



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI COMMERCIAL AND ADMIRALTY DIVISION
HIGH COURT CIVIL CASE NO. 620 OF 2007

SHEILA AKINYI MARCO & 2 OTHERS.....PLAINTIFFS/DECREE HOLDERS

VS

MICHAEL CHEGE NJOROGE.....JUDGMENT DEBTOR

AND

JOHN WACHIRA MUGO.....1ST OBJECTOR
MOSES WANGAI NJOROGE.....2ND OBJECTOR
ELIZABETH SAVETH WANGAI.....3RD OBJECTOR
FLORENCE SOILA NGOSSOR.....4TH OBJECTOR
ROMOB SUPPLIERS KENYA LIMITED.....5TH OBJECTOR

RULING

1. Before me is a Notice of Motion dated 17th February 2009 and expressed to be brought under the previous Order XL1 of the Civil Procedure Rules. The application seeks stay of execution of the order of this court made on 4th February 2009 (Kimaru J.) pending hearing and determination of an intended appeal by the 1st to 4th Objectors in this matter. The application is based on grounds set out on the face of the Notice of Motion and supported by an affidavit sworn on 17th February 2009 by Moses Wangai Njoroge, the 2nd Objector, with the authority of the other Objectors.

2. The grounds in support of the application are rendered as follows:

- 1) That the appeal has very high chances of success;
- 2) That unless the stay is granted, the intended appeal will be rendered nugatory.
- 3) That the applicant will suffer substantial and irreparable loss if stay is not granted.
- 4) That the application has been made without unreasonable delay.
- 5) That no prejudice will be suffered by the 5th Objector if stay is granted.

3. The background to the present application is that the 1st to 4th Objectors were the plaintiffs in HCCC No. 479 of 2007 in which suit Mr. Michael Chege Njoroge, the judgment debtor in this suit, was 3rd defendant. The 1st to 4th Objectors in this suit obtained a preliminary decree against the defendants in HCCC No. 479 of 2007 in the sum of Kshs.19, 727,014.95. Subsequent to the preliminary decree, the 1st

to 4th Objectors obtained a prohibitory order against properties owned by Michael Chege Njoroge the 3rd defendant in HCCC No. 479 of 2007. The prohibitory order was granted by Lady Justice Okwengu in a ruling delivered on 28th January 2008.

4. Meanwhile, the plaintiffs in the present case obtained judgment against the same defendants and attached the same properties already attached HCCC No. 479 of 2007. The plaintiffs in the present case then went ahead to arrange sale of the properties through public auction. This sale was objected to by the plaintiffs in HCCC No. 479 of 2007 on the grounds that they already had a prohibitory order in their favour over the properties.

5. At the same time, the 5th Objector filed an objection in both HCCC No. 479 of 2007 and HCCC No. 620 of 2007 seeking to forestall the sale of the same properties on the basis that Mr. Michael Chege Njoroge, the registered owner of the properties had sold the properties to them through sale agreements dated 8th and 9th November 2007.

6. In a ruling delivered on 4th February 2009 under HCCC 620 of 2007 (being the present case) the court (Kimaru J.) made orders dismissing the order of attachment issued to the 1st to 4th Objectors, as well as the objection application filed by the 1st to 4th Objectors in this matter. The court then went ahead to make an order granting the 5th Objector the liberty to be registered as the owner of the properties aforesaid.

7. It is the Applicants' case that having been dissatisfied by the ruling of Kimaru J given on 4th February 2009 aforesaid, they have filed a notice of appeal against that ruling and therefore merit an order of stay of execution to enable them pursue the appeal.

8. With regard to whether the application meets the legal criteria for stay of execution pending appeal, it is the Applicant's case that they have demonstrated that they would suffer substantial damage given that they already have prohibitory orders over the properties obtained in HCCC No. 479 of 2007, which decree is for a sum of Kshs.19 Million. The Applicants believe that recovery of this amount can only be realized through the attached properties. On the need to furnish security to the court, the Applicants argue that this is not mandatory in the High Court and, in any case, the Applicants were not defendants in this matter. As to whether there has been delay in bringing the present application, the Applicants argue that the delay in bringing this application was caused by the very many other applications filed by the parties and which had to be determined first.

9. The application is opposed. For the 5th Objector, there is a replying affidavit sworn by Brenda Jerotich Nagogo. The 5th Objector through its learned counsel has also filed a list of authorities which I shall consider in the course of my ruling. Essentially, the 5th Objector concurs fully with the ruling of 4th February 2009 delivered by Kimaru J. Learned counsel for the 5th Objector Mr. Murango told the court that the present application does not meet the tenets of orders of stay pending appeal for the following reasons:

- 1) The 5th objector bought the properties long before any of the other parties came to court seeking orders to attach the properties.
- 2) The Applicant has taken no steps to prosecute the application since obtaining interim orders of stay granted by Khaminwa J. on 17th February 2009. It is the 5th Objector who has been pushing for the application to be heard.
- 3) No substantial loss will be suffered by the Objectors.
- 4) The Objectors have not provided any security as required under Order 41. Security is a must for stay of execution.

Mr. Murango therefore urged the court to dismiss the application for stay and to declare the 5th Objector owner of the property.

10. The plaintiffs in this suit also oppose the application and there is a replying affidavit sworn on 11th March 2011. On behalf of the Plaintiff, learned counsel Mr. Gichuhi submitted that no leave to appeal was granted in this matter. He told the court that objection proceedings have no automatic right of appeal under the former Order 41 Rule 1 sub rule (n). On the issue of security, Mr. Gichuhi submitted that the 1st to 4th objectors had not complied with the court orders of 11th January 2010, which is an indication that they cannot provide security as required under the former Order 41 and which made provision of security mandatory. He also argued that the 1st to 4th Objectors had made no due diligence towards prosecution of this case as the present application was fixed for hearing by the 5th objector. He urged the court to dismiss the application.

11. In response to the above submission, Mr. Thuita, for the 1st to 4th Objectors submitted that compliance with the orders of 11th January 2010 was irrelevant to the present application and argued that the court cannot shut a party from a right because of costs. He told the court that the plaintiff can execute that order without affecting the objector's right of appeal. On the issue of security, Mr. Thuita submitted that furnishing security would only be necessary if there was a remedy binding upon the applicant, as provided for in Order 42 sub rule 2(b). In the present case, he argued that no security can be binding upon an objector hence the requirement does not apply. On the issue of leave to appeal, Mr. Thuita submitted that this only applies to execution. In the present case, there was automatic leave to appeal. As to the issue of whether the Applicants had been diligent to prosecute this matter, Mr. Thuita referred the court to a letter he wrote to the Deputy Registrar of this court on 20th May, 2011 complaining about delay in fixing the present application for hearing. In his view, this letter demonstrated that the applicants were keen to prosecute the application.

12. I have carefully considered the application, the affidavits filed in support and in opposition to the applications and the rival submissions by counsel for the parties. I have also perused the authorities cited by counsel and are now properly placed to make my view on this matter.

13. The sole issue that I am required to determine in the present application is whether the applicant has met the conditions for grant of stay of execution set out at order 42 Rule 6(1) and (2) of the Civil Procedure Rule 2010 which replaced the Order XLI under which the present application is brought. Order 42 Rule 6 provides:-

“6.(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule

(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.”

9. The above provision was expanded by the Court of Appeal in the case of **Butt Vs Rent Restriction**

Tribunal[1982] KRL 417 where the learned Judge, Madan JA (as he then was) quotes with approval the views of Brett L.J. in Wilson Vs Church (No 2) 12 ch D [1879] 454 AT 459 as follows:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful is not nugatory”

Justice Madan then rendered himself thus in the Butt case (Supra) at page 419,

“if there is no other overwhelming hindrance, a stay ought to be granted so that an appeal if successful may not be nugatory. A stay which would otherwise be granted ought not to be refused because the Judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings”

Again the court will grant a stay if special circumstances of the case dictate so. See Attorney general Vs Emerson and others 24 QBD [1889]56 at page 59. In the Butt decision (Supra) at page 420, the court found that since there was a large amount of rent in dispute between the parties, it was a “special circumstance” that gave the applicant an undoubted right of appeal. These general principles were also stated in Madhupaper international Limited Vs Kerr [1985] KLR 840. See particularly page 846.

10. Further conditions for stay of execution were laid down by **Visram J** in the case of **Prime Bank vs. Esige** [2005] 1 KLR as follows:

“Now the Court of Appeal has developed some principles to guide the exercise of that power so that the same is not left to caprice and those principles are simple and direct as follows:

(a) The appellant must show that his appeal is an arguable one. In other words, he must show that the appeal is not a frivolous one.

(b) The appellant must also show in addition that if the order of stay of proceedings is not granted, his appeal, if it were to succeed, would be rendered nugatory”

11. In addition, the court should also pay regard to the overriding objective to do justice to the parties as captured at Section 1A and 1B and as read together with section 3A of the Civil Procedure Act. I cannot put it better than the court of appeal in Harit Shett T/a Harit Sheth Advocate Vs Shamas Charania[2010] eKLR (Civil Application No 68 of 2008;

“The next aspect of such an application like this is, however, difficult to resolve. This is whether or not the appeal, if successful would be rendered nugatory. In our view, the sum of Shs.32 Million is relatively substantial taking into account the station of the applicant’s legal practice. We draw guidance herein from this Court’s decision in the well known case of Oraro & Rachier Advocates Vs Co-operative Bank of Kenya Ltd [1999] 1 EA 236. Further in this regard, we have also taken into account the provisions of section 1a and 1B of the Civil Procedure Act and section 3A and 3B of the Appellate Jurisdiction Act, which provisions came into force on 23rd July, 2009. By these new concepts of jurisprudence the courts, including this court, in interpreting the Civil Procedure Act or the Appellate Jurisdiction Act or in exercising any power must take into consideration the overriding objective as defined include the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing. See E. Muriu Kamau t/a Muriu Mungai & Co. Advocates Vs. National Bank of Kenya ltd Civil Application No.Nai.258/2009 (unreported).”

12. With the legal parameters for the grant of stay of execution pending appeal laid down as above, I can now apply them to the present case.

13. It is not disputed that by her ruling of 28th January 2008 in HCCC No. 479 of 2007, Okwengu J (as

she then was) issued a prohibitory order in favour of the 1st to 4th Objectors which order was registered against the properties of Michael Chege Njoroge, the 3rd defendant in that suit. These prohibitory orders were duly registered against the titles to the property. Upon such registration, and during the pendency of the prohibitory orders, no further dealings could have been effective as against the attached titles. The plaintiffs in the present case obtained judgment against the 3rd judgment debtor in this matter on 16th July 2008 which was subsequent to the prohibitory orders in favour of the 1st to 4th Objectors. The 5th Objector then obtained the orders of Kimaru J on 4th February 2009 which again was much later. The intended appeal relates to the latter orders. This chronology of events leads me to the conclusion that the interests 1st to 4th Objectors over the properties supplant those of the plaintiffs and the 5th Objector, in as long as the prohibitory orders were registered over the titles when no other competing interest had been registered. Consequently, and the ruling intended to be appealed against having dismissed the prohibitory orders, it is obvious to me that the 1st to 4th Objectors stand to suffer substantial loss unless the appeal is heard and determined. This is more so given that the judgment debtors herein do not appear to have stable means of income that can meet the decretal sum in favour of the four Objectors given that the business giving rise to the present liabilities was tainted with fraud and has since been closed. The Applicants therefore succeed on the contention that they stand to suffer irreparable damage if the appeal is not heard.

14. On whether the appeal will be rendered nugatory if stay is not granted, it is overwhelmingly clear that barring the interim orders of stay in place, the properties may have by now long been dissipated given the competing interests of various parties. These include commercial banks, the plaintiffs, the four Objectors themselves and the 5th Objector. I do indeed believe that it would be in the interest of all the parties that the matter be finally determined at the appellate court given the multiplicity of applications that have clogged up this court and emasculated the court from making any meaningful headway in the resolution of this matter. For instance, I do not understand the basis upon which the Plaintiffs have opposed the present application as the ruling of 4th February 2009 effectively placed the properties exclusively in the hands of the 5th Objector thereby denying the plaintiffs any recourse they may have had towards the properties in execution of the decree they obtained against the 3rd Judgment debtor in this matter.

15. On the issue of security for costs, Order 42 Rule 6(2) makes it mandatory for the applicant to provide ***“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”***. In the present case, the prohibitory orders granted to 1st to 4th Objectors were granted to provide them recourse to the judgment debtor’s assets in execution of the decree obtained against him. This recourse was in terms of immovable properties which the court preserved through the prohibitory orders. Order 42 Rule 6 (2) serves the purpose of ensuring that the respondent in an appeal can have recourse to the appellant for enforcement of the decree should the appeal be lost. In the present case, the respondent is still the registered owner of the attached properties and cannot have any further claims against the appellants in the event that the appeal is lost. The plaintiffs and the 5th Objectors’ claims also upon the properties in a very specific way that cannot inhere any further recourse to the appellants if the appeal is lost. The subject matter leading to the litigation herein is intact and no party would be prejudiced by the pursuit of the appeal.

16. Finally, I do note from the court record that the circumstances under which the ruling of 4th February 2009 was delivered were not amiable as between counsel for the 1st to 4th Objectors and the court. This court finds it in the interest of the ends of justice that the 1st to 4th Objectors should be allowed to appeal in order to vindicate any doubts that the ruling of the court of 4th February 2009 was influenced by the altercations that were exchanged in court between the learned judge and the learned counsel for the four Objectors. As the court observed in the **Harit Sheth case** (supra):

“...the court must take into consideration that the overriding objective as defined includes the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing..”

17. For these reasons, I am inclined to allow, as I hereby do, the Applicant/Objector’s Notice of Motion

dated 17th February 2009 with no orders as to costs.

DATED, SIGNED and DEILVERED in Nairobi this 19th January 2012.

**J. M. MUTAVA
JUDGE**