



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL CASE NO 1 OF 2011**

**STEPHEN WANYEE ROKI.....1ST**  
**PLAINTIFF**

**VERSUS**

**K-REP BANK LIMITED.....1ST**  
**DEFENDANT**

**CITY COUNCIL OF NAIROBI.....2ND**  
**DEFENDANT**

**DENNIS WAWERU.....3RD**  
**DEFENDANT**

**RULING**

1. In the Notice of Motion application dated 10<sup>th</sup> February, 2012 and filed on 11<sup>th</sup> December, 2012, the Plaintiff sought the following orders:-
  - i. Spent
  - ii. Spent
  - iii. **THAT pending the hearing and determination of the Applicant's intended appeal in the Court of Appeal this Honourable Court pleased to stay the orders of Hon. Mr. Justice L Njagi dismissing the Applicant's application for injunction dated 8<sup>th</sup> February, 2011 in his ruling delivered on 20<sup>th</sup> November 2012.**
  - iv. **THAT pending hearing and determination of this application this Honourable Court be pleased to issue an order restraining the Defendants either by themselves, their agents, servants, employees or otherwise whomsoever from transferring, alienation or in any other interfering with the Plaintiffs/Applicant's ownership of land parcels Nos. L.R Dagoretti/Riruta 3753 and L.R Dagoretti/Riruta 4724.**
  - v. **THAT pending the hearing and determination of the Applicant's intended appeal in the Court of Appeal this Honourable court be pleased to issue an order restraining the Defendants either by themselves, their agents, servants, employees or otherwise whomsoever from transferring, alienating or in any other way interfering with the Plaintiffs/Applicant's ownership of land parcels Nos. L.R Dagoretti/Riruta 3753 and L.R Dagoretti/Riruta 4724.**
2. The brief facts of this case as can be discerned from the ground and the Plaintiff's updated Supporting Affidavit are that S.Roki General Contractors in which the Plaintiff was a director

- obtained an overdraft facility on a charge on properties known as L.R. No. **L.R Dagoretti/Riruta 3753 and L.R Dagoretti/Riruta 4724** (hereinafter referred to as suit premises).
3. The Plaintiff contended that the said suit premises were sold at an unreasonably low price based on suspect valuation of reserve price and that to the best of his knowledge, the said properties had not been transferred to the 3<sup>rd</sup> Defendant. The Plaintiff also averred that the said suit premises were family/matrimonial properties and passing of the same to a third party would cause the Plaintiff's family to suffer irreparably.
  4. It was the Plaintiff's case that the said suit premises were sold after the 2<sup>nd</sup> Defendant, who had contracted the Plaintiff to construct and enhance Ngunyumu Primary School in Korogocho Ward, failed to service the overdraft facility from the monies it would periodically be paying on account of the contract based on an irrevocable letter of undertaking dated the 15<sup>th</sup> August 2005 by the 2<sup>nd</sup> Defendant Exhibit marked "RGC3".
  5. The Plaintiff contended that there were triable issues in the matter as he was not given sufficient time to get any meaningful bids to avoid the properties being sold at an under value and further that the Notice issued by the 1<sup>st</sup> Defendant contravened the provisions of the Registered Land Act (now repealed) and the Registration of Titles Act (also repealed).
  6. He also argued that his appeal against the ruling of Njagi J delivered on 20<sup>th</sup> November, 2012 which dismissed his application to restrain the Commissioner of Lands from registering the transfer of suit premises was arguable and had high chances of success.
  7. On 20<sup>th</sup> December, 2012, this court issued interim orders to restrain the Defendants, their servants, agents, employees from interfering with the suit premises pending the hearing and determination of the application.
  8. The Plaintiff reiterated the aforesaid facts in his written submissions dated 16<sup>th</sup> January, 2013 and filed on 18<sup>th</sup> January, 2013. He relied on the cases of **Dr. Daniel Chebutuk Rotich vs Morgan Kimaset Chebutuk and Ali Asgar & 3 others vs Muslim Association of Mombasa [2012] eKLR** where the court in both cases granted a stay of execution pending the hearing and determination of the appeal on the grounds that the Applicants therein stood to suffer irreparable loss. He submitted that the Memorandum of Appeal which was annexed to his Supporting Affidavit and marked "RGC 11" showed that he had an arguable appeal. The grounds in the said Memorandum of Appeal were stipulated as follows:-
    1. **THAT the learned judge erred in law and in fact by not at all considering the Applicant's application and submissions but only chose to dwell on the Respondents' submissions in his three-page ruling.**
    2. **THAT the learned judge erred in law and in fact by analysing issues which would have been dealt with in the hearing of the main suit thus denying the Appellant the chance to ventilate his argument at a full hearing.**
    3. **THAT the learned judge erred in law and in fact by not observing that the Appellant would be prejudiced if the only family property was allowed to be transferred before pertinent issues to the main suit were determined at a full hearing.**
    4. **THAT the learned judge erred law and in fact by not appreciating that there were various legal anomalies in the sale process of the parcels of land belonging to the Applicant's family.**
    5. **THAT the learned judge erred in law and in fact for being so cursory and quick to dismiss the Appellant's application without giving any cogent reasons for the dismissal.**
  9. In his further submissions dated and filed on 11<sup>th</sup> June, 2013, the Plaintiff stated that the equity of redemption had not yet been defeated and that it was only fair if he was given an opportunity to redeem the suit premises. He submitted that the application herein was not *res judicata* and that the fact that the 3<sup>rd</sup> Defendant was the Managing Director of Faida Bank was indicative of the fact that there was a collusion between the two (2) banks.
  10. The 2<sup>nd</sup> Defendant failed to file any responses and/or file any written submissions. On the other hand, the 3<sup>rd</sup> Defendant filed its written submission dated 1<sup>st</sup> February, 2013 on the same date.
  11. It was the 3<sup>rd</sup> Defendant's case that the Plaintiff had not satisfied the principles set out in the case of **Geilla vs Cassman Brown & Co Ltd [1973] EA 358** which stipulates that an Applicant must

satisfy the court that:-

- a. **It has established a *prima facie* with a probability of success; or**
- b. **It has established that he/she stands to suffer irreparable loss unless the order is granted or**
- c. **where the court was in doubt, to decide the case on a balance of convenience.**

12. He also argued that for one to succeed in an application for temporary injunction, there had to be in existence a legal right in the property being sought to be protected from alienation which the Plaintiff herein had failed to establish. He contended that even if the sale was irregular, the Plaintiff's remedy would only be in damages and not on an injunction. He relied on Section 53 of the Land Registration Act which has since been repealed. He relied on the cases of **Louis Roger Quandji Vs. Bank of India & Another (2009) eKLR**.

13. The 3<sup>rd</sup> Defendant further submitted that the Plaintiff's application was *res judicata*, as the Plaintiff's previous application in which he sought to review its ruling was determined by a court of equal jurisdiction of this court. He also relied on Section 7 of Civil Procedure Act and on the case of **Joseph Kalore Ole Mpoie & 5 others vs Kenya Forest Service [2012] eKLR** to support its argument that this application was *res judicata*.

14. The 3<sup>rd</sup> Defendant further sought for the dismissal of the Plaintiff's application on the ground that the jurat of the Plaintiff's Supporting Affidavit was on a different page. He argued that failure to comply with a substantive provision of an Act of Parliament could not be referred to as a mere irregularity.

15. The court has carefully considered the pleadings herein and the respective submissions by all the parties and finds that it will be necessary to consider the 3<sup>rd</sup> Defendant's submissions on the validity of the Plaintiff's Supporting Affidavit as a preliminary issue and for the sake of good order.

16. Section 5 of the Oaths and Statutory Declarations Act provides that:-

**“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken.”**

17. However, the court also does take cognisance of the provisions of Order 19 Rule 6 of the Civil Procedure Rules, 2010 which provide the instances when the court may order an affidavit to be struck out. A court may order that any matter in an affidavit be struck out for being scandalous, irrelevant or oppressive but an affidavit cannot, however, be struck out merely on technicalities. This position is well set out in Order 19 Rule 7 of the Civil Procedure Rules, 2010 which stipulates as follows:-

**“The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect of misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.”**

18. The court has carefully perused the Plaintiff's Supporting Affidavit and finds that the same showed the place and date when the oath was taken. Copy of the Supporting Affidavit in the file did not have a date but the Defendant did not complain about the same. This could have meant that his copy was duly dated as he was mostly concerned with the fact that the jurat was on a different page.

19. The court takes the view that a Supporting Affidavit presented to the court which is not dated is not a mere technicality. It goes to the root of the Plaintiff's application as Section 5 of the Oaths & Statutory Declarations Act is couched on mandatory terms. It is a question of substance and not form.

20. In arriving at the said holding, the court has had due regard to the case of **Rajput vs Barclays Bank of Kenya Limited & 3 others [2004] 2 KLR** where Emukule J dealt with a similar issue and held as follows:-

**“... failure to comply with the provisions of law, the Oaths and Statutory Declarations Act and the Rules thereunder is a matter of substance and not form. It is not a matter that is**

**curable about which the court should take a lenient view...”**

21. On that basis alone, the court finds that the Plaintiff’s application would fail in its entirety. However, as Article 159 (2) (d) of the Constitution of Kenya, 2010 mandates the court to be guided by the principle that “.....**justice shall be administered without undue regard to procedural technicalities**”, the court will proceed to determine whether or not the court can grant the Plaintiff the orders that he had sought in his application by considering the facts in the Plaintiff’s Supporting Affidavit.
22. The Plaintiff has sought a stay of execution of the orders issued by Njagi J on 20<sup>th</sup> December, 2012. In the said order, Njagi J found that the Plaintiff had not established a *prima facie* case with a probability of success as was required in the case of **Geilla Vs. Cassman Brown (Supra)**. This was essentially a negative order and the case law cited by the Plaintiff would not be of assistance to him in this matter as the order by the said judge cannot be stayed. He did not order the Defendants to do or abstain from doing something.
23. This was also the holding on **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.
24. The court has had due regard to Section 2 of the Civil Procedure Act Cap 21 of the laws of Kenya which in the definition of a decree holder, alludes to an order that “is capable of execution”.
25. In that section, a decree holder is defined as “any person in whose favour a decree has been passed or **an order capable of execution** has been made...” It therefore obtains that there are orders that are capable of execution while others are not.
26. Quoting **Ndungu Kinyanjui vs Kibicho Kugeria Services & Another Civil Application No NAI 79 Of 2007 ( unreported)** in the **Re Sonalux** case, 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.”**

27. A close scrutiny of the Civil Procedure Rules 2010 does not reveal any provision that would allow this superior court to grant stay orders emanating from the dismissal of an application that had sought injunctive order in the same court. Order 42 Rule 6 of the Civil Procedure Rules 2010 under which the Plaintiff’s application reads as follows:-

**“ No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or an order appealed from... the court appealed from may for sufficient cause order stay of execution of such decree or order...”**

28. Undoubtedly, the Plaintiff strongly feels that he has an arguable appeal at the Court of Appeal. The court is, however, alive to the fact that it cannot sit on an appeal in a matter that has been handled by a court of similar and competent jurisdiction and give the same orders which such a court had refused to grant in the first place and more so when the law does not provide that the same can be granted after they were refused in the first instance. While the court can grant an injunction to enable parties go to the court of Appeal as was held, in the **Madhupaper vs Kerr (1985) KLR 40**, the superior court must have considered the possibility that it could be found to have been wrong in its decision. The court is not convinced that this is one such case.
29. At this stage, the court cannot also re-open the arguments of whether or not the property was sold at an undervalue or that the Plaintiff’s family would suffer irreparable damage and loss if the said suit premises were sold because the matter is *res judicata* as a court of competent jurisdiction as this court heard and determined the application for injunction. It would be of no assistance to the Plaintiff to call it a stay of execution pending appeal so that the same is different from the application that was decided by Njagi J.
30. In view of the fact that the order by Njagi J was a negative order and that there is nothing to be stayed, the court do not find any merit in the Plaintiff’s Notice of Motion application dated 10<sup>th</sup>

December, 2012 and filed on 11<sup>th</sup> December, 2012 and in circumstances, the same is hereby dismissed with costs.  
31. It is so ordered.

**DATED** and **DELIVERED** at **NAIROBI** this 20<sup>th</sup> day of September 2013

**J. KAMAU**

**JUDGE**