



Otundo & 2 others v Co-operative Bank of Kenya & another (Environment & Land Case 6B of 2021) [2022] KEELC 3616 (KLR) (10 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3616 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 6B OF 2021**

JM ONYANGO, J

MAY 10, 2022

BETWEEN

ANTHON ONGORI OTUNDO 1ST APPLICANT

JEREMIAH KENEDY OAGARE 2ND APPLICANT

AGNEA MORAA OTUNDO 3RD APPLICANT

AND

CO-OPERATIVE BANK OF KENYA 1ST RESPONDENT

NIRA AUCTIONEERS 2ND RESPONDENT

RULING

Introduction

1. On the 8th December 2021, the court dismissed the Plaintiffs/Applicants' application for injunction to restrain the Defendants/Respondents from disposing of their properties known as LR No. West Kitutu/Bomatara/3643, LR No. Nyaribari Chache B/B/Boburia/8797 and LR No. Nyansiongo Settlement Scheme/482 pending the hearing and determination of the suit herein. Following the dismissal of their application, the Applicants filed a Notice of Appeal to the Court of Appeal dated 17th January 2022.
2. The Applicants also filed a Notice of Motion dated 24th January, 2022 seeking orders of stay of execution and stay of proceedings pending appeal. The application is based on the grounds listed on the face of the Notice of Motion and the affidavit of Anton Ongori Otundo the 1st Plaintiff/Applicant herein sworn on the 24th January, 2022.
3. In the said affidavit, he avers that subsequent to the dismissal of their application for injunction, the 2nd Defendant/Respondent has prematurely issued a notice of sale in respect of the suit properties on behalf of 1st Defendant/Respondent. He further depones that he does not owe the 1st Respondent



any money whatsoever. He depones that if the 1st Defendant is allowed to proceed with the intended sale, the same shall destroy the substratum of the suit thereby defeating their equity of redemption. He further avers that if the suit properties are sold the Applicants shall suffer irreparable loss.

4. In response to the application, the 1st Defendant/Respondent filed a Replying Affidavit sworn on its behalf by Joel Odhiambo, the Business, Banker, Kisii branch on 2nd February 2022. Mr. Odhiambo averred that that the Applicants had merely filed a Notice of Appeal and were yet to file their appeal.
5. Mr. Odhiambo pointed out that in their application, the Applicants have attempted to deny the debt owed to the 1st Defendant/ Respondent yet they had admitted the same in the main suit and in their earlier application for injunction.
6. He further deponed that the Applicants had not demonstrated that they would suffer substantial loss if their application was not allowed. Conversely, he contended that the 1st Defendant stood to suffer immense loss as the Plaintiffs owed them a huge debt which they would lose in case the application was allowed.
7. Mr. Odhiambo deponed that even though the Applicants had indicated that they were willing to furnish security, they had not indicated whether they were ready and willing to deposit the entire sum they owed the 1st Respondent pending the hearing and determination of their intended appeal.
8. The court directed that the application be argued by way of written submissions and both parties filed their submissions which I have considered.

Issues for determination

9. The main issues for determination are:
 - i. Whether the Applicants are entitled to an order of stay of execution pending appeal.
 - ii. Whether the proceedings herein should be stayed pending the hearing of the Appeal in the Court of Appeal.

Analysis and Determination

10. It is not in dispute that the Applicants are seeking to stay the order dismissing their application for injunction. A ruling of the court that has no order to be enforced cannot be stayed because basically there is nothing at all to be stayed. From the ruling dated 8th December, 2021 the court did not order the Applicants to do anything or refrain from doing anything save for costs that are to be borne the Applicants. All it did was to dismiss the application for injunction dated 23rd July, 2021. In the case of *Western College of Arts and Applied Sciences v EP Oranga & 3 others* [1976] eKLR, the Court of Appeal stated thus:

“What is there to be executed under the judgment, the subject of the intended appeal” The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In *Wilson v Church* the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to 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, it is so ordered.”



11. Similarly, in *Raymond M. Omboga v Austine Pyan Maranga* Kisii HCCA No 15 of 2010, Makhandia J (as he then was) stated thus:

“The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favor of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise...”

12. In the instant application, the Applicants have introduced the issue of the recent attempt by the 1st Defendant to exercise its statutory power of sale albeit unprocedurally as this is not the issue before the court. It follows therefore, that since the Applicants are seeking to stay a negative order, the same cannot be granted. The Applicants have also not laid any basis as to why the proceedings herein ought to be stayed.

13. The upshot is that the application lacks merit and it is hereby dismissed with costs to the 1st Respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 10TH DAY OF MAY, 2022.

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J.M ONYANGO

JUDGE

