parallel applications for stay in the High Court and Court of Appeal was not good use of judicial time.

3. The application is opposed by the Respondent via grounds of opposition filed in court on 2nd May 2013. Among other grounds the Respondents state that the Plaintiff/Applicant is deceitful in so far as there are no orders in the High Court stopping the exercise of the 1st Defendant's Statutory Power of Sale and that the Order of Mutava J. lapsed once the Plaintiff/Applicant withdrew Civil Application Number 138 of 2012 (UR 104/2012), and further that the Plaintiff has offered no security to warrant any orders of stay.

4. I have carefully considered the application and the opposing oral submissions by the parties. I hasten to observe that the matter at hand has been disputed for a while now and now the court file is replete with Judgements, Rulings and Orders.

5. Starting in the middle of the history of this matter, it is on record that by this court's judgement

delivered on 26th April 2012 the Plaintiff's suit was dismissed together with all consequential orders hitherto. The dismissal of the suit exposed the Plaintiff to possible sale of the suit property by the 1st Defendant because the injunctive orders which were then preventing the sale were vacated. This caused the Plaintiff to file an application by way of Notice of Motion dated 26th June 2012 in which the sole prayer was:-

“(i) That pending hearing and determination of the Applicant's application dated 23rd May 2012 and now scheduled for 18th July 2012 before the Court of Appeal this Honourable Court be pleased to issue a temporary stay of execution staying the execution of orders of the Honourable Court allowing for advertising for sale, disposing off, selling by private treaty or otherwise howsoever interfering with the Applicant's occupation, use and ownership of title or interest in ALL THAT parcel of land known as L.R. NO. 1098/6 (title 66702) Nairobi contained in the Ruling dated 26th April 2012.”

6. The court on 27th September 2012 allowed the above application, and since then the Plaintiff has wallowed in the belief that the suit property was protected by the said stay that was granted by the court.

7. It must have therefore come as a surprise to the Plaintiff when the Plaintiff was served with a Notification of Sale by Antique Auctioneers dated 5th April 2013 indicating that the suit property would be sold on 8th May 2013 unless the alleged outstanding sum of Kshs.41,599,960.79 was paid before the date of the auction. The Plaintiff is now in court to stop the threatened sale.

8. Mr. Wachakana for the Applicant orally submitted before the court that the Respondents are in violation of the order of this court dated 27th September 2012 which granted stay of execution against the suit property. In reply Mr. Lico for the Respondents submitted that the alleged stay was particular and was given *“pending the hearing and determination of the Applicant's application dated 23rd May 2012 in the Court of Appeal i.e. Civil Application Number 138 of 2012 (UR 104/2012)”*. Because that application was subsequently withdrawn the order of this court dated 27th September 2012 could not stand and that the withdrawal of the Court of Appeal application automatically caused the collapse of the said court orders.

9. Mr. Wachakana for the Applicant submitted that the said stay orders covered both stay proceedings in the Court of Appeal and also in the High Court and that the withdrawal of the Court of Appeal application did not affect the validity of the said orders.

10. I have carefully considered this point. It is clear from the wording of the prayer/order that it was intended to cover a particular event i.e. pending the hearing and determination of the matter before the Court of Appeal. As soon as that matter was withdrawn the denominator upon which the order was

granted, and upon which it stood, disappeared and the order automatically lapsed. That is the strict interpretation of the order. However, I believe that the intention of the Plaintiff/Applicant was that the order of stay would cover both the applications for stay in the High Court as well as any other further proceedings in the Court of Appeal. The problem is caused by a weakness in the drafting of the order. While this is not excusable, this court is a court of equity and dispenses justice fairly, and would ensure justice provided that the Applicant has also approached the court of equity with clean hands.

11. The other issue is whether or not the Statutory Notice which was issued earlier is still valid for the purposes of the sale of the suit property now. Clearly, once the court finds that the orders of 27th September 2012 had lapsed, it also by necessary implication re-validated the Statutory Notice whose effect was sought to be negated by the said order. I therefore hold that the Statutory Notice issued to the Plaintiff and on the basis the 1st Defendant intends to sell the suit property is valid.

12. However, through the current application the Applicant has moved this court afresh for stay orders pending the hearing and determination of the appeal being Civil Appeal Number 164 of 2012. This is the kind of application that the Applicant ought to have submitted and argued before Honorable Justice Mutava. I am however, not satisfied that the Applicant has met grounds upon which a stay can be granted. In this particular case it is not doubted that the Plaintiff owes money upon the guarantee, to the 1st Defendant. The sum due is Kshs.19,000,000/= plus interests. There is no evidence that the Plaintiff has been paying the sum due or that he has pledged to pay the sum due. A court of justice must consider the plight of all the parties. The 1st Defendant's right to sell the mortgaged property is statutory and cannot be taken away except when it is clear that the chargor is also anxious to redeem his property. Because the chargor is not showing interest in redeeming his property by honouring the guarantee, I make the following orders:-

a. *I dismiss the **Notice of Motion** application dated 16th April 2013.*

b. *I direct that if the 1st Defendant intends to proceed and sell the suit property a fresh Statutory Notice be issued to the chargor and the Defendant be at liberty to proceed with the sale upon the lapse of the said notice.*

c. *In the alternative to prayers (a) and (b) above I allow the application on the **CONDITION** that the Applicant pays the 1st Defendant the guarantee amount of **Kshs.19,000,000/=** within 30 (**thirty**) days from the date hereof.*

d. *Parties to bear own costs.*

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 30TH DAY OF MAY 2013

E. K. O. OGOLA

JUDGE

PRESENT:

Wachakana for the Plaintiff/Applicant

No appearance for the Defendant/Respondent

Teresia – Court Clerk